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Ensuring the Application of RFRA and RLUIPA in Pro SePrisoner Litigation

T. W. Brown

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ABSTRACT

An inmate filing suit to protect the right to free exercise has three options. To begin, every prisoner can proceed under the First Amendment. However, this action is exceedingly deferential to prison administrators, and inmates rarely prevail. Recognizing this fact, Congress has passed two statutes that provide additional protection for the religious rights of inmates. The earlier statute, the Religious Freedom Restoration Act, provides a more stringent remedy for prisoners housed in the federal system. The second statute, titled the Religious Land Use and Institutionalized Persons Act, affords the same for those incarcerated by states. Given the different levels of protection provided by these three options, the process of determining which claims a prisoner is actually advancing assumes great importance.

This article explores and critiques that process as it currently exists. Under the status quo, courts regularly create uncertainty when dealing with prisoners alleging a violation of the right to free exercise. All too often, these courts will construe a *pro se* inmate's complaint to state a claim under the deferential Free Exercise Clause only, while ignoring the potential applicability of RFRA and RLUIPA. When prisoners attempt to assert their rights under either statute at a later stage in litigation this uncertainty worsens.

Ultimately, this article suggests an improved process, one that will better protect the interests of inmates and prison administrators, while also promoting judicial efficiency. In short, courts should use the Prison Litigation Reform Act's screening procedure to conclusively determine the applicability of all three causes of action at the outset. The primary benefit of this approach is that it disposes of uncertainty at the earliest practicable stage, thus avoiding the various problems that exist today.

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I. INTRODUCTION

An inmate alleging a violation of the right to free exercise can sue prison officials under three separate but related causes of action.[1] The first of these options, a civil suit alleging a violation of the Free Exercise Clause, is constitutional in nature and can be advanced by all prisoners, regardless of whether the plaintiff is housed in a state or federal prison.[2] The latter two options are statutory in nature, and not everyone has the ability to advance them.[3] For inmates housed in state prisons, the Religious Land Use and Institutionalized Persons Act ("RLUIPA") provides the only statutory avenue for relief.[4] For their counterparts in the federal system, the Religious Freedom Restoration Act ("RFRA") offers the sole remedy.[5]

While all three alternatives protect the same basic interest, each represents a distinct cause of action with its own rules and accompanying analysis.[6] Put simply, suits brought under the Free Exercise Clause are exceedingly deferential to prison administrators.[7] Even when an inmate can show a *prima facie* violation of the right to free exercise under the First Amendment, the defendants win if the challenged restriction is deemed "reasonable," a low standard akin to the rational-basis test used elsewhere in constitutional law.[8] On the other hand, once an inmate has demonstrated a *prima facie* violation of RFRA or RLUIPA, prison administrators must justify their action by overcoming strict scrutiny, a much higher standard.[9] Given these significant differences, the process of determining which causes of action a prisoner is actually advancing assumes great importance.[10]

Unfortunately, that process is currently a mess. At the outset, a prisoner seeking to protect the right to free exercise lacks the opportunity to choose a

1. *See* COLUM. HUM. RTS. L. REV., A JAILHOUSE LAWYER'S MANUAL 727 (9th ed. 2011).
2. *See* U.S. CONST. amend. I; *see also* 42 U.S.C. § 1983 (2012).
3. *See* COLUM. HUM. RTS. L. REV, *supra* note 1, at 727.
4. *See id.*; *see also* 42 U.S.C. § 2000cc-2(a) (2012).
5. *See* 42 U.S.C. § 2000bb-1(c); *see also* COLUM. HUM. RTS. L. REV., *supra* note 1, at 727.
6. *See* COLUM. HUM. RTS. L. REV., *supra* note 1, at 727.
7. *See* SARAH E. RICKS & EVELYN M. TENENBAUM, CURRENT ISSUES IN CONSTITUTIONAL LITIGATION 634 (2011).
8. *See* Derek P. Apanovitch, Note, *Religion and Rehabilitation: The Requisition of God by the State*, 47 DUKE L.J. 785, 831 (1998).
9. *See* 42 U.S.C. § 2000bb–1(b) (2012); 42 U.S.C. § 2000cc-2(b).
10. *See infra* Part III.A.

specific cause of action over the others.[11] Instead, prisons provide inmates with "form" complaints. These complaints ask inmates to briefly describe the facts underlying their claims, and explicitly instruct them to forgo reference to any specific causes of action.[12] After the complaint has been submitted, courts then look to the facts alleged in an attempt to construct claims on behalf of the litigant.[13] Courts generally accomplish this by comparing the *prima facie* elements of any potentially applicable claims to the facts alleged.[14]

By design, the *prima facie* elements necessary to state a claim under RFRA or RLUIPA are similar to those necessary to state a claim under the Free Exercise Clause.[15] In fact, in eight federal circuits, a *prima facie* claim made under the Free Exercise Clause necessarily includes a *prima facie* claim under RFRA and RLUIPA.[16] In the remaining circuits, the necessary elements of these claims are still very similar.[17]

Despite this, courts often ignore the applicability of the relevant statutes and instead construe *pro se* complaints to include a claim under the deferential Free Exercise Clause only.[18] This creates the problem of uncertainty regarding whether a claim under RFRA or RLUIPA is actually before the court, and when prisoners attempt to assert their rights under either statute at a late stage in litigation, such as summary judgment, this uncertainty worsens.[19]

Courts today employ one of two approaches to address this situation.[20] Unfortunately, both create unnecessary difficulties.[21] First, some courts will find that the applicable statutory claim has been before it all along at a late stage in litigation, such as summary judgment.[22] Although this approach ensures that prisoners do not waive the protections RFRA or RLUIPA due to ignorance, it requires additional litigation to create a record dealing with

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11. *See, e.g.*, *Civil Rights Complaint Form to be Used by Prisoners in Actions Under 28 U.S.C. §1331 or § 1346*, N.D. FLA. (2007), *available at* http://www.flnd.uscourts.gov/forms/Pro%20Se/Complaint-bivens1331.pdf ("State briefly the FACTS of this case . . . . Do not make any legal arguments or cite to any cases or statutes.").

12. *Id.*; *see, e.g.*, *Pro Se Complaint Form*, M.D. PA., *available at* http://www.pamd.uscourts.gov/docs/complain.pdf.

13. *See* Rory K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 U. PA. L. REV. 585, 602 (2011).

14. *See infra* notes 87-93 and accompanying text.

15. *See infra* notes 58-62, 68-76 and accompanying text.

16. *See infra* notes 58-62, 68-76 and accompanying text.

17. *See infra* notes 137-38 and accompanying text.

18. *See infra* notes 115-17 and accompanying text.

19. *See infra* notes 116-18 and accompanying text; *see also* Part IV.D.3.

20. *See*, *e.g.*, Grayson v. Schuler, 666 F.3d 450, 451 (7th Cir. 2012); Henderson v. Terhune, 379 F.3d 709, 715 n.1 (9th Cir. 2004).

21. *See, e.g.*, *Grayson*, 666 F.3d at 451; *Henderson*, 379 F.3d at 715 n.1.

22. *See, e.g.*, *Grayson*, 666 F.3d at 451.

the strict-scrutiny standard both statutes require.[23] This, in turn, harms prison administrators and the courts by creating inefficiency.[24]

Other courts have advanced the opposite solution, holding that a claim under RFRA or RLUIPA is waived unless the prisoner explicitly advances it at an early stage in litigation.[25] Although this approach promotes judicial efficiency, it seems inherently unfair, given that the complaints provided instruct prisoners to state only the facts underlying their claims, rather than specific bases for relief.[26]

This article suggests a better set of solutions. In circuits where a *prima facie* claim under the Free Exercise Clause necessarily includes a claim under RFRA or RLUIPA, a court should always construe a *pro se* complaint that states the former to include the latter.[27] To adequately protect the interests of inmates, prison administrators and the courts, this should occur at the screening stage.[28] On the other hand, in circuits where the *prima facie* elements of the constitutional and statutory claims differ, a court should initially dismiss without prejudice any complaint hinting at a violation of the Free Exercise Clause.[29] Once more, this should occur at the screening stage, and in the relevant dismissal order, the court should briefly explain the differences between the various, applicable claims.[30] In this order, the court should also describe the elements necessary to state a claim under both causes of action.[31] The prisoner can then choose to advance one or both claims by filing an amended complaint.[32]

Part II and Part III lay the foundation for defense of these solutions.[33] Part II begins by explaining the varying levels of protection provided by the Free Exercise Clause, RFRA and RLUIPA.[34] Next, Part III describes the traditional approach courts have taken to constructing claims on behalf of *pro se* litigants, with an eye toward describing how this process can lead to problems when courts are careless.[35]

Building on this discussion, Part IV suggests two new solutions, both of which would ensure the application of RFRA and RLUIPA in *pro se* litigation, while also protecting the interests of prison administrators and the

23. *See* Jones v. Goord, 435 F.Supp.2d 221, 262 (S.D.N.Y. 2006).
24. *Id.*
25. *See, e.g.*, *Henderson*, 379 F.3d at 715 n.1.
26. *See Complaint Form*, *supra* note 11.
27. *See* Roberson v. Woodford, 2007 WL 4168354, at *1 (N.D. Cal. 2007).
28. *See* 28 U.S.C. § 1915A(a) (2012).
29. *See* Lopez v. Smith, 203 F.3d 1121, 1124 (9th Cir. 2000).
30. *See infra* notes 151-52 and accompanying text.
31. *See infra* notes 152-53 and accompanying text.
32. *See infra* notes 153-54 and accompanying text.
33. *See infra* Parts II-III.
34. *See infra* Parts II.A-C.
35. *See infra* Part III.

courts.[36] To reiterate, in circuits where a *prima facie* claim under the Free Exercise Clause necessarily includes a claim under the relevant statute, courts should always identify one when the other is present.[37] To adequately protect the interests of all parties, this should occur at the screening stage, as mandated by the Prison Litigation Reform Act.[38] In the remaining circuits, where the *prima facie* elements differ slightly, courts should dismiss the complaint without prejudice, describe the necessary elements of both claims in the accompanying dismissal order and allow the prisoner to re-file the complaint.[39]

Ultimately, the solutions proposed in Part IV provide three important advantages over the status quo.[40] First, the solutions advanced in this article require a court to determine at the outset what claims are before it.[41] This ends any uncertainty regarding the applicability of RFRA or RLUIPA at the earliest possible stage.[42] Second, these solutions do not require courts to engage in any additional work.[43] Instead, they will continue to screen all prisoner complaints using the same approach they do today.[44] Finally, these solutions better protect the interests of inmates, prison administrators, and the courts.[45] With regard to *pro se* inmates, the benefits of the solutions advanced in this article are obvious.[46] These approaches ensure that prisoners who establish a *prima facie* violation of the right to free exercise will not lose the protections of RFRA or RLUIPA based on their ignorance or shoddy drafting.[47] In addition, given the massive *pro se* docket in federal courts,[48] approaches which identify RFRA and RLUIPA claims at the earliest possible stage would protect prison officials from prejudice and promote judicial efficiency.[49]

Part V concludes this piece by briefly describing how vigorous *pro se* litigation can help to create a more just penal system.[50] Ultimately, this article has two goals. First, it should introduce readers to a problem that affects one of the most precious rights of America's most vulnerable

36. *See infra* Part IV.
37. *See, e.g.*, *Roberson*, 2007 WL 4168354, at *1.
38. *See* 28 U.S.C. § 1915A(a); COLUM. HUM. RTS. L. REV., *supra* note 1, at 302.
39. *See infra* Part IV.
40. *See infra* Part IV.D.
41. *See infra* Part IV.D.1.
42. *See infra* Part IV.D.1.
43. *See infra* Part IV.D.2.
44. *See infra* Part IV.D.2.
45. *See infra* Part IV.D.3.
46. *See infra* Part IV.D.
47. *See*, *e.g.*, *Jones*, 435 F.Supp.2d at 262.
48. *See* Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 440-42 (2009).
49. *See*, *e.g.*, *Jones*, 435 F.Supp.2d at 262.
50. *See infra* Part V.

population. Second, it should propose and defend a series of common-sense solutions that mutually benefit inmates, prison administrators, and the courts.

Initially, however, it is important to understand the three causes of action available to any prisoner who wishes to protect the right to free exercise.[51]

II. PROTECTING THE RIGHT TO FREE EXERCISE IN AMERICA'S PRISONS

Part II describes, analyzes, and contrasts actions brought under RFRA, RLUIPA, and the Free Exercise Clause. Section A describes and analyzes the protections afforded to inmates under the First Amendment, noting specifically the elements required to state a *prima facie* claim.[52] Section B and Section C do the same for RFRA and RLUIPA.[53] Last, Section D briefly compares and contrasts the three causes of action.[54]

A. The Free Exercise Clause

Inmates retain the various protections afforded to all citizens by the Constitution.[55] With regard to the Free Exercise Clause, this means prison officials must afford inmates "reasonable opportunities" to act on their sincerely held religious beliefs.[56] In other words, prison administrators may curb an inmate's right to free exercise only if the applicable restriction is reasonable.[57]

There are four elements to a *prima facie* claim under the Free Exercise Clause.[58] To satisfy current pleading standards, a prisoner must allege the following: "that prison officials [1] unreasonably [2] burdened a [3] sincerely held [4] religious belief."[59] In reverse order, the following four sub-sections describe these elements more fully.[60]

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51. *See* COLUM. HUM. RTS. L. REV, *supra* note 1, at 727.
52. *See infra* Part II.A.
53. *See infra* Part II.B-C.
54. *Infra* Part II.D.
55. *See* Bell v. Wolfish, 441 U.S. 520, 545 (1979) ("[W]e have held that convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison.").
56. *See* Cruz v. Beto, 405 U.S. 319, 322 (1972).
57. Turner v. Safley, 482 U.S. 78, 89-91 (1987).
58. *See, e.g.*, Kay v. Bemis, 500 F.3d 1214, 1218-22 (10th Cir. 2007).
59. *See id.* at 1218.
60. *See infra* Part II.A.1-4.

1. A "Religious" Belief

The Free Exercise Clause is triggered only when a prisoner's "religious" beliefs are at issue.[61] Although the Supreme Court has yet to comprehensively define "religion" for the purposes of Free Exercise analysis,[62] most courts interpret the term broadly by focusing the inquiry on the role of the affected belief in the life of its adherent.[63] Under this approach, a belief is considered "religious" if it stems from an inmate's own deeply held moral, ethical, or metaphysical sense of right or wrong.[64] Given the subjective nature of this analysis, many courts have noted that the oddity of an inmate's belief or its divergence from more traditional creeds is irrelevant to whether it is sufficiently "religious."[65]

2. "Sincerity"

An inmate alleging a violation of the Free Exercise Clause must also state that the affected belief is "sincerely held."[66] Although courts have approached the issue from differing perspectives, the basic inquiry focuses

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61. *See, e.g.*, McAlister v. Livingston, 348 F.App'x 923, 935 (5th Cir. 2009); *Kay*, 500 F.3d at 1218; Kaufman v. McCaughtry, 419 F.3d 678, 681-82 (7th Cir. 2005); Levitan v. Ashcroft, 281 F.3d 1313, 1319-21 (D.C. Cir. 2002); DeHart v. Horn, 227 F.3d 47, 51-52 (3rd Cir. 2000); Wiggins v. Sargent, 753 F.2d 663, 665 (8th Cir. 1985); Callahan v. Woods, 658 F.2d 679, 683 (9th Cir. 1981) (citing United States v. Seeger, 380 U.S. 163, 185 (1965)); Kramer v. Conway, 962 F.Supp.2d 1333, 1345 (N.D. Ga. 2013); Panayoty v. Annucci, 898 F.Supp.2d 469, 481 (N.D.N.Y. 2012); Toronka v. Cont'l Airlines, Inc., 649 F.Supp.2d 608, 611-12 (S.D. Tex. 2009); Dawson v. Burnett, 631 F.Supp.2d 878, 882 (W.D. Mich. 2009); Adams v. Stanley, 237 F.Supp.2d 136, 140-41 (D.N.H. 2003).

62. *See* Scott C. Idleman, *The Underlying Causes of Divergent First Amendment Interpretations*, 27 MISS. C. L. REV. 67, 77 (2008).

63. *See, e.g.*, Welsh v. United States, 398 U.S. 333, 340 (1970); Patrick v. LeFevre, 745 F.2d 153, 157 (2nd Cir. 1984). *But see* Africa v. Pennsylvania, 662 F.2d 1025, 1026 (3rd Cir. 1981) (describing a set of objective criteria to help determine whether beliefs are sufficiently "religious" to warrant protection under the First Amendment); United States v. Meyers, 95 F.3d 1475, 1482-84 (10th Cir. 1996).

64. *See* Watts v. Florida Int'l Univ., 495 F.3d 1289, 1296-98 (11th Cir. 2007); *Kaufman*, 419 F.3d at 681-82; Morrison v. Garraghty, 239 F.3d 648, 658-59 (4th Cir. 2001); *DeHart*, 227 F.3d at 51 ("A court's task is to decide whether the beliefs avowed are . . . religious in nature, in the claimant's scheme of things."); *Meyers*, 95 F.3d at 1482-83 (noting that the threshold for establishing the "religious" nature of beliefs is "low"); *Wiggins*, 753 F.2d at 666-67; *Callahan*, 658 F.2d at 683 (citing *Seeger*, 380 U.S. at 185); A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist., 701 F.Supp.2d 863, 876 (S.D. Tex. 2009), *aff'd* 611 F.3d 248, 261-63 (5th Cir. 2010); United States v. Manneh, 645 F.Supp.2d 98, 108-09 (S.D.N.Y. 2008); Hudson v. Maloney, 326 F.Supp.2d 206, 211 (D. Mass. 2004); McMurdie v. Doutt, 468 F.Supp. 766, 769-71 (N.D. Ohio 1979).

65. *See* Thomas v. Review Bd., 450 U.S. 707, 714 (1981); *Morrison*, 239 F.3d at 659; Doswell v. Smith, No. 94-6780, 1998 WL 110161, at *5 (4th Cir. Mar. 13, 1998); *Hudson*, 326 F.Supp.2d at 211.

66. *See, e.g.*, *McAlister*, 348 F. App'x at 935; *Kay*, 500 F.3d at 1218; *Morrison*, 239 F.3d at 656; *DeHart*, 227 F.3d at 51-52; *Africa*, 662 F.2d at 1029-30 (citing *Seeger*, 380 U.S. at 185; *Callahan*, 658 F.2d at 683); Theriault v. Carlson, 495 F.2d 390, 395 (5th Cir. 1974); *Kramer*, 962 F.Supp.2d at 1345; *Panayoty*, 898 F.Supp.2d at 481; Roberts v. Klein, 770 F.Supp.2d 1102, 1111 (D. Nev. 2011); Brown v. Ray, 695 F.Supp.2d 292, 299-300 (W.D. Va. 2010); *Dawson*, 631 F.Supp.2d at 882; *Adams*, 237 F.Supp.2d at 140-41.

on whether the plaintiff's belief is professed in good faith.[67] As various courts have noted, this analysis is necessarily subjective,[68] and the ultimate determination of "sincerity" often requires in-court testimony and cross-examination on the subject.[69]

Despite the complexity of this task, courts have identified a few different ways a plaintiff might prove this element of the claim.[70] For instance, an inmate could use prison records to establish a lengthy and steadfast affiliation with the affected religion.[71] In the same vein, an inmate could demonstrate "sincerity" by establishing a detailed knowledge of the doctrines surrounding the affected belief.[72] Finally, a litigant could bolster this showing by also pointing to a series of decisions to act on the affected belief, despite repeatedly suffering penalties for doing so.[73] In any event, a suggestion of sincerity is generally enough at the pleading stage, and prisoners often receive the benefit of the doubt on this issue.[74]

3. A Circuit Split: What Sort of "Burdens" Implicate the First Amendment?

The next element of a Free Exercise claim involves the extent of the burden imposed on the plaintiff and whether it rises to a constitutionally cognizable level.[75] Again, the Supreme Court has not yet explained comprehensively what is necessary to demonstrate this element of the claim

67. Laurensau v. Romarowics, 528 F.App'x 136, 139 (3rd Cir. 2013); *Levitan*, 281 F.3d at 1320-21; *DeHart*, 227 F.3d at 52 n.3; *Callahan*, 658 F.2d at 683; *Manneh*, 645 F.Supp.2d at 111-12 (citing Int'l Soc. for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2nd Cir.1981).

68. *See Betenbaugh*, 611 F.3d at 261; Gladson v. Iowa Dept. of Corr., 551 F.3d 825, 833 (8th Cir. 2009); *Watts*, 495 F.3d at 1296; *Doswell*, 1998 WL 110161, at *5; Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988); *LeFevre*, 745 F.2d at 156-57; Perez v. Frank, No. 06-C-248-C, 2007 WL 1101285, at *9 (W.D. Wisc. 2007).

69. Van Wyhe v. Reisch, 581 F.3d 639, 656 (8th Cir. 2009); *Kay*, 500 F.3d at 1219-20; *LeFevre*, 745 F.2d at 157; Shaheed-Muhammad v. Dipaolo, 393 F.Supp.2d 80, 90-92 (D. Mass. 2005).

70. *See Needville Indep. Sch. Dist.*, 611 F.3d at 261; *see also Kay*, 500 F.3d at 1219.

71. *Grayson*, 666 F.3d at 454-55; *Needville Indep. Sch. Dist.*, 611 F.3d at 261- 63; *Kay*, 500 F.3d at 1219-20; Burns v. Warwick Valley Cent. Sch. Dist., 166 F.Supp.2d 881, 890-91 (S.D.N.Y. 2001).

72. Robinson v. Foti, 527 F.Supp. 1111, 1113 (E.D. La. 1981).

73. *Kay*, 500 F.3d at 1219-20; United States v. Ward, 989 F.2d 1015, 1018-19 (9th Cir. 1992).

74. *See, e.g.*, *Grayson*, 666 F.3d at 454-55; *Manneh*, 645 F.Supp.2d at 107-09; *Shaheed-Muhammad*, 393 F.Supp.2d at 90-92.

75. *See* Hernandez v. C.I.R., 490 U.S. 680, 699 (1989); McKinley v. Maddox, 493 F.App'x 928, 932-33 (10th Cir. 2012); Tapp v. Proto, 404 F.App'x 563, 565-66 (3d Cir. 2010); Howard v. Skolnik, 372 F.App'x 781,782 (9th Cir. 2010); *Gladson*, 551 F.3d 825 at 832; Nelson v. Miller, 570 F.3d 868, 877 (7th Cir. 2009); Parker v. Hurley, 514 F.3d 87, 103 (1st Cir. 2008); *Watts*, 495 F.3d at 1294-95; *Levitan*, 281 F.3d at 1320-21; Strout v. Albanese, 178 F.3d 57, 65 (1st Cir. 1999); Walker v. Mintzes, 771 F.2d 920, 930 (6th Cir. 1985); Calvary Christian Ctr. v. City of Fredericksburg, 800 F.Supp.2d 760, 773 (E.D. Va. 2011) (quoting Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006)); GeorgiaCarry.Org, Inc. v. Georgia, 764 F.Supp.2d 1306, 1309-11 (M.D. Ga. 2011); *Needville Indep. Sch. Dist.*, 701 F.Supp.2d at 876-77.

in the prison context.[76] In the absence of explicit direction, circuit courts have responded with two different tests.[77]

The more prevalent test, used in eight separate circuit courts of appeals, requires the plaintiff to allege that the defendant's actions constitute a "substantial burden."[78] A plaintiff may demonstrate a "substantial burden" in a few different ways.[79] First, an inmate could show that the defendant's actions rendered the plaintiff's religious exercise effectively impracticable.[80] Additionally, the inmate could show that the defendants placed "substantial pressure" on the inmate to violate the affected belief.[81] Courts often explain this sort of "substantial pressure" in terms of unfair "coercion."[82] For instance, prison officials may "coerce" an inmate into violating sincerely held religious beliefs by enforcing punishments on the basis of conduct the prisoner feels religiously motivated to do.[83] "Coercion" may also be present when prison officials require an inmate to take an action at odds with a religious belief in order to obtain a benefit to which that prisoner is otherwise entitled, such as a meal.[84] In general, courts requiring a "substantial burden" want to see that prison officials have placed the inmate into a dilemma in which following one's religious beliefs leads to an objectively negative result.[85]

The less prevalent test, used only in the Third Circuit, asks whether the burden rises above a "*de minimis*" level.[86] This analysis turns on the frequency and extent of the alleged violation, along with the reasons

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76. John J. Dvorske, *Validity, Construction, and Operation of Religious Land Use and Institutionalized Persons Act of 2000*, 181 A.L.R. FED. 247, 262-65 (2002).

77. *See McKinley*, 493 F.App'x at 932.

78. *Id.* at 932-33; *Skolnik*, 372 F.App'x at 782; *Nelson*, 570 F.3d at 877; *Gladson*, 551 F.3d at 833-34; *Levitan*, 281 F.3d at 1321; *Strout*, 178 F.3d at 65; Moore-King v. Cnty. of Chesterfield, Va., 819 F.Supp.2d 604, 623 (E.D. Va. 2011); *Calvary Christian Ctr.*, 800 F.Supp.2d at 773 (quoting *Lovelace*, 472 F.3d at 187); *GeorgiaCarry.Org, Inc*., 764 F.Supp.2d at 1309-12; Mitchell v. Angelone, 82 F.Supp.2d 485, 490 (E.D. Va. 1999).

79. *See, e.g.*, *McKinley*, 493 F.App'x at 932-34.

80. *McKinley*, 493 F.App'x at 932-33 (quoting Abdulhaseeb v. Calbone, 600 F.3d 1301, 1315 (10th Cir. 2010)); *Nelson*, 570 F.3d at 878; Civil Liberties Union for Urban Believers, 342 F.3d 752, 761 (7th Cir. 2003).

81. *See Thoma*s, 450 U.S. at 717-18; *Nelson*, 570 F.3d at 878 (quoting Koger v. Bryan, 523 F.3d 789, 799 (7th Cir.2008)); *GeorgiaCarry.Org, Inc*., 764 F.Supp.2d at 1309-10.

82. *See Parker*, 514 F.3d at 102-03; Navajo Nation v. United States Forest Serv., 535 F.3d 1058, 1063 (9th Cir. 2008) (en banc); *Calvary Christian Ctr.*, 800 F.Supp.2d at 773 (quoting *Lovelace*, 472 F.3d at 187); *GeorgiaCarry.Org, Inc*., 764 F.Supp.2d at 1309-10.

83. *Gladson*, 551 F.3d at 832 (quoting *Thomas*, 450 U.S. at 717-18); *see Navajo Nation*, 535 F.3d at 1063; *GeorgiaCarry.Org, Inc*., 764 F.Supp.2d at 1309-10.

84. *Gladson*, 551 F.3d at 832 (quoting *Thomas*, 450 U.S. at 717-18); *see Navajo Nation*, 535 F.3d at 1063; *Calvary Christian Ctr.*, 800 F.Supp.2d at 773 (quoting *Lovelace*, 472 F.3d at 187); *GeorgiaCarry.Org, Inc*., 764 F.Supp.2d at 1309.

85. *See, e.g.*, *Gladson*, 551 F.3d at 832-34.

86. *See Tapp*, 404 F.App'x at 565-66; *see also Kramer*, 214 F.App'x at 247 n.2; Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 170 (3rd Cir. 2002).

provided to justify the defendant's action.[87] For instance, the Third Circuit held that a jail's failure to provide a pork-free meal to an inmate with religious objections constituted a "*de minimis*" violation of the First Amendment when it occurred only three times over the course of over eight-hundred meals.[88] In the same case, the Third Circuit explained that short-lived inconveniences based on "institutional" realities rarely rise above the "*de minimis*" level.[89] However, "a routine or blanket practice" which repeatedly interferes with an inmate's sincerely held religious beliefs would likely satisfy this test.[90]

The remaining circuits have not clearly addressed whether a "substantial burden" or "*de minimis*" test applies.[91] The Second Circuit has considered the issue, but has not yet reached a decision.[92] In the absence of direction, multiple district courts in the Second Circuit have applied the majority test.[93] Likewise, the Fifth Circuit has not yet determined which test applies, and without guidance, district courts in Texas and Louisiana have employed both.[94] Finally, the Sixth Circuit requires prisoners to show a "sufficient infringement" upon their beliefs, but it has yet to explain exactly what that means.[95] At least one district court within the Sixth Circuit has taken this to require the "*de minimis*" analysis.[96]

4. Reasonableness v. Unreasonableness

To state a *prima facie* claim for a violation of the Free Exercise Clause, a prisoner must also allege that the defendant's actions were unreasonable.[97] To make this determination, courts consider the following four factors:

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87. Rapier v. Harris, 172 F.3d 999, 1006 n.4 (7th Cir. 1999).

88. *Id.* at 1006 n.4.

89. *Id.*

90. *Id.*

91. *See infra* notes 92-95.

92. Salahuddin v. Goord, 467 F.3d 263, 274-75 (2nd Cir. 2006); McEachin v. McGuinnis, 357 F.3d 197, 202-03 (2nd Cir. 2004); Ford v. McGinnis, 352 F.3d 582, 592-94 (2nd Cir. 2003).

93. Lewis v. Zon, 920 F.Supp.2d 379, 384 (W.D.N.Y. 2013); Pugh v. Goord, 571 F.Supp.2d 477, 497 (S.D.N.Y. 2008); Kole v. Lappin, 551 F.Supp.2d 149, 154 (D. Conn. 2008); Singh v. Goord, 520 F.Supp.2d 487, 509 (S.D.N.Y. 2007).

94. *Needville Indep. Sch. Dist*., 701 F.Supp.2d at 876; Omar v. Casterline, 414 F.Supp.2d 582, 591-93 (W.D. La. 2006).

95. *Walker*, 771 F.2d at 930.

96. Greenberg v. Hill, No. 2:07-CV-1076, 2009 WL 890521, at *8 (S.D. Ohio 2009).

97. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (citing Turner v. Safley, 482 U.S. 78, 89-90 (1987)); *see also* Hayes v. Tennessee, 424 F.App'x 546, 549 (6th Cir. 2011) (citing *Turner*, 482 U.S. at 89-90); *McAlister*, 348 F. App'x at 935; Shakur v. Schriro, 514 F.3d 878, 884 (9th Cir. 2008); Hathcock v. Cohen, 287 F.App'x 793, 799 (11th Cir. 2008); *Kay*, 500 F.3d at 1218-19; *Kaufman*, 419 F.3d at 682-83; *Levitan*, 281 F.3d at 1320-21; *DeHart*,227 F.3d at 51; Covino v. Patrissi, 967 F.2d 73, 78-80 (2d Cir. 1992); *Panayoty*, 898 F.Supp.2d at 481 (citing Farid v. Smith, 850 F.2d 917, 926 (2d Cir. 1988)); Dawson v. Burnett, 631 F.Supp.2d 878, 882 (W.D. M ich. 2009); Marx v. Larsen, 2003 WL 22425032, at *1-*2 (N.D. Tex. 2003) (citing *Turner*, 482 U.S. at 89-90; Powell v. Estelle, 959 F.2d 22,

> (1) Whether the challenged restriction is rationally related to the penological interest put forward to justify it;
>
> (2) Whether alternative means of religious exercise remain available to the plaintiff;
>
> (3) Whether accommodation of the plaintiff's free exercise will unduly impact guards or other prisoners; and,
>
> (4) Whether feasible alternatives to the challenged restriction exist, such that prison officials could advance the proffered interest without affecting the plaintiff's right to free exercise.[98]

Overcoming this "reasonableness" standard is exceedingly difficult for *pro se* prisoners.[99] For instance, courts typically defer to the judgment of prison officials on the first factor, especially when those officials claim that the challenged restriction is necessary to advance the goal of prison security.[100] In addition, with regard to the second factor, courts generally view the availability of "alternative means" broadly.[101] To illustrate, the Ninth Circuit has explained that "[t]he relevant inquiry . . . is not whether the inmate has an alternative means of engaging in the particular religious practice that he or she claims is being affected; rather, [the question is] whether the [aggrieved prisoner has] been denied all means of religious expression."[102]

Given these difficulties, some scholars have compared the "reasonableness" standard faced by prisoners alleging a violation of the Free Exercise Clause to the "rational basis" test employed in other contexts.[103] In either case, the plaintiff's chance for victory is slim.

25-26 (5th Cir.), *cert. denied,* 506 U.S. 1025 (1992)); Adams v. Stanley, 237 F.Supp.2d 136, 141 (D.N.H. 2003).

98. *Shakur*, 514 F.3d at 884 (quoting *Turner*, 482 U.S. at 89-90).

99. *See* Benjamin Pi-wei Liu, Comment, *A Prisoner's Right to Religious Diet Beyond the Free Exercise Clause*, 51 UCLA L. REV. 1151, 1156 (2004).

100. *See, e.g.*, Thornburgh v. Abbott, 490 U.S. 401, 407–08 (1989) ("Acknowledging the expertise of these officials and that the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world.").

101. Ward v. Walsh, 1 F.3d 873, 877 (9th Cir. 1993) (citing *O'Lone*, 482 U.S. at 351-52).

102. *Id.*

103. *See* RICKS, *supra* note 7, at 634; s*ee also* Apanovitch, *supra* note 8, at 831 ("Because Turner is essentially a rational basis test, prisoners' Establishment Clause claims will almost always lose when assessed under Turner.").

B. The Religious Freedom Restoration Act

RFRA represents Congress's first attempt to provide protection for the right to free exercise of religion beyond that available under the First Amendment.[104] Although it was originally intended to protect the religious rights of all Americans, RFRA is currently available only to plaintiffs challenging the actions of the federal government, and for the purposes of this article, it applies only to inmates housed in the Federal Bureau of Prisons.[105] The initial pleading requirements under RFRA mirror those of a claim made under the Free Exercise Clause.[106] In order to state a *prima facie* claim under RFRA, an inmate must demonstrate that prison officials (1) substantially burdened a (2) sincerely held (3) religious belief, and these requirements are the same in each circuit.[107]

The similarities between the pleading requirements under RFRA and the Free Exercise Clause are by design.[108] Both the representatives who authored and debated RFRA and the witnesses called to Congress to testify on the Act understood that the pleading requirements of a cause of action under this statute were to be drawn directly from the First Amendment context.[109]Accordingly, the requirements of a "substantial burden" and "religious belief" were written into RFRA explicitly,[110] and courts across America have since read the requirement of "sincerity" into the act.[111]

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104. *See* RICKS, *supra* note 7, at 631-33.

105. *See* Hankins v. Lyght, 441 F.3d 96, 106 (2d Cir. 2006); *see also* COLUM. HUM. RTS. L. REV., *supra* note 1, at 727-28; RICKS, *supra* note 7, at 632-33.

106. 42 U.S.C. § 2000bb-1(a); U.S. CONST. amend. 1.

107. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1125-26 (10th Cir. 2013); General Conference Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 410 (6th Cir. 2010); *Navajo Nation*, 535 F.3d at 1068; Kaemmerling v. Lappin, 553 F.3d 669, 677-79 (D.C. Cir. 2008); United States v. Zimmerman, 514 F.3d 851, 853 (9th Cir. 2007); Francis v. Mineta, 505 F.3d 266, 269 (3d Cir. 2007); United States v. Israel, 317 F.3d 768, 771 (7th Cir. 2003); Diaz v. Collins, 114 F.3d 69, 71-72 (5th Cir. 1997); Weir v. Nix, 114 F.3d 817, 820 (8th Cir. 1997); Goodall v. Stafford Cnty. Sch. Bd., 60 F.3d 168, 171 (4th Cir. 1995); *Manneh*, 645 F.Supp.2d at 107; Gary S. v. Manchester Sch. Dist., 241 F.Supp.2d 111, 121 (D.N.H. 2003); Yahweh v. United States Parole Comm'n, 158 F.Supp.2d 1332, 1344-45 (S.D. Fla. 2001).

108. *Infra* notes 109-12.

109. *See, e.g.*, *Religious Freedom Restoration Act of 1991: Hearing Before the Subcommittee of Civil and Constitutional Rights on the Constitution of the House Committee on the Judiciary*, 102nd Cong. 411 (1992) (prepared statement of David Zwibel, Director of Government Affairs, Agudeth Israel); *Religious Freedom Restoration Act of 1991: Hearing Before the Subcommittee of Civil and Constitutional Rights on the Constitution of the House Committee on the Judiciary*, 102nd Cong. 41 (1992) (prepared statement of Mark Chopko, General Counsel, United States Catholic Conference); 139 Cong. Rec. H2356 (daily ed. May 11, 1993) (statement of Congressman Jack Brooks) (explaining "sincerity" and "substantial burden" requirements, especially with respect to pro se prisoner litigation); 138 Cong. Rec. S9777 (daily ed. July 2, 1992) (statement of Sen. Ted Kennedy) (describing RFRA's basis in the First Amendment).

110. 42 U.S.C. § 2000bb-1(a); 42 U.S.C. § 2000bb-2(b) (citing 42 U.S.C. § 2000cc-5 (2006)).

111. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2774, n. 28 (2014) (citing United State v. Quaintance, 608 F.3d 717, 718-19 (10th Cir. 2010)); *Hobby Lobby Stores, Inc*., 723 F.3d at

Courts have also given substance to RFRA's "substantial burden" requirement by looking to the use of that term in the Free Exercise context.[112]

If a prisoner is able to establish these three elements, the burden of persuasion shifts, and the defendants must then justify their actions under the strict-scrutiny standard.[113] To satisfy this analysis, the defendants must demonstrate two facts.[114] First, the defendants must prove that the restriction furthers a "compelling governmental interest."[115] Second, the defendants must also show that the challenged burden is the "least restrictive means" of doing so.[116]

To reiterate, RFRA provides additional protection for the free exercise rights of inmates in federal prison beyond that available under the First Amendment.[117] Most significantly, after establishing that prison officials have (1) substantially burdened a (2) sincerely held (3) religious belief, a prisoner bringing a claim under RFRA avoids the deferential "reasonableness" standard employed in the First Amendment context.[118]

As a practical matter, a prisoner alleging the first three elements of a claim under the Free Exercise Clause in any circuit that requires a "substantial burden" has also stated a claim under RFRA.[119] In other words, if a prisoner's complaint contains facts demonstrating a (1) substantial burden on a (2) sincerely held (3) religious belief, that inmate has established a *prima facie* violation of both RFRA and the Free Exercise Clause in a majority of America's federal courts.[120]

C. The Religious Land Use and Institutionalized Persons Act

RLUIPA represents Congress's second attempt to provide additional protection for the right to free exercise beyond that available under the First

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1125-26; *Goodall*, 60 F.3d at 171; *Manneh*, 645 F.Supp.2d at 107; *see also* Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005) (applying the "sincerity" requirement to a RLUIPA claim, despite the absence of any "sincerity" requirement in the statute itself).

112. *Hobby Lobby Stores, Inc*., 723 F.3d at 1138 (citing *Abdulhaseeb*, 600 F.3d at 1315-16); *Kaemmerling*, 553 F.3d at 677-79; *Navajo Nation*, 535 F.3d at 1069-70; Patel v. United States Bureau of Prisons, 515 F.3d 807, 813 (8th Cir. 2008); Jolly v. Coughlin, 76 F.3d 468, 476-77 (2d Cir. 1996); *Goodall*, 60 F.3d at 171; Monaghan v. Sebelius, 916 F.Supp.2d 802, 809 (E.D. Mich. 2012).

113. 42 USC § 2000bb–1(b).

114. *Id.*

115. *Id.*

116. *Id.*

117. *See* RICKS, *supra* note 7, at 631-33.

118. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1125-26; *Shakur*, 514 F.3d at 884 (quoting *Turner*, 482 U.S. at 89-90).

119. *See* 42 U.S.C. § 2000bb-1(a).

120. *See* RICKS, *supra* note 7, at 631-33.

Amendment.[121] Unlike RFRA, however, RLUIPA applies only to inmates housed in state prisons.[122]

By design, the initial pleading requirements of a cause of action under RLUIPA mirror the necessary elements of a cause of action made under the Free Exercise Clause.[123] Once again, Congress explicitly wrote into the act the requirement of a "religious" belief[124] and a "substantial burden."[125] Additionally, the Supreme Court read the requirement of "sincerity" into the statute only a few years after President Clinton signed it into law.[126] Given these facts, a prisoner must allege a (1) substantial burden on a (2) sincerely held (3) religious belief to state a *prima facie* claim under RLUIPA, and these requirements are the same in each circuit.[127]

Both the representatives who authored and debated RLUIPA and the many witnesses called to Congress to testify about the Act understood that a cause of action under the proposed statute would mirror very closely a cause of action made under the Free Exercise Clause.[128] Accordingly, courts across America have seen fit to define RLUIPA's necessary elements with reference to the First Amendment context.[129] For instance, while Congress

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121. James D. Nelson, Note, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053, 2057-60 (2009).

122. *See* 42 U.S.C. § 2000cc-2(a); *see also* COLUM HUM. RTS. L. REV., *supra* note 1, at 727.

123. *See* 42 U.S.C. § 2000cc-1(a); U.S. CONST. amend. 1.

124. *See* 42 U.S.C. § 2000cc-1(a); *see also* 42 U.S.C. § 2000cc-5(7)(A).

125. *See* 42 U.S.C. § 2000cc-1(a).

126. *Cutter*, 544 U.S. at 725 n.13.

127. *See* Gardner v. Riska, 444 F.App'x 353, 354-55 (11th Cir. 2011); *Tennessee*, 424 F.App'x at 554-55; Muhammad v. Sapp, 388 F.App'x 892, 895 (11th Cir. 2010); *Abdulhaseeb*, 600 F.3d at 1314; Colvin v. Caruso, 605 F.3d 282, 297-98 (6th Cir. 2010); *Gladson*, 551 F.3d 825, 833 (8th Cir. 2009); *Koger*, 523 F.3d at 797-99; Washington v. Klem, 497 F.3d 272, 276 (3d Cir. 2007); Adkins v. Kaspar, 393 F.3d 559, 567-72 (5th Cir. 2004); LeBaron v. Spencer, 527 F.App'x 25, at 28-29 (1st Cir. 2013) (citing *Abdulhaseeb*, 600 F.3d at 1312; *Koger*, 523 F.3d at 797–98); Lewis v. Zon, 920 F.Supp.2d 379, 385 (W.D.N.Y. 2013) (citing *Salahuddin*, 467 F.3d 263, 274-75); Florer v. Bales-Johnson, 752 F.Supp.2d 1185, 1202 (W.D. Wash. 2010) (quoting Warsoldier v. Woodford, 418 F.3d 989, 994 (9th Cir. 2005)).

128. *See, e.g.*, *Religious Liberty: Hearing Before the Senate Committee on the Judiciary,* 106th Cong. 689 at 113 (1999) (prepared statement of Steven T. McFarland, Center for Law and Religious Freedom, Christian Legal Society) (stressing requirements of "religious belief" and "sincerity"); *Religious Liberty Protection Act of 1998: Hearings Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 105th Cong. 997 at 23-24 (1998) (statement of David Zwibel, Director of Government Affairs and General Counsel, Agudeth Israel of America) (stressing "religion" and "sincerity" requirements of RLUIPA claim); *Religious Liberty Protection Act of 1998: Hearings Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 105th Cong. 207-08 (1998) (prepared statement of Steven K. Green, Legal Director, Americans United for the Separation of Church and State) (describing meaning of "substantial burden" with reference to First Amendment case law); 106 Cong. Rec. S2689 (daily ed. July 27, 2000) (statement of Sen. Orrin Hatch) (describing necessity of showing a "substantial burden" on "sincere religious exercise"); 145 Cong. Rec. H5580 (daily ed. July 15, 1999) (statement of Congresswoman Sheila Jackson Lee) (noting the requirements of "sincerely held religious beliefs").

129. *See, e.g.*, Spratt v. Rhode Island Dep't of Corrections, 482 F.3d 33, 38 (1st Cir. 2007) (defining "substantial burden" with reference to the Supreme Court's use of the term in the Free Exercise context).

did not define the term "substantial burden" within the Act, the legislative history makes clear that its sponsors intended to codify that term of art as the Supreme Court had used it when analyzing the Free Exercise Clause.[130] Accordingly, every court that has considered the issue has defined RLUIPA's "substantial burden" requirement with reference to its own use of the term in the Free Exercise context[131] or the Supreme Court's use of the term when considering similar claims.[132]

After a prisoner has established a *prima facie* violation of RLUIPA, the burden of persuasion shifts, and the defendants must justify the restriction under the same strict-scrutiny standard imposed by RFRA.[133] Once more, prison officials can do so by establishing that their action represented the "least restrictive means" of furthering "a compelling governmental interest."[134]

To reiterate, RLUIPA provides additional protection for the free exercise rights of state-level inmates beyond that available under the First Amendment.[135] After establishing that prison officials have (1) substantially burdened a (2) sincerely held (3) religious belief, a prisoner bringing a claim under RLUIPA avoids the deferential "reasonableness" standard employed in the First Amendment context.[136]

As a practical matter, a prisoner alleging the first three elements of a cause of action under the Free Exercise Clause in any court that requires a "substantial burden" has also pled a cause of action under RLUIPA.[137] In other words, if a prisoner's complaint contains facts demonstrating a (1) substantial burden on a (2) sincerely held (3) religious belief, that inmate has established a *prima facie* violation of both RLUIPA and the Free Exercise Clause in a majority of America's federal courts.[138]

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130. *See* 146 Cong. Rec. S7774-75 (July 27, 2000) (Joint Statement of Sen. Hatch and Sen. Kennedy) (stating that the term "substantial burden" is to "be interpreted by reference to existing Supreme Court jurisprudence.").

131. *Hayes*, 424 F.App'x at 554; Perkel v. U.S. Dep't of Justice, 365 F.App'x 755, 756 (9th Cir. 2010) (citing *Navajo Nation*, 535 F.3d at 1063; Van Wyhe v. Reisch, 581 F.3d 639, 655-56 (8th Cir. 2009)).

132. *Abdulhaseeb*, 600 F.3d at 1314-16; *Koger*, 523 F.3d at 799; Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 348 (2d Cir. 2007); *Washington*, 497 F.3d at 277; *Spratt*, 482 F.3d at 38; *Lovelace*, 472 F.3d at 186-87 (4th Cir. 2006); *Adkins*, 393 F.3d at 567-71; Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1226-27 (11th Cir. 2004)*; see also* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 514-16 (2005).

133. 42 U.S.C. 2000cc-2(b).

134. 42 U.S.C. 2000cc-1(a).

135. Nelson, *supra* note 121, at 2057.

136. *Id.* at 2057-59.

137. *See* 42 U.S.C. § 2000cc-1(a).

138. *See, e.g.*, Alvarez v. Hill, 518 F.3d 1152, 1157 (9th Cir. 2008) (explaining that a prisoner's bare allegations of a substantial burden on his right to free exercise satisfied federal pleading standards and stated a claim upon which relief could be granted for both the Free Exercise Clause and RLUIPA).

D. Comparing and Contrasting

In eight circuit courts of appeals, the *prima facie* elements for a cause of action under RFRA and RLUIPA run parallel to those necessary to state a claim under the Free Exercise Clause.[139] With regard to the prisoner's basic grievance, the initial three elements under RFRA, RLUIPA, and the Free Exercise Clause are the same.[140] The only difference is the burden the government must satisfy in order to defend against the action.[141] If a prisoner brings a claim under the Free Exercise Clause, the challenged restriction is valid if it is found to be reasonable.[142] This standard is deferential to prison officials, and it is exceedingly difficult for *pro se* inmates to overcome.[143] Alternatively, if an inmate brings a claim under RFRA or RLUIPA, prison officials must prove that the challenged restriction satisfies strict scrutiny, a much higher burden.[144]

III. RFRA, RLUIPA AND THE PROCESS OF INFERRING CLAIMS ON BEHALF OF *PRO SE* PRISONERS

Given the significant advantages of making a claim under RFRA or RLUIPA, you would assume that prisoners alleging a violation of the right to free exercise would be sure to cite the applicable statutory law as a basis for relief.[145] Unfortunately, many prisoners fail to do so.[146]

Part III explains this failure and explores its effect. Section A describes the traditional process by which courts have constructed claims on behalf of *pro se* litigants.[147] Section B then explores the problems that occur when a court employing this process recognizes a claim under the First Amendment but ignores the applicability of RFRA or RLUIPA.[148]

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139. Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001); Walden v. CDC & Prevention, 669 F.3d 1277 (11th Cir. 2012); *Hobby Lobby Stores, Inc.*,870 F.Supp.2d at 1278.

140. 42 U.S.C. 2000bb-1; 42 U.S.C. 2000cc-1; U.S. CONST. amend. 1.

141. 42 U.S.C. 2000bb-1; 42 U.S.C. 2000cc-1; U.S. CONST. amend. 1.

142. *O'Lone*, 482 U.S. at 349 (citing *Turner*, 482 U.S. at 89).

143. Apanovitch, *supra* note 8, at 833.

144. Sara Smolik, *The Utility and Efficiacy of the Rluipa: Was it a Waste?*, 31 B.C. ENVTL. AFF L. REV. 723, 726 (2004).

145. *See* COLUM. HUM. RTS. L. REV., *supra* note 1, 727-28 (stressing the importance of noting RFRA or RLUIPA in a complaint).

146. *See id.*

147. *See* infra Part III.A.

148. *See* infra Part III.B.

A. Constructing Claims on the Basis of the Facts Alleged: The Traditional Approach to Pro Se Pleadings

Pro se litigants are notorious for drafting disorganized and incoherent complaints.[149] In addition to a frequently confusing style, *pro se* plaintiffs often reference irrelevant facts and legal doctrines at each stage in litigation.[150] Given these practical problems, on what basis could a court possibly identify the potential claims within a *pro se* prisoner's complaint?

Traditionally, courts will consider the facts alleged by the prisoner, and on that basis, will construe the complaint to include all appropriate causes of action.[151] In other words, courts disregard the various stylistic problems and irrelevant information commonly found in *pro se* pleadings,[152] and instead, construct claims by looking to the facts alleged and comparing those facts to the necessary elements of all potentially applicable causes of action.[153] To illustrate, a court in the Seventh Circuit, one of the eight circuit courts of appeals which require a "substantial burden" in the Free Exercise context, will construe a state-jail prisoner's complaint to include a claim under both the Free Exercise Clause and RLUIPA if that prisoner alleges facts demonstrating an (1) unreasonable and substantial burden on a (2) sincerely held (3) religious belief.[154] Importantly, the court would do this even if the prisoner mistakenly listed RFRA as a basis for relief, rather than RLUIPA.[155] Under the traditional approach, courts construe *pro se*

149. Schneider, *supra* note 13, at 602.

150. *Id.* at 602-03.

151. *Id.*; *see also* Firstenberg v. City of Santa Fe, New Mexico, 696 F.3d 1018, 1024 (10th Cir. 2012); Williams v. Curtin, 631 F.3d 380, 383-84 (6th Cir. 2011); Ortiz v. Downey, 561 F.3d 664, 670 (7th Cir. 2009); *Kaemmerling*, 553 F.3d at 676-77; Boxer X v. Harris, 437 F.3d 1107, 1110-12 (11th Cir. 2006); Settles v. United States Parole Commission, 429 F.3d 1098, 1106 (D.C. Cir. 2005); *McEachin*, 357 F.3d at 200 n.2; Higgins v. Beyer, 293 F.3d 683, 688 (3d Cir. 2002); Minger v. Green, 239 F.3d 793, 799-800 (6th Cir. 2001); Holley v. Dept. of Veteran's Affairs, 165 F.3d 244, 247-48 (3d Cir. 1999); Bilal-Edwards v. United Planning Org., 896 F.Supp.2d 88, 94 n.10 (D.C. 2012); Westley v. Mann, 896 F.Supp.2d 775, 787-88 (D. Minn. 2012); Roberts v. Klein, 770 F.Supp.2d 1102, 1110-11 (D. Nev. 2011); Chapman v. U.S. Marshal for N. Dist. of Ill., 584 F.Supp.2d 1083, 1091-92 (N.D. Ill. 2008); McCreary v. Vaughan-Bassett Furniture Co., Inc., 412 F.Supp.2d 535, 535 (M.D.N.C. 2005); Estate of Williams-Moore v. Alliance One Receivable Mgmt., Inc., 335 F.Supp.2d 636, 646-48 (M.D.N.C. 2004); Williams v. Bitner, 285 F.Supp.2d 593, 605 (M.D. Penn. 2003); Bonilla v. Rodriguez, 635 F.Supp. 148, 153 (D.P.R. 1986).

152. Schnieder, *supra* note 13, at 602 (citing Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991)).

153. *Id.* at 603 (citing Martin v. Overton, 391 F.3d 710, 713 (6th Cir. 2004)); *see also* Jonathon D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 369 (2002).

154. *See Ortiz*, 561 F.3d at 670.

155. Jonathan Knapp, *Making Snow in the Desert: Defining a Substantial Burden Under RFRA*, 36 ECOLOGY L.Q. 259, 291 (2009).

complaints to include all relevant claims, even when the plaintiff references a basis for relief that is ultimately determined to be inapplicable.[156]

This approach is particularly appropriate in the prison context. Recognizing the limited legal skills of most *pro se* inmates, many courts have seen fit to provide prisoners a standard form on which to draft their complaints.[157] Generally, these forms instruct inmates to "state as briefly as possible the facts" underlying their claims and to forego any reference to "legal arguments[,] cases or statutes."[158] In short, these instructions assume that courts will take an active role in identifying claims on behalf of *pro se* prisoner litigants.[159]

B. What is the "RFRA/RLUIPA Problem"?

The basic approach outlined above assumes that a court will construe a *pro se* plaintiff's complaint to include every cause of action supported by the facts alleged.[160] Accordingly, a *pro se* prisoner does not waive a particular cause of action by failing to mention it in the initial pleading, and that prisoner is free to advance any remedy supported by the facts alleged in the complaint in a subsequent addendum or motion.[161] In some cases, however, a prisoner will fail to explicitly advance a remedy supported by the facts alleged in the complaint prior to summary judgment.[162] What happens if the court also fails to recognize that remedy at an earlier stage? The following sub-section provides a general answer to this question, and the one after it describes the conflicting and oddly specific rules that have sprung up regarding the applicability of RFRA and RLUIPA.[163]

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156. *See, e.g.*, *McEachin*, 357 F.3d at 199 n.2; *Minger*, 239 F.3d at 799; *Bilal-Edwards*, 896 F.Supp.2d at 94 n.10.

157. *See, e.g.*, *Form to be Used by Prisoner in Filing a Complaint Under the Civil Rights Act, 42 U.S.C. § 1983*, W.D. MICH. (2012), *available at* http://www.miwd.uscourts.gov/sites/miwd/files/cmpref.pdf; *see also* Lynn S. Branham, *Of Mice and Prisoners: The Constitutionality of Extending Prisoners' Confinement for Filing Frivolous Lawsuits*, 75 S. CAL. L. REV. 1021, 1065 (2002).

158. *See, e.g.*, *Civil Rights Complaint Form*, *supra* note 11.

159. *Id.*

160. *See infra* Part III.A.

161. *See, e.g.*, Shomo v. New York, 374 F.App'x 180, 182-83 (2d Cir. 2010); Higgins v. Beyer, 293 F.3d 683, 688 (3d Cir. 2002); *Minger*, 239 F.3d at799-800; Northrop v. Hoffman of Simsbury, Inc., 134 F.3d 41, 46 (2nd Cir. 1997) (quoting Albert v. Carovano, 851 F.2d 561, 571 n.3 (2d Cir. 1988) (en banc)); *Holley*,165 F. 3d at 247-48; *Bilal- Edwards*, 896 F.Supp.2d at 94 n.10; Douglas v. Osteen, 560 F.Supp.2d 362, 369 (E.D. Pa. 2008).

162. *See, e.g.*, *Shomo*, 374 F. App'x 180, 182-83 (2d Cir. 2010).

163. *See infra* Part III.B.1-2.

1. The "Fair Notice" Standard: Construing Previously Unmentioned Claims at Summary Judgment

A court considering a motion for summary judgment will generally allow any plaintiff, even one represented by counsel, to advance a cause of action not previously addressed by the parties only if the facts alleged in the complaint or the substance of subsequent motions provided the defendant with "fair notice" of the newly advanced claim.[164] This sort of notice can be provided in a few different ways.[165] For one, the plaintiff might explicitly mention the cause of action in a subsequent motion prior to summary judgment.[166] Also, the plaintiff might present evidence or argument during a hearing that makes it clear that the previously unmentioned cause of action is before the court.[167] Lastly, the court might determine that the new cause of action should be considered as an amendment to the complaint in the interest of justice[168] or that, based on the facts alleged in the complaint, the specific cause of action had been before the court all along.[169]

To protect defendants from unfair prejudice, however, this rule is limited.[170] Judges are less likely to allow the plaintiff to advance a new

164. Marshall v. Penn Twp., 458 F.App'x 178, 181 (3d Cir. 2012); Liberty Lincoln-Mercury, Inc. v. Ford Motor Co., 676 F.3d 318, 326 (3d Cir. 2012); Huggins v. FedEx Ground Package System, Inc., 592 F.3d 853, 861-63 (8th Cir. 2010); Cortés-Rivera v. Dep't of Corrections and Rehab. of the Commonwealth of Puerto Rico, 626 F.3d 21, 28-29 (1st Cir. 2010); E.E.O.C. v. Lee's Log Cabin, Inc., 546 F.3d 438, 442-43 (7th Cir. 2008); Stover v. Hattiesburg Public Sch. Dist., 549 F.3d 985, 989 n.2 (5th Cir. 2008); Howington v. Quality Rest. Concepts, LLC, 298 F.App'x 436, 442 n.6 (6th Cir.2008); Wiley v. Glassman, 511 F.3d 151, 160-61 (D.C. Cir. 2007); Consol. Edison Co. v. UGO Utilities, Inc., 423 F.3d 90, 104 (2d Cir. 2004); Manning v. Chevron Chemical Co., LLC, 332 F.3d 874, 879 (5th Cir. 2003); Vencor, Inc. v. Standard Life & Acc. Ins. Co., 317 F.3d 629, 641 n.11 (6th Cir. 2003); Morales-Vallellanes v. Potter, 339 F.3d 9, 14-15 (1st Cir. 2003); *Carovano*, 851 F.2d at 571 n.3; Willmore-Cochran v. Wal- Mart Associates, Inc., 919 F.Supp.2d 1222, 1234-35 (N.D. Alab. 2013); Amerisure Ins. Co. v. Scottsdale Ins. Co., 795 F.Supp.2d 819, 828 (S.D. Ind. 2011); Quality Res. & Services, Inc., v. Idaho Power Co., 706 F.Supp.2d 1088, 1096 (D. Idaho 2010); Miles-Hickman v. David Powers Homes, Inc., 589 F.Supp.2d 849, 867-68 (S.D. Tex. 2008); Dixie Aire Title Services, Inc. v. SPW, LLC, 389 B.R. 222, 229 (W.D. Okla. 2008); Strickland v. Jewell, 562 F.Supp.2d 661, 670-71 (M.D.N.C. 2007); Spengler v. Worthington Cylinders, 514 F.Supp.2d 1011, 1017-19 (S.D. Ohio 2007); Bats v. Cobb Cnty., Ga., 495 F.Supp.2d 1311, 1313 n.1 (N.D. Ga. 2007).

165. *Alvarez*, 518 F.3d at 1157-59; *Consol. Edison Co.*, 423 F.3d at 104; *Carovano*, 851 F.2d at 571 n.3; *Stover*, 549 F.3d at 989 n.2; *Manning*, 332 F.3d at 879; Morin v. Moore, 309 F.3d 316, 322-23 (5th Cir. 2002); Miles-Hickman v David Powers Homes, Inc., 598 F.Supp.2d 849, 867-68; Ketcher v. Wal-Mart Stores, Inc., 122 F.Supp.2d 747, 755-56 (S.D. Tex. 2000).

166. *Alvarez*, 518 F.3d at1157-58.

167. *Consol. Edison Co*., 423 F.3d at 104; *Carovano*, 851 F.2d at 571 n.3.

168. *Stover*, 549 F.3d at 989 n.2; *Manning*, 332 F.3d at 879; *Morin*, 309 F.3d at 323; *Miles-Hickman*, 598 F.Supp.2d at 867; *Ketcher*, 122 F. Supp. 2d at 755-56.

169. *Marshall*, 458 F.App'x at180; *Morales-Vallellanes*, 339 F.3d at 14-15; *Amerisure Ins. Co.*, 795 F.Supp.2d at 828; *Strickland*, 562 F.Supp.2d at 670-71; *Spengler*, 514 F.Supp.2d at 1017-19.

170. *Cortés-Rivera*, 626 F.3d at 28-29.

cause of action at summary judgment when a party is represented by counsel and the case has been before the court for quite some time.[171]

Interestingly, courts employ the "fair notice" analysis even when the plaintiff is *pro se*.[172] In that context, however, judges are generally more willing to excuse the litigant's failure to explicitly raise a cause of action not mentioned prior to summary judgment.[173] Nevertheless, even when the plaintiff is *pro se*, a court will consider whether recognizing a new cause of action at such a late stage in litigation would unduly prejudice the defendants.[174]

2. The "RFRA/RLUIPA Problem"

Although the "fair notice" analysis applies to all types of actions, courts have crafted oddly specific rules with regard to the applicability of RFRA and RLUIPA.[175] For instance, whether a state-jail inmate who has established a *prima facie* violation of the Free Exercise Clause may advance a previously unmentioned RLUIPA claim at summary judgment depends on the circuit in which the prisoner brings the action.[176] Currently, courts in the Second,[177] Third,[178] Seventh[179] and Tenth[180] Circuits will infer the applicable statutory claim at summary judgment, even if the prisoner did not

171. *Id.*; Tucker v. Union of Needletrades, Indus. and Textile Emp., 407 F.3d 784, 787-89 (6th Cir. 2005); Beckman v. U.S. Postal Service, 79 F.Supp.2d 394, 407-08 (S.D.N.Y. 2000).

172. *See, e.g.*, Austin v. Terhune, 367 F.3d 1167, 1171 (9th Cir. 2004).

173. Burchett v. Bromps, 380 F.App'x 568, 569-70 (9th Cir. 2010); Keeler v. Florida Dep't of Health, 324 F.App'x 850, 858-59 (11th Cir. 2009); Pabon v. Wright, 459 F.3d 241, 247-48 (2d Cir. 2006); McDermott v. Royal, 123 F.App'x 241, 242-43 (8th Cir. 2004); *Austin*, 367 F.3d at 1171; Morrison v. Hall, 261 F.3d 896, 899 n.2 (9th Cir. 2001); Bass v. Robinson, 167 F.3d 1041, 1047 (6th Cir. 1999); Ganther v. Ingle, 75 F.3d 207, 211-12 (5th Cir. 1996); Ohuche v. Merck & Co., Inc., 903 F.Supp.2d 143, 150 (S.D.N.Y. 2012); Antoniewicz v. Astrue, 769 F.Supp.2d 713, 722-23 (D. Del. 2011); Benckini v. Hawk, 654 F.Supp.2d 310, 316 n.1 (E.D. Pa. 2009); Ajaj v. United States, 479 F.Supp.2d 501, 510, 534-35, 539-40 (D.S.C. 2007); Keehner v. Dunne, 409 F.Supp.2d 1266, 1270 (D. Kan. 2005); Strahan v. Frazier, 156 F.Supp.2d 80, 94 n.14 (D. Mass. 2001); Lawson v. Diehl Machines, Inc., 1999 WL 325064, at *1 n.1 (N.D. Ind. 1999).

174. *See, e.g.*, *Jones*, 435 F.Supp.2d at 259-64.

175. *See* Ali v. District of Columbia, 278 F.3d 1, 8 (D.C. Cir. 2002); *see also Grayson*, 666 F.3d at 451; *Henderson*, 379 F.3d at 715 n.1.

176. *Compare Grayson*, 666 F.3d at 451 (inferring RLUIPA claim on the basis of the facts alleged in the complaint at summary judgment) *with* Henderson, *supra* note 13, at 715 n.1 (9th Cir. 2004) (refusing to infer RLUIPA claim at summary judgment, despite earlier recognizing a claim under the Free Exercise Clause).

177. *See* Dingle v. Zon, 189 F.App'x 8, 10 (2d Cir. 2006); Ramsey v. Goord, 661 F.Supp.2d 370, 393 (W.D.N.Y. 2009). *But see Jones*, 435 F.Supp.2d at 259-64 (refusing to infer RLUIPA claim at summary judgment to protect defendants from prejudice after years of discovery and nearly ten years of litigation).

178. *See* Smith v. Johnson, 202 F.App'x 547, 549 (3d Cir. 2006).

179. *See Grayson*, 666 F.3d at 451.

180. *See Hammons*, 348 F.3d at 1258.

previously reference it.[181] In doing so, these courts are attempting to protect the interests of *pro se* litigants despite the possible prejudice to defendants and the inefficiency of requiring further litigation to deal with the previously unconsidered strict-scrutiny standard.[182]

Conversely, the Ninth Circuit[183] requires a prisoner to explicitly refer to one of these bases for relief at some point prior to summary judgment in order to ensure the heightened protection offered by either statute.[184] Although this approach may punish *pro se* litigants for their ignorance, it promotes judicial economy and protects defendants from uncertainty.[185] By requiring a plaintiff to state a basis for relief before summary judgment, courts ensure an adequate record on which to determine whether a genuine issue of material fact exists with regard to the claims before it.[186] This approach also protects defendants from unfairness.[187] If a claim for RLUIPA could be inferred on the facts alleged in the plaintiff's complaint at such a late stage in litigation, many defendants would be unduly prejudiced for their failure to previously construct a record effectively responding to RLUIPA's strict-scrutiny standard.[188]

Unfortunately, both of these approaches create unnecessary problems.[189] The circuits following the more liberal approach may unfairly prejudice defendants, create uncertainty at a late stage in litigation, and undercut the goal of judicial efficiency.[190] In turn, the more conservative approach may unfairly place the onus to state a claim for RFRA or RLUIPA on *pro se* inmates, potentially punishing them for their ignorance of those laws.[191]

The "RFRA/RLUIPA Problem" can be summarized as follows: if a court considering a claim involving the right to free exercise does not explicitly determine the exact causes of action before it at an early stage in

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181. *See Dingle*,189 F.App'x 8, 10; Ramsey, 661 F.Supp.2d at 393. *But see Jones*, 435 F.Supp.2d at 259-64 (refusing to infer RLUIPA claim at summary judgment to protect defendants from prejudice after years of discovery and nearly ten years of litigation).

182. *See, e.g.*, *Grayson*, 666 F.3d at 451.

183. *Henderson*, 379 F.3d at 715 n.1; *see also Alvarez*, 518 F.3d at1157-59.

184. *See Henderson*, 379 F.3d at 715 n.1; *see also Alvarez*, 518 F.3d at 1157-59.

185. *See* Robert Bacharach & Lyn Entzeroth, *Judicial Advocacy in Pro Se Litigation: A Return to Neutrality*, 42 IND. L. REV. 19, 26 (2009); *see also* D. Brock Hornby, *Summary Judgment Without Illusions*, 13 GREEN BAG 2D 273, 281-82 (2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Judge%20Hornby,%20Summary%20Judgment%20Without%20Illusions.pdf.

186. *See Jones*, 435 F.Supp.2d at 262.

187. *Id.*

188. *Id.* at 261-62.

189. *See* Connor v. Ill. Dept. of Natural Res., 417 F.3d 675, 679-80 (2005); *see* Daniel J. Solove, *Faith Profaned: The Religious Freedom Restoration Act and Religion in The Prisons*, 106 YALE L.J. 459, 462-63, 472 (1996); *see* Stewart v. Firstenergy Corp., 2007 WL 43645, at *1-2 (N.D. Ohio 2007).

190. *See Connor*, 417 F.3d 679-80; *see* Solove, *supra* note 189, at 462-63, 472; *see Stewart*, 2007 WL 43645 at *1-2.

191. *See* Solove, *supra* note 189, at 462-63, 472.

litigation, it creates uncertainty regarding the applicability of RFRA and RLUIPA.[192] In turn, this uncertainty leads to various problems when inmates attempt to assert their rights under either statute at a late stage in litigation.[193] What is the best solution to this "Problem"?

An optimal solution would require courts to identify a claim for RFRA or RLUIPA based on the facts alleged in a *pro se* prisoner's complaint at the earliest possible stage.[194] This solution would ensure that a *pro se* prisoner litigant does not inadvertently waive a claim under either statute due to ignorance.[195] It would also protect defendants from prejudice and promote efficiency in the courts.[196]

IV. ENSURING THE APPLICATION OF RFRA AND RLUIPA IN *PRO SE* PRISONER LITIGATION

Part IV advances and supports two solutions to the "Problem" described above. Which solution applies depends on whether the district court considering the relevant *pro se* complaint sits in a circuit that requires a "substantial burden" in the Free Exercise context.[197] In circuits that do, district courts should always identify a claim for RFRA or RLUIPA whenever the facts alleged in a *pro se* prisoner's complaint establish a *prima facie* violation of the Free Exercise Clause.[198] To adequately protect the interests of inmates, prison officials and the courts, this should occur at the screening stage, before the court orders service of the complaint upon the defendants.[199] In the remaining circuits, district courts should employ a two-part solution whenever a prisoner files a *pro se* complaint alleging a potential violation of the Free Exercise Clause.[200] First, the court should dismiss the complaint without prejudice.[201] Second, in the court's dismissal order, it should explain the potential application of the Free Exercise Clause, RFRA and RLUIPA, along with the *prima facie* elements of each.[202] This will allow the prisoner to pursue the relevant statutory claim in an amended

192. *See supra* notes 175-91 and accompanying text.
193. *See supra* notes 19, 174 and accompanying text.
194. Rodriguez v. Doral Mortgage Corp, 57 F.3d 1168, 1177 (1st Cir. 1995).
195. *Id.*
196. *Id.*
197. *See* Gaubatz, *supra* note 132, at 513-14; *see also* Burton v. Clark, 2012 BL 198206, at *9-13 (E.D. Cal. 2012).
198. *See* Gaubatz, *supra* note 132, at 513-14.
199. *See* MICHAEL MUSHLIN, RIGHTS OF PRISONERS § 17.39 (4th ed. 2009).
200. *See, e.g.*, Shane v. Fauver, 213 F.3d 113, 117 (3d Cir. 2000); *Lopez*, 203 F.3d at 1124.
201. *See, e.g.*, *Shane*, 213 F.3d at 117; *Lopez*, 203 F.3d at 1124.
202. *See Roberson*, 2007 WL 4168354 at *1.

complaint.[203] Again, to adequately protect the interests of all parties, this process should take place at screening.[204]

Part IV is divided into four sections. Section A introduces the Prison Litigation Reform Act's screening procedure and explains how it works today.[205] Section B then describes how the Prison Litigation Reform Act's screening procedure can be used to ensure the application of RFRA and RLUIPA in the eight circuits that require a "substantial burden" in the Free Exercise context.[206] Section C does the same for the remaining circuit courts of appeals.[207] Finally, Section D explores the benefits of these solutions, with specific reference to the interests of inmates, prison officials and the courts.[208]

A. What is the Prison Litigation Reform Act's Screening Procedure and How Does it Work Today?

Under the Prison Litigation Reform Act, federal courts must "screen" every complaint filed by an inmate against prison officials.[209] As a practical matter, "screening" obligates federal courts to perform three tasks, each of which is done *sua sponte*.[210] First, after reviewing the complaint, courts must dismiss any "frivolous or malicious" claims.[211] Second, courts must also dismiss any claims that seek monetary relief against a defendant protected by some form of immunity.[212] Last, the Prison Litigation Reform Act requires courts to "identify cognizable claims" within the remainder of the complaint in order to determine whether any of these state a claim upon which relief can be granted.[213] In short, the Prison Litigation Reform Act's screening procedure built upon and added to the obligations courts traditionally faced when reviewing the complaints of inmates *in forma pauperis*.[214] However, this law entailed a few significant changes.[215] First, it expanded the scope of screening by requiring courts to review *all* prisoner complaints, not just those seeking *in forma pauperis* relief.[216] Second, this law explicitly *requires* courts to "identify cognizable claims" within the

203. *See* Securities Regulation & Law Report (BNA), 46 SRLR Issue No. 38, 53 (2014).
204. *Rodriguez*, 57 F.3d at 1177.
205. *Infra* Part IV.A.
206. *Infra* Part IV.B.
207. *Infra* Part IV.C.
208. *Infra* Part IV.D.
209. 28 U.S.C. § 1915A(a).
210. *See* 28 U.S.C. § 1915A(b).
211. 28 U.S.C. § 1915A(b)(1).
212. 28 U.S.C. § 1915A(b)(2).
213. 28 U.S.C. § 1915A(b).
214. *See* 28 U.S.C. 1915(e)(2) (2012); *see also* MUSHLIN, *supra* note 199, at § 17:39.
215. *See* 28 U.S.C. § 1915A.
216. *See id.*; *see also* Plunk v. Givens, 234 F.3d 1128, 1129 (10th Cir. 2000).

complaint.[217] Third, the Prison Litigation Reform Act *mandates* that screening take place at the *earliest practicable stage* in litigation, preferably before the defendants are served with the complaint.[218]

Two of these features require further comment.[219] First, by explicitly requiring courts to identify cognizable claims within a *pro se* complaint, the Prison Litigation Reform Act simply codified the approach courts traditionally employ when construing the pleadings of *pro se* litigants.[220] Second, and more importantly, the Prison Litigation Reform Act affected the timing at which this process occurs.[221] Previously, a court could "screen" a complaint advanced by an inmate seeking *in forma pauperis* relief at any time.[222] Because there was no requirement that courts do so at any particular stage,[223] judges often began this process only after the defendants had made a motion to dismiss following service of the complaint.[224] Pursuant to the Prison Litigation Reform Act, however, this process must occur at the *earliest practicable stage*, preferably before the court dockets the case, and before the defendants are served the complaint.[225]

To reiterate, under the Prison Litigation Reform Act's screening procedure, courts *must* identify cognizable claims by comparing the facts alleged in the *pro se* complaint against the *prima facie* elements of the various causes of action available.[226] This process generally occurs before the complaint is served on the defendants and, if the facts alleged in the complaint establish the required elements of a particular claim, the prisoner

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217. 28 U.S.C. 1915A(b).

218. *See* MUSHLIN, *supra* note 199, at § 17:39 ("[T]he PLRA contemplates that screening is to take place before service of process on the defendant.").

219. *See infra* notes 220-25 and accompanying text.

220. *Compare* Black v. Lane, 22 F.3d 1395, 1400 (7th Cir. 1994) (inferring claim for retaliation on the basis of the facts alleged in the pro se prisoner's complaint and overturning dismissal of complaint for failure to state a claim; Pre-PLRA), *and* Santana v. Keane, 949 F.2d 584, 585 (2nd Cir. 1991) (constructing due process claim on the basis of the inmate's factual allegations and overturning dismissal of complaint for failure to state a claim; Pre-PLRA), *with* Marion v. Columbia Corr. Inst., 559 F.3d 693, 699 (7th Cir. 2009) (reversing PLRA screening dismissal of a pro se prisoner's complaint for failure to state a claim on the basis of the facts alleged therein), *and McEachin*, 357 F.3d at 199 n.2, 201-03 (overturning PLRA screening dismissal of pro se complaint because facts alleged established a prima facie violation of the right to free exercise, thus both implicating the First Amendment and RLUIPA).

221. *See* 28 U.S.C. § 1915A(a); *see also* MUSHLIN, *supra* note 199, at § 17:39.

222. *See* 28 U.S.C. § 1915(e)(2) (noting that screening may occur at "any time").

223. *Id.*

224. *See, e.g.*, *Hall*, 935 F.2d 1106, 1109-10 (10th Cir. 1991).

225. *See* MUSHLIN, *supra* note 199, at § 17:39; *see also* Perales v. Bowlin, 644 F.Supp.2d 1090, 1097-1101 (N.D. Ind. 2009) (surveying a pro se prisoner's possible claims and ordering responsive pleadings from two defendants).

226. 28 U.S.C. § 1915A(b).

has stated a *prima facie* basis for relief and that portion of his complaint will survive screening.[227]

With regard to claims under the Free Exercise Clause, district courts in each circuit analyze whether the facts alleged in the complaint establish the four elements described in Part II.[228] Generally, the inmate must allege that prison officials (1) unreasonably (2) burdened a (3) sincerely held (4) religious belief.[229] In eight circuit courts of appeals, the "burden" must be "substantial" in order to implicate the First Amendment's protections.[230]

To state a claim under RFRA or RLUIPA, a prisoner need only allege facts establishing a (1) substantial burden on a (2) sincerely held (3) religious belief.[231]

In the eight circuit courts of appeals that require a "substantial burden" in the Free Exercise context, a prisoner alleging an (1) unreasonable and substantial burden on a (2) sincerely held (3) religious belief has established a *prima facie* violation of the Free Exercise Clause and whichever statutory protection applies based on the plaintiff's circumstances.[232]

Given these facts, the Prison Litigation Reform Act's screening procedure provides an optimal solution the "RFRA/RLUIPA Problem."[233] In the eight circuit courts of appeals that require a "substantial burden" in the Free Exercise context, district courts should always construe a *pro se* complaint that states the necessary elements of a cause of action under the Free Exercise Clause to also include a claim under RFRA or RLUIPA, whichever applies.[234] In the remaining circuits, courts should dismiss without prejudice any *pro se* complaint alleging a violation of the Free Exercise Clause, explain the pleading requirements of the potentially applicable claims in the relevant dismissal order, and allow the prisoner the opportunity to pursue both in an amended complaint.[235]

The logistics of these solutions are discussed in the following two sections.[236] After that, the advantages of both are described.[237]

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227. *See, e.g.*, Mack v. Yost, 427 F.App'x 70, 72-73 (3rd Cir. 2011) (listing the required elements for a retaliation claim and concluding, on the basis of the facts alleged by the relevant prisoner, that his complaint established a prima facie violation).

228. *See supra* Part II.A.1-4.

229. *See supra* notes 19-54 and accompanying text.

230. *See supra* notes 33-38 and accompanying text.

231. *See supra* notes 58-61, 67-70 and accompanying text.

232. *See supra* Part II.B.

233. *See infra* Part IV.B-C.

234. *See, e.g.*, *Roberson*, 2007 WL 4168354 at *1 ("Liberally construed, plaintiff's allegations appear to state cognizable claims for violation of his First . . . Amendment right[] to free exercise of religion . . . . They also implicate RLUIPA . . . .").

235. *See infra* note 240 and accompanying text.

236. *See infra* Part IV.B-C.

237. *See infra* Part IV.D.1-3.

B. The Prison Litigation Reform Act's Screening Procedure Provides an Optimal Solution to the "RFRA/RLUIPA Problem" in the Majority of America's Federal Courts

In eight circuit courts of appeals, the facts necessary to state a claim under the Free Exercise Clause include those required to state a claim under RFRA or RLUIPA.[238] Accordingly, any complaint that states facts establishing a violation of a prisoner's right to Free Exercise under the First Amendment necessarily includes a cause of action under RFRA or RLUIPA, whichever applies.[239] By the plain language of the Prison Litigation Reform Act, courts are *required* to "identify" both at the screening stage.[240]

Despite this fact, the "Problem" described above persists. While some federal courts will infer a cause of action for RFRA or RLUIPA at the screening stage whenever an inmate alleges facts establishing a *prima facie* violation of the Free Exercise Clause,[241] many ignore the potential applicability of those statutes.[242] This creates uncertainty regarding the applicability of either statute at later stages in litigation, which ultimately harms *pro se* litigants, prejudices prison administrators, and undercuts the goal of judicial efficiency.[243] To resolve this problem, courts in the eight circuits that require a "substantial burden" in the Free Exercise context should always identify a claim for RFRA or RLUIPA whenever the facts alleged in a *pro se* prisoner's complaint establish a *prima facie* violation of the Free Exercise Clause.[244]

This solution mirrors the traditional approach taken by courts when dealing with *pro se* pleadings, and its primary benefits are two-fold.[245] First, this solution requires a court to determine at the outset what causes of action are before it.[246] At the earliest possible stage, this ends any uncertainty regarding the applicability of RFRA or RLUIPA.[247] Second, this solution does not require any additional work for courts or litigators.[248]

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238. *See supra* notes 58-61, 68-75 and accompanying text.
239. *See supra* note 234 and accompanying text.
240. *See* 28 U.S.C. § 1915A(b) ("On review, the court shall identify cognizable claims . . . . ").
241. *See, e.g.*, Brady v. Marsh, 2010 WL 3767851, at *3 (E.D. Cal. 2010); Deherrera v. Mahoney, 2008 WL 697592, at *5 (D. Mont. 2008) ("Plaintiff's claims could be construed as allegations of interference with Plaintiff's free exercise of religion in violation of the First Amendment and/or claims under the Religious Land Use and Institutionalized Persons Act of 2000 . . . .").
242. *See, e.g.*, Mayo v. Norris, 2009 WL 2207929, at *2 (E.D. Ark. 2009); Jebril v. Joslin, 2008 WL 416240, at *4-5 (S.D. Tex. 2008).
243. *See infra* Part IV.D.1-3.
244. *See supra* note 234 and accompanying text.
245. *See supra* notes 151-53 and accompanying text.
246. *See* Leonard v. Lacy, 88 F.3d 181, 185 (2nd Cir. 1996).
247. *See supra* notes 185, 194-96.
248. *See* Schneider, *supra* note 13, at 597-98.

Instead, judges would continue to screen all prisoner complaints by employing the traditional approach to *pro se* pleadings.[249] If a prisoner's complaint establishes a *prima facie* violation of the Free Exercise Clause, a court in any of the circuits that requires a "substantial burden" in the Free Exercise context would simply note this in its screening order and briefly explain that it has "identified" a *prima facie* claim under both the First Amendment and the applicable statute.[250] The onus then returns to the parties to develop those claims on the merits.[251]

C. The Prison Litigation Reform Act's Screening Procedure Provides an Optimal Solution for the "RFRA/RLUIPA Problem" in America's Remaining Circuits

The Prison Litigation Reform Act's screening procedure also provides a solution in America's remaining circuits.[252] Courts often deal with confusing or incomplete *pro se* complaints by dismissing the action without prejudice, briefly explaining the relevant legal doctrines to the prisoner in a screening order, and allowing that inmate a chance to refile an amended complaint.[253] In doing so, courts draw attention to the necessary elements of the potentially applicable claims, which in turn allows prisoners the opportunity to allege their claims once more with the *prima facie* elements in mind.[254]

In circuits that do not require a "substantial burden" in the First Amendment context, the necessary elements of a claim under the Free Exercise Clause and a claim under RFRA or RLUIPA are slightly different.[255] However, all three causes of action protect the same basic interest, and even in circuits that do not follow the majority approach, the elements of a claim under each basis for relief are similar.[256] Accordingly, whenever a district court in one of these circuits fields a complaint that suggests or establishes a violation of the Free Exercise Clause, it should dismiss the action without prejudice, and in its screening order, the court should briefly note the potential applicability of the relevant statutes.[257] The court should also describe the necessary elements of a cause of action under the Free Exercise Clause and the necessary elements of a cause of action

249. *See id.*
250. *See* Mayfield v. Texas Dep't of Crim. Justice, 529 F.3d 599, 613 (5th Cir. 2008).
251. *See* Gay v. Terrell, No. 12-2925, 2013 U.S. Dist. LEXIS 139654, at *59 (E.D.N.Y. 2013); *see supra* notes 221-27.
252. *See supra* notes 92-96 and accompanying text.
253. *See, e.g.*, *Shane*, 213 F.3d at 117; *Lopez*, 203 F.3d at 1124.
254. *See supra* Part III.A.
255. *See supra* notes 19-49, 58-62, 68-76 and accompanying text.
256. *See supra* notes 19-49, 58-62, 68-76 and accompanying text.
257. *See supra* Part II.A.

under RFRA or RLUIPA.[258] This will allow prisoners the opportunity to tailor the facts alleged in an amended complaint to both causes of action.[259] After the amended complaint is filed, the district court can then determine conclusively whether the prisoner has established a prime facie claim under the various, relevant causes of action.[260]

D. Identifying a Claim for RFRA or RLUIPA at the Screening Stage Benefits Inmates, Prison Administrators, and the Courts

Both of the solutions described above allow courts to conclusively determine the applicability of the Free Exercise Clause, RFRA, and RLUIPA at the earliest practicable stage in litigation.[261] Section D explains why this approach best serves the interests of inmates, prison administrators, and the courts.[262]

1. Using the Prison Litigation Reform Act's Screening Procedure to Solve the "RFRA/RLUIPA Problem" Adequately Protects the Interests of Inmates

Employing either of the solutions advanced above to solve the "Problem" addressed in Part III protects the interests of *pro se* prisoner litigants by ensuring that no inmate is denied the protections of RFRA or RLUIPA due to ignorance.[263] Significantly, this likely comports with the subjective expectations of prisoners.[264] After all, most inmates are provided form complaints and asked to "state as briefly as possible the facts" underlying their claims and to forego any reference to "legal arguments . . . or cases or statutes."[265] Given these instructions and the traditional methods used by courts to identify claims in complaints drafted by *pro se* litigants, inmates almost certainly expect help in identifying the most advantageous avenues for relief.[266]

258. *See supra* Part II.A.
259. *See supra* Part IV.A.
260. *See supra* Part IV.A.
261. *See supra* Part III.B.2.
262. *See infra* Part IV.D.1-3.
263. *See supra* Part III.B.2.
264. *See supra* notes 151-53 and accompanying text.
265. *See, e.g.*, *Complaint Form*, *supra* note 11.
266. *See supra* notes 151-53 and accompanying text.

2. Using the Prison Litigation Reform Act's Screening Procedure to Solve the "RFRA/RLUIPA Problem" Adequately Protects the Interests of Prison Officials

Employing the Prison Litigation Reform Act's screening procedure to solve the "RFRA/RLUIPA Problem" also protects the interests of prison administrators by ensuring that defendants are aware of each of the plaintiff's claims at the outset of the action.[267] This will allow defendants to construct a record tailored to the standards of both the First Amendment and the applicable statute, thus protecting against the possibility of prejudice at a later stage in litigation.[268]

3. Using the Prison Litigation Reform Act's Screening Procedure to Solve the "RFRA/RLUIPA Problem" Also Serves the Goal of Judicial Efficiency

Some courts will infer a claim for RFRA or RLUIPA at summary judgment on the basis of the facts alleged in the complaint, even if the prisoner never previously referenced that statute as a basis for relief before the district court.[269] In addition to prejudicing defendants, the uncertainty inherent to this approach also harms the courts.[270] Specifically, it undercuts the goal of judicial efficiency and creates additional work for judges and litigants.[271] If a court infers a RFRA or RLUIPA claim on summary judgment, and neither party has considered the applicability of the statute prior to that point, it will lack an adequate record on which to consider this new cause of action.[272] Accordingly, the parties must begin anew, constructing a separate record addressing the strict-scrutiny standard.[273] This prolongs the amount of time the action remains on the docket and creates inefficiency.[274]

Employing the Prison Litigation Reform Act's screening procedure to solve the "RFRA/RLUIPA Problem" serves the goal of judicial efficiency by determining the causes of action before the court at the earliest possible stage in litigation.[275] It also allows the parties to develop those claims from the outset, while protecting both litigants and the court against uncertainty.[276]

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267. *See supra* Part IV.B.
268. *See supra* Part IV.B.
269. *See, e.g.*, *Grayson*, 666 F.3d at 451.
270. *See e.g.*, *Jones*, 435 F.Supp.2d at 262.
271. *Id.*
272. *Id.*
273. *See* Hammons v. Jones, 2007 WL 2219521, at *3 (N.D. Okla. 2007).
274. *See id.* at *2-3; *see also supra* note 48 and accompanying text.
275. *See supra* Part IV.B.
276. *See supra* Part IV.B.

V. CONCLUSION

The gradual recognition that inmates are entitled to constitutional rights represents one of the most stirring legal developments of the Twentieth Century.[277] For nearly two-hundred years, American courts refused to interfere in the affairs of prisons, and accordingly, inmates were left without a forum in which to protect their interests.[278] Beginning in the 1960s, however, courts began to analyze prison conditions more closely, ultimately leading to a series of Supreme Court decisions dealing with issues as diverse as healthcare,[279] free speech,[280] and the exercise of religion.[281] Due to this heightened scrutiny, the conditions in American prisons improved dramatically.[282]

At each step in this evolution, *pro se* litigation has played a vital role,[283] and it continues to do so today.[284] Given its historical importance and continued relevance, such litigation should be treated with the respect it deserves.[285] Moreover, courts should conduct such litigation in a method that adequately protects the rights of inmates, while also respecting the interests of prison administrators and the courts.[286]

Unfortunately, the current treatment of *pro se* litigants alleging a violation of the right to free exercise fails on both counts.[287] Inconsistency and uncertainty harm the interests of all parties, and the approaches currently employed by courts to deal with these issues create unnecessary complications of their own.[288]

To solve these problems, courts should adopt the solutions proposed above.[289] Doing so would ensure the application of RFRA and RLUIPA whenever warranted.[290] Moreover, these solutions provide adequate protection for the interests of *pro se* prisoner litigants, administrators, and

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277. David Borchardt, Note, *The Iron Curtain Redrawn Between Prisoners and the Constitution*, 42 COLUM. HUM RTS. L. REV. 469, 469-70 (2012).

278. *See* Alison Brill, Note, *Rights Without Remedy: The Myth of State Court Accessibility After the Prison Litigation Reform Act*, 30 CARDOZO L. REV. 645, 652 & n.38 (2008).

279. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 103-04 (1976).

280. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 413-14 (1974).

281. *See, e.g.*, *Cruz*, 405 U.S. at 322.

282. Borchardt, *supra* note 277, at 474-75.

283. *See, e.g.*, Estelle, 429 U.S. at 106. (noting the original complaint was handwritten and filed by a pro se prisoner); Haines v. Kerner, 404 U.S. 519, 519-20 (1972).

284. *See* Martha Neil, *SCOTUS Agrees to Hear 2 Pro Se Appeals; One Written in Pencil by Inmate Off of Website Form*, ABA J. ONLINE (Sept. 25, 2012, 10:56 PM), http://www.abajournal.com/mobile/article/us_supreme_court_agrees_ to_hear_2_pro_se_ap peals.

285. *See supra* notes 283-84 and accompanying text.

286. *See supra* Part IV.D.

287. *See supra* Part III.B.2.

288. *See supra* Part III.B.2.

289. *See supra* Part IV.D.

290. *See supra* Part IV.D.

the courts.[291] In short, both represent a dramatic improvement over the status quo.[292]

291. *See supra* Part IV.D.
292. *See supra* Part III.B.2.