FIRST AMENDMENT — FREE EXERCISE IN PRISONS — FIFTH CIRCUIT HOLDS THAT PRISON'S PROHIBITION ON ALL OBJECTS OVER TWENTY-FIVE DOLLARS DID NOT VIOLATE PRISONER'S FIRST AMENDMENT RIGHTS OR SUBSTANTIALLY BURDEN HIS RELIGION UNDER RLUIPA. — *McFaul v. Valenzuela*, 684 F.3d 564 (5th Cir. 2012).

The First Amendment forbids Congress from enacting a law prohibiting the free exercise of religion.[1] Nonetheless, the Supreme Court has maintained that "[l]awful incarceration brings about the necessary . . . limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[2] As such, the Court has ruled that the Free Exercise Clause does not require prison officials to provide exemptions from neutral prison rules in order to accommodate particular inmates' religious beliefs where such rules are "reasonably related to legitimate penological interests."[3] But although religious accommodations are not usually constitutionally mandated, Congress can choose to enact laws that accommodate religious beliefs provided the enactments do not exceed its constitutional authority.[4] Congress did just that in passing the Religious Land Use and Institutionalized Persons Act of 2000[5] (RLUIPA), which states that no government shall impose a substantial burden on the religious exercise of a prisoner unless the burden (1) furthers a compelling governmental interest and (2) is the least restrictive means of furthering that interest.[6]

Recently, in *McFaul v. Valenzuela*,[7] the Fifth Circuit held that a prison's prohibition on objects costing more than twenty-five dollars, which prevented a prisoner from obtaining Neo-Pagan medallions, did not violate the prisoner's right to free exercise of religion because the prisoner had "alternative means of exercising [his] rights,"[8] nor did it violate the prisoner's rights under RLUIPA because the prohibitions did not "impose a substantial burden on [his] religious exercise."[9] This case was rightly decided on First Amendment grounds under Supreme

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

[2] O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987) (first alteration in original) (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)) (internal quotation marks omitted).

[3] *Id.* at 349 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)) (internal quotation mark omitted).

[4] *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872, 890 (1990) ("But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required . . . .").

[5] 42 U.S.C. §§ 2000cc to 2000cc-5 (2006).

[6] *See id.* § 2000cc-1. The Supreme Court has upheld the Act's constitutionality. *See* Cutter v. Wilkinson, 544 U.S. 709, 718–19 (2005).

[7] 684 F.3d 564 (5th Cir. 2012).

[8] *Id.* at 572; *see id.* at 574–75.

[9] *Id.* at 575 (quoting 42 U.S.C. § 2000cc-1(a)); *see id.* at 577.

Court precedent, and was probably correct under RLUIPA, given the slim amount of evidence the prisoner presented in his favor. But the decision demonstrates two flaws in the enterprise of granting religious exemptions to neutral prison policies: (1) prisoners can face severe evidentiary challenges in making such claims, and (2) the evidentiary burden is particularly high for prisoners with unique religious beliefs.

In 2009, Anson McFaul was a prisoner in the Preston E. Smith Unit of the Texas Department of Criminal Justice.[10] McFaul claimed that he was a Celtic Druid, a religion "involv[ing] periodic 'ritual salutations to the sun' at specific times of day."[11] In addition, he stated that he needed "a bone skull necklace, a sun triskele pendant, and a mirrored black pendant" to practice his faith properly.[12] McFaul claimed that he was "in grave danger" without those items.[13] The prison denied McFaul's request, citing a prison policy forbidding possession of objects worth more than twenty-five dollars.[14]

McFaul filed suit in the Northern District of Texas, alleging that prison officials violated his constitutional and statutory rights by prohibiting the religious items.[15] Magistrate Judge Koenig issued a report holding that McFaul failed to state a First Amendment claim, in part because the regulation did not "entirely stifle[]" the prisoner's religious practice, since McFaul was allowed to possess two other Neo-Pagan medallions.[16] She also found that McFaul did not present sufficient evidence showing that the prison regulation placed a substantial burden on his exercise of religion under RLUIPA.[17] Magistrate Judge Koenig dismissed McFaul's other claims.[18] The district court adopted the report and granted summary judgment for the defendants.[19]

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[10] McFaul v. Valenzuela, No. 5:09-CV-165-BG ECF, 2010 WL 5811483, at *1 (N.D. Tex. Sept. 14, 2010).

[11] *McFaul*, 684 F.3d at 569.

[12] *McFaul*, 2010 WL 5811483, at *1. He believed that the triskele pendant was "integral to [his] religion" because it symbolizes the "three forces of nature" and could be worn for protection, that the prayer beads would help him concentrate as he prayed, and that the mirrored black pendant would allow him to connect with Mother Nature. *McFaul*, 684 F.3d at 569 (alteration in original) (internal quotation marks omitted).

[13] *McFaul*, 684 F.3d at 570 (internal quotation marks omitted).

[14] *See id.* at 569–70.

[15] *McFaul*, 2010 WL 5811483, at *1.

[16] *Id.* at *5 (quoting Scott v. Miss. Dep't of Corr., 961 F.2d 77, 81 (1992)). Magistrate Judge Koenig also found that the regulation was reasonably related to penological interests, including "maintain[ing] the safety of the institution, reduc[ing] trafficking of contraband, and reduc[ing] time and costs in identifying contraband." *Id.* at *4.

[17] *See id.* at *3. Instead, McFaul presented evidence that his religion "requires its adherents to swear to silence about its 'mysteries.'" *Id.*

[18] *Id.* at *3, *5 (dismissing McFaul's Fourteenth Amendment equal protection claim and his claim under Texas's analogue to RLUIPA, the Texas Religious Freedom Restoration Act (TRFRA)).

[19] McFaul v. Valenzuela, No. 5:09-CV-165-C ECF, 2011 WL 588747, at *1 (N.D. Tex. Feb. 10, 2011).

The Fifth Circuit affirmed.[20] Writing for a unanimous panel, Judge Smith[21] held that McFaul had failed to state a claim under either the First Amendment or RLUIPA.[22] Regarding the former, Judge Smith evaluated the reasonableness of the prison's restriction in light of the four factors the Supreme Court outlined in *Turner v. Safley*[23]: (1) whether the regulation connects to "legitimate governmental interests"; (2) whether the inmate has "available alternative means of exercising" his rights; (3) the impact of accommodation on prison resources; and (4) the presence of ready alternative policies to fully "accommodate the prisoner's 'rights at *de minimis* cost to valid penological interests.'"[24] First, he agreed with prison officials that the policy of limiting the value of religious medallions to twenty-five dollars was related to the prison interests of "safety, security, and discipline."[25] Second, Judge Smith argued that because McFaul admitted that he "was able to engage in some of the observances necessary to his religion, his inability to participate in other 'required' rituals does not show an absence of alternatives."[26] Third, he noted that allowing McFaul these religious objects would impose costs on the prison and other prisoners.[27] Finally, Judge Smith agreed with the district court that McFaul had not posited any alternative policies with de minimis cost to the prison, and that regardless, "the weight of the other three factors shows that the regulation is valid."[28]

Turning to the RLUIPA claim, although Judge Smith agreed that "RLUIPA imposes a higher burden than does the First Amendment,"[29] he held that McFaul had not demonstrated sufficient evidence to show that the prison regulation "substantially burden[ed]" his religious exercise.[30] Citing Fifth Circuit precedent, Judge Smith held that McFaul had not established that the regulation "truly pressures the adherent to

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[20] *McFaul*, 684 F.3d at 568.

[21] Judge Smith was joined by Judges Davis and Dennis.

[22] *McFaul*, 684 F.3d at 568.

[23] 482 U.S. 78 (1987).

[24] *McFaul*, 684 F.3d at 572 (quoting *Turner*, 482 U.S. at 91).

[25] *Id.*; *see id.* at 574. The court noted that McFaul could "grind his pentagram into shards to hurt others," and that he could "trade [the requested objects] for contraband." *Id.* at 572.

[26] *Id.* at 574–75. Judge Smith relied on *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), in which the Supreme Court held that prison rules preventing Muslim prisoners from attending Jumu'ah, a required Muslim service during the work day, were permissible because Muslim prisoners were permitted to practice other important aspects of their religion. *Id.* at 351–52.

[27] *McFaul*, 684 F.3d at 575 (noting that prison guards would have to expend extra effort to determine whether items are contraband if exceptions were made, and that prisoners could fight over valuable items).

[28] *Id.* (quoting McFaul v. Valenzuela, No. 5:09-CV-165-C ECF, 2011 WL 588747, at *5 (N.D. Tex. Feb. 10, 2011)) (internal quotation mark omitted).

[29] *Id.* (quoting Mayfield v. Tex. Dep't of Criminal Justice, 529 F.3d 599, 612 (5th Cir. 2008)) (internal quotation mark omitted).

[30] *Id.*

significantly modify his religious behavior and significantly violate his religious beliefs."[31] Judge Smith argued that merely accepting McFaul's assertion that he needed these objects to adhere to his sincerely held religious beliefs would "require [courts] to find a substantial burden whenever *any* request in connection with a sincere religious belief was denied by a state prison," no matter how "scant" the sources.[32] For Judge Smith, the restriction on McFaul's religious exercise was markedly different from the restriction at issue in *Sossamon v. Lone Star State of Texas*,[33] in which a prison regulation prohibited a Christian inmate from accessing a chapel to pray before a cross and altar, even though a Christian cleric "swore that such activities were not a necessary practice of Christianity," because that plaintiff "established a factual dispute" regarding the centrality of the practices to his beliefs.[34] The Fifth Circuit also affirmed the grant of summary judgment on McFaul's other claims.[35]

*McFaul* was rightly decided on constitutional grounds given Supreme Court precedent and was probably correct on statutory grounds given the slim amount of evidence McFaul presented. Nonetheless, *McFaul*'s analysis demonstrates the broader evidentiary challenges of allowing religious accommodations in prisons. Prisoners encounter severe evidentiary problems in having to prove the substantiality of burdens on, and the adequacy of alternatives to, their religious practices. And those evidentiary problems are even more acute when a prisoner's religious beliefs are rare or idiosyncratic.

First, given the Supreme Court's decision in *O'Lone v. Estate of Shabazz*,[36] Judge Smith's First Amendment holding was unsurprising. There, the Court, applying the "reasonableness test" from *Turner*,[37] held that a restriction prohibiting Muslim prisoners from attending Jumu'ah, an important Muslim service, did not violate the Free Exercise Clause because, inter alia, those prisoners had alternative means of exercising their religious rights due to the numerous other accom-

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[31] *Id.* at 575–76 (quoting Adkins v. Kaspar, 393 F.3d 559, 570 (5th Cir. 2004)) (internal quotation mark omitted).

[32] *Id.* at 577 (alteration in original) (quoting Smith v. Allen, 502 F.3d 1255, 1278 (11th Cir. 2007), *abrogated on other grounds by* Sossamon v. Texas, 131 S. Ct. 1651 (2011)) (internal quotation mark omitted).

[33] 560 F.3d 316 (5th Cir. 2009), *aff'd sub nom. Sossamon*, 131 S. Ct. 1651.

[34] *McFaul*, 684 F.3d at 577 (citing *Sossamon*, 560 F.3d at 333).

[35] The Fifth Circuit rejected McFaul's Equal Protection, Due Process, and TRFRA claims. *Id.* at 577–79. The court also rejected his claims that the magistrate judge lacked jurisdiction, prejudiced McFaul through her handling of discovery, and erred by denying his motion to be appointed counsel. *Id.* at 579–81.

[36] 482 U.S. 342 (1987).

[37] *See* Turner v. Safley, 482 U.S. 78, 89–91 (1987).

modations afforded to Muslims for other practices of their religion.[38] Just as Muslim prisoners were not "deprived of all forms of religious exercise,"[39] McFaul could perform ritual salutations four times daily and own medallions costing less than twenty-five dollars.[40] And since Jumu'ah is at least as centrally important to Islam as owning certain medallions is to Celtic Druidism,[41] Judge Smith's reasoning is well within *O'Lone*'s bounds.

Likewise, although RLUIPA places a higher burden than does the Free Exercise Clause on prison officials where regulations impinge on a prisoner's religious beliefs, the Fifth Circuit's decision is understandable. Jurisprudence in this area is unsettled,[42] and the Supreme Court has yet to rule on what constitutes a "substantial burden" for purposes of RLUIPA.[43] Still, McFaul's evidence that the restriction was a substantial burden on the practice of Celtic Druidism was slim. He offered inadequate explanations for why the medallions in question were necessary (not merely helpful) to his religious practice — he largely admitted they were not[44] — and the evidence from his spiritual teacher was almost entirely devoid of relevant substance.[45] McFaul simply did not offer a very compelling case given RLUIPA's strict language.

Nonetheless, the Fifth Circuit's finding that McFaul was unable to produce sufficient evidence to state a claim under the Free Exercise Clause or RLUIPA demonstrates two significant evidentiary problems with the doctrine. First, it is often exceedingly difficult for individuals to prove the substantiality of the burden placed on their religious exer-

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[38] *O'Lone*, 482 U.S. at 351–52 (noting that Muslim prisoners could congregate for prayer outside work hours, were provided a state-sponsored imam, were served special nonpork meals, and were allowed special accommodations during Ramadan).

[39] *Id.* at 352.

[40] *McFaul*, 684 F.3d at 574.

[41] *See O'Lone*, 482 U.S. at 360 (Brennan, J., dissenting) ("Jumu'ah is obligatory, cannot be made up, and must be performed in congregation." (quoting Shabazz v. O'Lone, 595 F. Supp. 928, 930 (D.N.J. 1984))).

[42] *Compare* Smith v. Allen, 502 F.3d 1255, 1277–79 (11th Cir. 2007) (holding that the mere assertion of centrality does not suffice to establish a substantial burden), *abrogated on other grounds by* Sossamon v. Texas, 131 S. Ct. 1651 (2011), *with* Sossamon v. Lone Star State of Tex., 560 F.3d 316, 333 (5th Cir. 2009) (finding plaintiff's assertions regarding religious practice sufficient, and noting that "[p]rison chaplains are not arbiters of the measure of religious devotion that prisoners may enjoy or the discrete way that they may practice their religion"), *aff'd sub nom. Sossamon*, 131 S. Ct. 1651.

[43] *See* SARAH E. RICKS & EVELYN M. TENENBAUM, CURRENT ISSUES IN CONSTITUTIONAL LITIGATION 642 (2011).

[44] *See McFaul*, 684 F.3d at 576 (describing McFaul's assertion that the triskele pendant would "protect him," his countervailing acknowledgment that an unobjectionable pentagram amulet would "perform the same function," and his admission that he could still "practice his daily observances" with "a pentagram without a black onyx").

[45] *See id.* at 574 (noting that McFaul's spiritual teacher provided "no explanation of . . . why the medallions were necessary," and that the teacher instead asserted that "practitioners 'are sworn to silence in certain mysteries of [the] religion'" (alteration in original)).

cise and the adequacy of alternative methods of religious practice. To decide whether a burden is substantial or an alternative is adequate, courts often turn to experts on a religion's practices to determine the truth behind an inmate's claims.[46] But while experts often are helpful in determining the *general* practices of a religious sect, deferring to religious experts can be problematic in determining *individual* religious beliefs. In particular, a religious expert may be unable to authoritatively speak to the importance of certain practices to a particular inmate.[47] Furthermore, significant difficulties would emerge if both the prison and the prisoner produced experts who disagreed as to whether a certain religious belief was sincere and a burden substantial. And finally, in cases where an inmate's beliefs are truly unique, there are no experts to bring into court — making it nearly impossible to prove the sincerity of the beliefs.[48] As the Supreme Court noted, "[w]hat principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?"[49]

Yet the Fifth Circuit's free exercise holding contradicted McFaul's assertion that rituals with the permitted objects were not adequate alternatives in his personal faith. Since McFaul refused to show what the rituals involving medallions "entailed . . . and why they were necessary," the Court held that other ritual salutations were adequate alternative practices, despite McFaul's own profession to the contrary.[50] In other words, because McFaul's beliefs were unique, and because McFaul's sole expert claimed that the religious beliefs were a secret, the court had to choose whether to take McFaul at his word; they chose not to do so.[51] In effect, the court determined what was and was not an adequate alternative religious practice for a Celtic Druid, though the Celtic Druid practitioner himself vehemently disagreed.

The second evidentiary problem is that individuals with unique ideologies may find it particularly difficult to prove the sincerity of their religious beliefs. Numerous scholars have pointed out that judicial determinations about the sincerity of a particular individual's beliefs are hazardous because judges are likely to be more sympathetic to mainstream religious practices than to those practices that are idiosyn-

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[46] *See, e.g.*, Borzych v. Frank, 439 F.3d 388, 390 (7th Cir. 2006) (looking to a professor with expertise in folklore and Old Norse language and literature to conclude that certain books were "not vital to any religious practice," despite an inmate's protestations that the books were religious texts for his religion, Odinism).

[47] *See* Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 CARDOZO L. REV. 1907, 1932–33 (2011).

[48] The number of distinct religions followed by inmates is large, *see* RICKS & TENENBAUM, *supra* note 43, at 618–21, so these evidentiary problems are likely to emerge frequently.

[49] Emp't Div. v. Smith, 494 U.S. 872, 887 (1990).

[50] *McFaul*, 684 F.3d at 574; *see id.* at 574–75.

[51] *See id.*

cratic or just plain bizarre.[52] Because, in other free exercise contexts, the Supreme Court has agreed that an individual should be free from judicial interference to assert the content of his own religious beliefs,[53] this freedom should apply whether he accepts the tenets of a major faith or adopts more idiosyncratic practices. Several Justices underlined this doctrine this past Term.[54]

Yet *McFaul*'s RLUIPA holding illustrates the difficulty prisoners with unique religious beliefs have of proving the sincerity of their beliefs to courts. The Fifth Circuit suggested that McFaul's own assertion, with few additional sources to back it up, was insufficient to demonstrate anything more than "mixed evidence regarding the centrality of" the objects to his religion for RLUIPA purposes, precluding McFaul from moving past summary judgment.[55] But in *Sossamon v. Lone Star State of Texas*,[56] in which regulations prevented a Christian from praying before a cross and altar,[57] the Fifth Circuit allowed that petitioner to move beyond summary judgment on his RLUIPA claim even though a cleric swore such activities were not necessary to Christianity.[58] In other words, the court denied that mere assertion of centrality

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[52] *See, e.g.*, Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1834 (2004); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 311 (1991) ("A court is more likely to find against a claimant on definitional grounds when the religion is bizarre, relative to the cultural norm, and is more likely to find that a religious belief is insincere when the belief in question is, by cultural norms, incredulous."); *see also* Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 806–11 (1997) (arguing that Native Americans have had a hard time convincing judges that their beliefs are religious and worthy of First Amendment protections because of judges' unfamiliarity with and biases about Native American practices).

[53] *See, e.g.*, *Smith*, 494 U.S. at 887 ("[C]ourts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 457 (1988) (denouncing the dissent's argument that "some sincerely held religious beliefs and practices are not 'central' to certain religions, despite protestations to the contrary from the [adherents]"); Thomas v. Review Bd., 450 U.S. 707, 716 (1981) ("[I]t is not within . . . judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").

[54] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 711 (2012) (Thomas, J., concurring) ("Judicial attempts to fashion a civil definition of 'minister' . . . risk disadvantaging those religious groups whose beliefs . . . are outside of the 'mainstream' or unpalatable to some."); *id.* at 712 (Alito, J., concurring) ("The Constitution guarantees religious bodies 'independence from secular control or manipulation — in short, power to decide for themselves, free from state interference, matters of . . . faith and doctrine.'" (quoting Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 116 (1952))).

[55] *McFaul*, 684 F.3d at 577.

[56] 560 F.3d 316 (5th Cir. 2009), *aff'd sub nom.* Sossamon v. Texas, 131 S. Ct. 1651 (2011).

[57] *Id.* at 321.

[58] *See id.* at 332–35; *see also id.* at 333 (explaining that the prisoner "may go to Christian services [as an alternative practice], but none of those services satisfy *his* need to perform what are apparently important aspects of *his* free exercise of Christianity").

by the practitioner is sufficient evidence to demonstrate a substantial burden on religious belief in the case of a Celtic Druid, but apparently held just that in a case involving a Christian.[59] That the court refused to take McFaul's word does not necessarily suggest purposeful discrimination against idiosyncratic ideologies, but the evidentiary burden had the effect of favoring Sossamon's mainstream beliefs over McFaul's when each plaintiff had only his own word to offer in his support.

Proposing a solution to these evidentiary problems is difficult. If the court system is determining which religious beliefs do and do not deserve exemptions from generally applicable rules, these issues are "[i]nherent [d]ifficulties."[60] The exemption doctrine could be scrapped altogether by declaring it unconstitutional[61] (something the Supreme Court has refused to do[62]) or by repealing RLUIPA (a politically implausible suggestion[63]). Another solution would be to lower the bar on the sufficiency of evidence required to demonstrate that a regulation substantially burdens religious belief, or that an alternative practice is adequate, and simultaneously to lower the bar on prison officials for demonstrating a compelling government interest in protecting penological interests.[64] But at least regarding RLUIPA, such an interpretation would flout Congress's clear intent to impose a heightened standard.[65] Thus, because the accepted rule is that religious accommodations are constitutionally sound and statutorily required, the most that can be done is for a judge facing a challenge like McFaul's to be mindful of the difficulties associated with "determin[ing] the place of a particular belief in a religion or the plausibility of a religious claim."[66] But without a change in the doctrine, the McFauls of the world are unlikely to get any more sympathetic a hearing than the one afforded by the Fifth Circuit.

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[59] Perhaps the difference between *McFaul* and *Sossamon* can be explained by the lack of detail McFaul provided about why the denial of certain objects substantially burdened his religious practice, resulting in no genuine issue of material fact. Certainly, McFaul's expert was unable to offer much testimony of value. *See supra* note 45. But McFaul "did provide *some* explanation" for needing these items. *McFaul*, 684 F.3d at 576. That Sossamon offered slightly more consistent explanations, *see Sossamon*, 560 F.3d at 321, does not change that he also asked the court to take his word that a given regulation substantially burdened his religious practice.

[60] Marshall, *supra* note 52, at 310.

[61] *Compare id.* at 320 (arguing that "[t]he free exercise exemption . . . offends Establishment Clause principles" by favoring religion over irreligion), *with* Matthew D. Krueger, Note, *Respecting Religious Liberty: Why RLUIPA Does Not Violate the Establishment Clause*, 89 MINN. L. REV. 1179, 1200–11 (2005) (arguing that the exemption is constitutional).

[62] *See* Cutter v. Wilkinson, 544 U.S. 709, 719–26 (2005).

[63] Congress unanimously passed RLUIPA in 2000. *See* 146 CONG. REC. H7190–92 (daily ed. July 27, 2000) (House proceedings); 146 CONG. REC. S7774–79 (daily ed. July 27, 2000) (Senate proceedings).

[64] *See* Lupu & Tuttle, *supra* note 47, at 1935 (offering such a proposal).

[65] *See Cutter*, 544 U.S. at 714–17 (describing RLUIPA's legislative history); RICKS & TENENBAUM, *supra* note 43, at 633–35.

[66] Emp't Div. v. Smith, 494 U.S. 872, 887 (1990).