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THE RELIGIOUS FREEDOM RESTORATION ACT, FEDERAL PRISON OFFICIALS, AND THE DOCTRINAL DINOSAUR OF QUALIFIED IMMUNITY

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In 2020, the United States Supreme Court held that the Religious Freedom Restoration Act (RFRA) allows for claims for money damages against federal officials who substantially burden a person's free exercise rights. As federal courts now grapple with these claims for damages, federal prison officials defending RFRA claims have turned to a trusty and time-honored defense: qualified immunity. In recent years, however, qualified immunity has come under increasing attack from judicial, scholarly, and popular sources, and the rationale underlying qualified immunity doctrine cannot withstand the kind of textual analysis that the Supreme Court used when announcing that the RFRA statute allowed for damages. Using the Supreme Court's rationale, the text and doctrine of RFRA, and the long-articulated criticisms of qualified immunity, this Article argues that qualified immunity should not be an available defense to statutory claims asserted against federal prison officials.

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In formulating this argument, the Article makes three primary contributions. First, it explains the importance of RFRA and its attendant religious rights protections to the more than 150,000 people confined by the federal government in the nation's prisons. Second, it demonstrates how the defense of qualified immunity is incongruent to the statute's text, history, and purpose. And, finally, it is the first article to analyze how the qualified immunity defense becomes unworkable when it is applied to the doctrine governing claims brought under the statute. Overall, by focusing on the narrow class of RFRA claims, the Article joins the chorus of commentators urging the federal courts to reconsider the knee-jerk application of qualified immunity to claims involving fundamental rights.

Introduction

In recent years, the Supreme Court has dramatically changed the law governing religious liberty claims.[1] At the same time, the continued killings of Black men like Tyre Nichols and George Floyd by police officers have amplified long-asserted criticisms of qualified immunity doctrine and its impact on law enforcement accountability.[2] At first glance, these two phenomena appear unrelated, and one might ask what the Supreme Court's current expansive view on religious liberty has to do with calls to reform qualified immunity. But because of a 2020 decision by the Supreme Court, there is a niche area where these two doctrines are currently colliding in the lower federal courts: religious liberty claims for damages asserted against federal prison officials for burdens placed on the religious exercise of people incarcerated in federal penitentiaries. This Article explores that collision.

In December 2020, the Supreme Court decided *Tanzin v. Tanvir*,[3] holding that the Religious Freedom Restoration Act (RFRA) allows for money damages as a remedy against federal officials sued in their individual capacity for violations of the statute.[4] Plaintiffs Muhammad Tanvir, Jameel Algibhah, Naveed Shinwari, and Awais Sajjad sued several Federal Bureau of Investigation (FBI) agents for

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[1] *See, e.g.*, Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & Liberty 699, 747 (2022) (describing "the Court's aggressive vindication of religious liberty claims" during the COVID-19 pandemic); Mark Joseph Stern, *The Silver Lining of the Supreme Court's Next Harmful Religious Liberty Ruling*, Slate (Jan. 18, 2023, 1:28 PM), https://slate.com/news-and-politics/2023/01/religious-liberty-supreme-court-employment-groff.html [https://perma.cc/8N53-NYGV] (explaining how the "politics of religious liberty have shifted significantly over the past half century" from a focus on accommodations for minority religious practices "that would harm no one" to a series of cases where "Christians' religious freedom to discriminate trumped others' freedom from discrimination").

[2] *See, e.g.*, Jay Schweikert, *The Killing of Tyre Nichols Reaffirms the Urgent Need for Police Accountability*, Cato Inst. (Feb. 2, 2023, 10:42 AM), https://www.cato.org/blog/killing-tyre-nichols-reaffirms-urgent-need-police-accountability [https://perma.cc/ZHJ5-XGPE] (detailing the police and qualified immunity reforms' "surge[] to national prominence" in the wake of George Floyd's murder in May 2020); Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201, 203–04 (2023) (describing scholarly attention to qualified immunity doctrine in recent years and compiling citations); Joanna Schwartz, *Making Cops Pay*, Inquest (Feb. 14, 2023), https://inquest.org/making-cops-pay [https://perma.cc/X88G-RUUC] (discussing the ways in which "ending qualified immunity would make things meaningfully better").

[3] 141 S. Ct. 486 (2020).

[4] *Id.* at 489 (identifying the question posed to the Court as "whether 'appropriate relief' [in the RFRA statutory text] includes claims for money damages against Government officials in their individual capacities" and holding that "it does").

violating their religious rights (among other claims).[5] After the terrorist attacks of September 11, 2001, FBI agents asked each of the plaintiffs, all Muslim, to become FBI informants.[6] The plaintiffs declined, as doing so would violate their sincerely held religious beliefs.[7] In response, the FBI agents placed the plaintiffs on the United States government's "no fly" list.[8] Subsequently, the plaintiffs filed suit and requested an injunction requiring the government to remove their names from the "no fly" list and damages for the violation of their rights by the FBI agents.[9] Predictably, after they filed suit, the Department of Homeland Security immediately told the plaintiffs that they could fly,[10] and the government argued that the

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[5] Tanvir v. Lynch, 128 F. Supp. 3d 756, 759 (S.D.N.Y. 2015) (describing the case as seeking to "remedy alleged violations of [the plaintiffs'] constitutional and statutory rights" and holding that in private actions initiated under RFRA, damages against the government are not available), *rev'd sub nom.* Tanvir v. Tanzin, 894 F.3d 449 (2d Cir. 2018) (holding that such damages are available).

[6] *Tanvir*, 128 F. Supp. 3d at 759 (describing the plaintiffs' claim "that as part of the U.S. Government's efforts to bolster its intelligence gathering in the aftermath of the terrorist attacks of September 11, 2001, they were asked to become informants by [FBI] agents").

[7] *Id.*; *see also* First Amended Complaint ¶ 65, *Tanvir*, 128 F. Supp. 3d 756 (No. 13-CV-6951) ("Acting as an informant would require them to lie and would interfere with their ability to associate with other members of their communities on their own terms."); *id.* ¶ 84 (explaining that Mr. Tanvir's sincerely held religious beliefs precluded him from acting as an informant because "he would be expected to engage with people within his community in a deceptive manner, monitor, and potentially entrap innocent people, and that those actions would interfere with the relationships he had developed with those community members"); *id.* ¶ 122 (same as to Mr. Algibhah); *id.* ¶ 157 (same as to Mr. Shinwari); *id.* ¶ 207 ("[I]nforming to the government on innocent people violates . . . core religious beliefs, including the proscription on bearing false witness against one's neighbor by engaging in relationships and religious practices under false pretenses, and by betraying the trust and confidence of one's religious community.").

[8] First Amended Complaint, *supra* note 7, ¶ 90 (alleging FBI agents placed Mr. Tanvir on the No Fly List "because he refused to become an informant against his community and refused to speak or associate further with the agents"); *see id.* ¶ 124 (same as to Mr. Algibhah); *id*. ¶ 159 (same as to Mr. Shinwari); *see also* Amy Howe, *Opinion Analysis: Justices Allow Muslim Men Placed on "No Fly" List to Sue FBI Agents for Money Damages*, SCOTUSBLOG (Dec. 10, 2020, 1:23 PM), https://www.scotusblog.com/2020/12/opinion-analysis-justices-allow-muslim-men-placed-on-no-fly-list-to-sue-fbi-agents-for-money-damages [https://perma.cc/AGJ8-ARWS] (describing the lawsuit filed by three Muslim men who alleged that they were placed on the No Fly List after refusing to become government informants).

[9] First Amended Complaint, *supra* note 7, ¶ 2, at 57 (requesting order to remove plaintiffs' names from the No Fly List); *id.* ¶ 6, at 57 (requesting compensatory and punitive damages); *see also* Howe, *supra* note 8 (noting that they sought to recover "money for airline tickets that they could not use and income that they lost when they were unavailable to take advantage of job opportunities").

[10] *See Tanvir*, 128 F. Supp. 3d at 765 (describing a letter received by plaintiffs a week before oral argument on motions to dismiss "advising them that: 'At this time the U.S. Government knows of no reason you should be unable to fly'"); *see also* Brief of General Conference of Seventh-Day Adventists as Amicus Curiae in Support of Respondents at 16,

claims for injunctive relief became moot.[11] Eventually, the parties agreed to dismissal of the injunctive claim without prejudice,[12] leaving only the damages claims at issue.

The Southern District of New York, however, determined that no damages remedy existed for the violation of the plaintiffs' RFRA rights and entered final judgment in favor of the government defendants.[13] An appeal followed, and the United States Court of Appeals for the Second Circuit reversed the district court, prompting the federal government to petition for certiorari on behalf of the FBI agents.[14] The Supreme Court unanimously affirmed the decision of the court of appeals, concluding in an opinion authored by Justice Thomas that the plain text of RFRA and the historical availability of damages demonstrated that Congress intended damages to be an available remedy for violations of the statute perpetrated by government officials.[15]

With *Tanzin*, the Supreme Court opened the courthouse doors a little wider for people incarcerated in federal prisons who are seeking redress for violations of their religious rights.[16] People incarcerated in federal custody find little redress for the violations of their constitu-

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Tanzin v. Tanvir, 141 S. Ct. 486 (2020) (No. 19-71) (describing the problem of selective mootness in cases where the government is a defendant—"a different sort of gamesmanship where the government provides eleventh-hour relief after lengthy litigation when unfavorable precedent is on the horizon"); Nicole B. Godfrey, *Holding Federal Prison Officials Accountable: The Case for Recognizing a Damages Remedy for Federal Prisoners' Free Exercise Claims*, 96 NEB. L. REV. 924, 958 (2018) ("[I]n cases for injunctive relief that present important constitutional questions, the [Federal Bureau of Prisons's] modus operandi is to move the prisoner-plaintiff from the jurisdiction in which the case was filed to another judicial district in an attempt to moot or otherwise throw unique procedural wrenches into the prisoner's claim.").

[11] *See* Order Granting Stay at 1, *Tanvir*, 128 F. Supp. 3d 756, ECF No. 93 (granting Defendants' request to stay claims for injunctive relief).

[12] *See* Letter to the Court at 1, *Tanvir*, 128 F. Supp. 3d 756, ECF No. 108 (signaling agreement for dismissal without prejudice).

[13] *Tanvir*, 128 F. Supp. 3d at 779, 781 (concluding that "Congress did not intend to create a *Bivens*-type action with the language of 'appropriate relief'" in the statute, so "the law does not permit Plaintiffs to seek damages against the Agents in their personal capacities" (quoting 42 U.S.C. § 2000bb-1(c) (1993))).

[14] *See Tanvir*, 894 F.3d at 458 (explaining that plaintiffs appealed the "district court's ruling that RFRA does not permit the recovery of money damages from federal officers sued in their individual capacities" and that the appellate court agreed and reversed the district court's decision); Petition for a Writ of Certiorari at 11, Tanzin v. Tanvir, 141 S. Ct. 486 (2020) (No. 19-71) (seeking certiorari review of the court of appeals' conclusion that RFRA allows for money damages against individual federal officers).

[15] *See* Tanzin v. Tanvir, 141 S. Ct. 486, 490–92 (2020); *see also infra* Section III.A (discussing why the Court's analysis in *Tanzin* supports the conclusion that qualified immunity should not be an available defense to claims brought under the RFRA statute).

[16] *See* Godfrey, *supra* note 10, at 926 (discussing the unavailability of a damages remedy for constitutional free exercise claims).

tional and statutory rights because of the decades-long retraction of the *Bivens* remedy,[17] the restrictions on all suits brought by incarcerated people under the Prison Litigation Reform Act (PLRA),[18] and the unique ability of the Federal Bureau of Prisons (BOP) to "manipulate litigation in order to avoid judicial decisions on the merits of any constitutional claim."[19]

In the religion context, this unavailability of redress is particularly nefarious because of the interwoven way in which religion both has helped shape the American punishment system and is lauded as an important component of efforts at rehabilitation.[20] American colonial society was deeply religious, and the criminal laws that grew out of

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[17] *See id.* at 932–47 (discussing the development and retraction of the *Bivens* doctrine). The Supreme Court first recognized "a cause of action for damages against *individual* federal officials for violations of constitutional rights . . . [in] *Bivens v. Six Unknown Names Agents of the Federal Bureau of Narcotics*," 403 U.S. 388 (1971). *Id.* at 932. *Bivens* involved Fourth Amendment violations by federal officials, but the Court recognized the availability of a *Bivens* remedy in at least two other cases: *Davis v. Passman*, 442 U.S. 228, 234–35 (1979) (recognizing a damages remedy for employment discrimination claims brought under a Fifth Amendment equal protection theory), and *Carlson v. Green*, 446 U.S. 14, 19–20 (1980) (recognizing a damages remedy for an Eighth Amendment claim brought by the estate of a person who died in federal prison after receiving inadequate medical care). *Id.* at 934–35; *see also* Julio Pereya, Ziglar v. Abbasi *and Its Effect on the Constitutional Rights of Federal Prisoners*, 109 J. CRIM. L. & CRIMINOLOGY 395, 417 (2019) (arguing that the deterrence value of a damages remedy is lost in cases where federal officers violate constitutional rights because of the Court's recent retraction of *Bivens*); Benjamin C. Zipursky, Ziglar v. Abbasi *and the Decline of the Right to Redress*, 86 FORDHAM L. REV. 2167, 2175 (2018) (arguing that "the core of *Ziglar* is the Supreme Court's neglect of the normative basis of the principle that 'where there is a right there is a remedy'" (internal citations omitted)).

[18] The Prison Litigation Reform Act (PLRA) provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The PLRA's exhaustion requirement has long been criticized for preventing redress for constitutional violations. *See, e.g.*, Margo Schlanger & Betsy Ginsberg, *Pandemic Rules: COVID-19 and the Prison Litigation Reform Act's Exhaustion Requirement*, 72 CASE W. RSRV. L. REV. 533, 538 (2022) (discussing how the PLRA's exhaustion requirement can "thwart[] constitutional oversight of prison and jail conditions").

[19] Godfrey, *supra* note 10, at 958–59 (discussing the BOP's "modus operandi . . . to move the prisoner-plaintiff from the jurisdiction in which the case was filed to another judicial district in an attempt to moot or otherwise throw unique procedural wrenches into the prisoner's claim"); *see also* Michele C. Nielsen, *Mute and Moot: How Class Action Mootness Procedure Silences Inmates*, 63 UCLA L. REV. 760, 775 (2016) (discussing how the context of prison litigation "renders [incarcerated people] vulnerable to . . . unilateral, involuntary mootness").

[20] *See* Godfrey, *supra* note 10, at 970 ("The prison system as we know it stems from early Quaker ideals about penance and reform."); *see also* AM. CORR. ASS'N, MANUAL OF CORRECTIONAL STANDARDS, at xxi (3d ed. 1966) (pointing to the rehabilitative function that religion serves in prison).

that society reflected its religiosity.[21] Moreover, the American punishment system focused not just on punishing rulebreakers but also teaching them a "lesson,"[22] and the nation's first prisons embodied that focus.[23]

While the purpose of imprisonment in America may have morphed over the centuries,[24] religion still plays an important role in life behind the walls.[25] Nearly every prison in the country employs at least one person whose primary duty is to coordinate religious programs and services for incarcerated people,[26] and research shows that

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[21] Religion and punishment have been entangled in American society since before the nation's founding. *See generally* RACHEL ELLIS, IN THIS PLACE CALLED PRISON: WOMEN'S RELIGIOUS LIFE IN THE SHADOW OF PUNISHMENT 6 (2023) ("Historians tell us that religion has long been entwined with punishment in the United States."). American colonial society focused on "village life, orderly life, religious life," and religion exerted a "powerful influence" on all aspects of society, including the criminal system and laws. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 22–24 (1993) (describing how religion shaped the development of the criminal system); *see also id*. at 33 ("The colonies in general made little or no distinction between sin and crime; piety and religion especially dominated the lives of Puritan leaders and divines. Religion was the cornerstone of their community. It was the duty of law to uphold, encourage, and enforce true religion."). Perhaps most importantly, the use of incarceration as punishment arose from religious values and ideals. *See* Betsy Shirley, *Religious Ideals Shaped the Broken U.S. Prison System. Can They Also Fix It?*, AMERICA: THE JESUIT REVIEW (July 17, 2020), https://www.americamagazine.org/politics-society/2020/07/17/religious-ideals-shaped-broken-us-prison-system-can-they-also-fix-it [https://perma.cc/Y9M2-TWV4] (describing the "influence of American religion on the underlying 'carceral logic' that created the U.S. prison system").

[22] FRIEDMAN, *supra* note 21, at 37 (describing the colonial system of punishment as "the way autocratic fathers or mothers punish children" with "heavy use of shame and shaming").

[23] *See generally* David J. Rothman, *Perfecting the Prison: United States, 1789–1865*, *in* THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 100, 106 (Norval Morris & David J. Rothman, eds., 1995) (explaining the early American prisons' focus on "[r]eform, not deterrence," which reflected a "shared assumption . . . that since the convict was not innately depraved but had failed to be trained to obedience by family, church, school, or community, he could be redeemed by the well-ordered routine of the prison").

[24] *See, e.g.*, James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 HOUS. L. REV. 1003, 1063 (1997) ("The warehouse prison as the latest form of incarceration to emerge from a paradigm shift that made confinement rather than corporal punishment the normative sanction for serious crime. This paradigm shift changed the target of punishment from the body of the offender to his personhood.").

[25] *See* Richard Stansfield, Thomas O'Connor & Jeff Duncan, *Religious Identity and the Long-Term Effects of Religious Involvement, Orientation, and Coping in Prison*, 46 CRIM. JUST. & BEHAV. 337, 348 (2019) (discussing a study that found that over three-quarters of the incarcerated participants would "attend at least one [humanist, spiritual, or religious] event during their first year in prison").

[26] *See* PEW RSCH. CTR., RELIGION IN PRISONS: A 50-STATE SURVEY OF PRISON CHAPLAINS 7 (2012), https://www.pewresearch.org/wp-content/uploads/sites/7/2012/03/Religion-in-Prisons.pdf [https://perma.cc/6RFY-HU9H] ("Almost all of the nation's more

religion provides hope, a sense of self-worth, better behavioral outcomes, and increased ability to adjust to prison life for people behind bars.[27] Data consistently shows that people in prison belong to a diverse group of religions.[28] Yet, religion's entanglement with American punishment and prisons has focused predominantly on Christian doctrine and values.[29] Consequently, incarcerated people of non-Christian religious faiths "have faced multiple hurdles in obtaining basic accommodations for their devotional practices, holidays, burial practices, and religious diet requirements."[30] Therefore, *Tanzin*'s recognition of a damages remedy for federal officials' violations of religious rights provides an important avenue of redress for incarcerated people of minority religious backgrounds.

That avenue of redress may ultimately be foreclosed, however, if the doctrine of qualified immunity is allowed to shield prison officials from liability under RFRA. The question of whether qualified immunity is an available defense under the statute remains unanswered after *Tanzin*. Unfortunately, in *Tanzin* itself, the parties had conceded that qualified immunity would be a defense available on remand.[31] The *Tanzin* Court noted the parties' agreement on the issue but did not otherwise comment on whether the federal-official-defendants could invoke qualified immunity as a defense from suit.[32] Since *Tanzin*, civil rights advocates and incarcerated plaintiffs in several

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than 1,100 state and federal prisons have at least one paid chaplain or religious services coordinator, and collectively they employ about 1,600 professional chaplains.").

[27] *See* ELLIS, *supra* note 21, at 9–10 (describing findings of prison studies that "echo the themes of religious redemption from centuries ago").

[28] *See* U.S. COMM'N ON C.R., ENFORCING RELIGIOUS FREEDOM IN PRISON 14 (2008) (explaining that "data from federal and state prisons suggest that the percentage of those professing non-Christian faiths is higher in prisons than in the non-incarcerated adult population overall" but that "the majority of those professing a religion in both populations identified themselves as Christians").

[29] *See* Jim Thomas & Barbara H. Zaitzow, *Conning or Conversion? The Role of Religion in Prison Coping*, 86 PRISON J. 242, 247 (2006) (recounting religious programming's acceptance in nearly all U.S. prisons by the mid-twentieth century but explaining that the programming "extended primarily to the two Christian doctrines of Catholics and Protestants").

[30] MUSLIM ADVOCS., FULFILLING THE PROMISE OF FREE EXERCISE FOR ALL: MUSLIM PRISONER ACCOMMODATION IN STATE PRISONS 4 (2019), https://muslimadvocates.org/wp-content/uploads/2019/07/FULFILLING-THE-PROMISE-OF-FREE-EXERCISE-FOR-ALL-Muslim-Prisoner-Accommodation-In-State-Prisons-for-distribution-7_23.pdf [https://perma.cc/ZDA4-DV2G] (describing the struggles that incarcerated people who are Muslim have faced in exercising their religious rituals).

[31] Tanzin v. Tanvir, 141 S. Ct. 486, 492 n.* (2020) (noting that plaintiffs had conceded the availability of the qualified immunity defense). On remand, the Southern District of New York granted the defendants' motions to dismiss on qualified immunity grounds, noting specifically that plaintiffs had conceded the availability of the defense. Tanvir v. Tanzin, 13-CV-6951 (RA), 2023 WL 2216256, at *8 (S.D.N.Y. Feb. 24, 2023).

[32] *See Tanzin*, 141 S. Ct. at 492 n.*.

cases have (thus far unsuccessfully) argued that the reasoning in *Tanzin* should preclude qualified immunity as an available defense to damages claims brought under RFRA,[33] and several courts post-*Tanzin* have either declined to decide the question sua sponte[34] or ignored the issue while either granting or denying qualified immunity.[35] While courts are seemingly willing to allow the defense in

[33] *See, e.g.*, Mack v. Yost, 63 F.4th 211, 217 (3d Cir. 2023) (holding that qualified immunity can be asserted as a defense under RFRA but that the defendants had not met their burden of establishing the defense); Ajaj v. Fed. Bureau of Prisons, 254 F.4th 805, 807 (10th Cir. 2022) (rejecting the contention that qualified immunity is inapplicable to RFRA claims but reserving for district court decision whether defendants were entitled to it); Shields of Strength v. U.S. Dep't of Defense, No. 6:21-cv-00484, 2023 WL 3293279, at *18–19 (E.D. Tex. May 5, 2023) (criticizing plaintiff for not providing a "meaningful discussion of the common law and public policies" to support the argument that qualified immunity is unavailable, deeming the argument waived, and finding available and granting qualified immunity to defendant officials); Richardson v. Murray, No. 4:20-110, 2022 WL 4586139, at *4 (M.D. Pa. Sept. 29, 2022) (noting that RFRA claims are subject to qualified immunity defense and remanding to the magistrate judge for consideration of the same); Hasbajrami v. Glogau, No. 1:20-cv-00084, 2022 WL 4652337, at *13 (W.D. Pa. Sept. 9, 2022) (finding defendant entitled to qualified immunity on RFRA claim); Stauffer v. Connors, No. 17-cv-905-wmc, 2022 WL 602916, at *3 n.3 (W.D. Wis. Mar. 1, 2022) (stating in dicta that RFRA claims are subject to defense of qualified immunity); Hasbajrami v. Glogau, No. 1:20-cv-00084, 2021 WL 6932162, at *7 (W.D. Pa. Dec. 2, 2021) (finding the defense of qualified immunity applied to pro se litigant's RFRA claims). In some cases, civil rights advocates have taken this argument a step further (also unsuccessfully) to assert that the rationale that yielded the Court's holding in *Tanzin* supports a wholesale rejection of qualified immunity as a defense to constitutional claims brought under 42 U.S.C. § 1983. *See, e.g.*, Conners v. Pohlmann, No. 15-101, 2021 WL 1172534, at *5 (E.D. La. Mar. 29, 2021) (declining to adopt the argument that *Tanzin* "overrule[d] qualified immunity by its own terms" and refusing "to find that it did so implicitly"); McDaniel v. Diaz, No. 1:20-cv-00856-NONE-SAB, 2021 WL 147125, at *14 n.6 (E.D. Cal. Jan. 15, 2021) (declining to decide whether *Tanzin* "requires courts to end the practice of limiting constitutional damages for policy reasons" in response to arguments that *Tanzin* "reflects a growing consensus that the contemporary doctrine of qualified immunity is unmoored from any lawful justification and in need of correction").

[34] *See, e.g.*, Biron v. Upton, No. 19-10862, 2022 WL 17691622, at *2 (5th Cir. Dec. 14, 2022) (declining to decide whether qualified immunity applies to RFRA claims where plaintiff forfeited arguments); Buck v. U.S. Dep't of Just., No. 5:19-CT-3100-FL, 2021 WL 1009294, at *4 n.3 (E.D.N.C. Mar. 16, 2021) (declining to decide issue of qualified immunity sua sponte); Ajaj v. Roal, No. 14-cv-01245-JPG, 2021 WL 949375, at *3 (S.D. Ill. Mar. 12, 2021) (reversing prior order dismissing individual capacity RFRA claims under qualified immunity, but declining to decide issues of qualified immunity because it is an affirmative defense that must be properly raised and briefed).

[35] *See, e.g.*, Ariz. Yage Assembly v. Garland, 595 F. Supp. 3d 869, 886 (D. Ariz. 2022) (granting qualified immunity on RFRA claim); Hasbajrami v. Hill, No. 1:20-CV-00220-RAL, 2022 WL 486617, at *10 (W.D. Pa. Feb. 17, 2022) (dismissing pro se litigant's claims on the basis of qualified immunity); Arrizon v. Wolf, No. 1:20-cv-788, 2021 WL 4901573, at *10 (W.D. Mich. Oct. 21, 2021) (finding defendants entitled to qualified immunity on claims "applying RFRA to DACA rights and procedures" because such a claim is "an entirely novel one" such that the "unlawfulness of Defendants' conduct [could not] have been obvious or beyond debate"); Driever v. United States, No. 19-1807 (TJK), 2021 WL 1946391, at *4 (D.D.C. May 14, 2021) (finding RFRA claims for damages against BOP

RFRA actions, doing so ignores important aspects of the *Tanzin* Court's analysis, the broader criticisms levied against qualified immunity in recent years (including by members of the Supreme Court), and the practical unworkability of the doctrine when applied to a statute that has a proscribed affirmative defense and focuses its inquiry on individualized belief systems.[36]

This Article makes three primary contributions. *First*, it explains the importance of RFRA and its attendant free exercise protections to the more than 150,000 people confined by the federal government in the nation's prisons. *Second*, it demonstrates that allowing the defense of qualified immunity to defeat RFRA claims for damages is incongruent with the statute's text, history, and purpose. *Third*, it analyzes how applying the defense of qualified immunity to RFRA claims is unworkable given the realities of the doctrine governing claims brought under the statute. Overall, the Article joins the chorus of commentators urging the judiciary to reconsider the knee-jerk application of qualified immunity to claims seeking to vindicate important constitutional and statutory rights.[37]

The Article proceeds in three parts. Part I traces the history of free exercise protections in American prisons. Part I examines both the doctrinal developments that prompted Congress to pass RFRA and the legislative statements made about the importance of protecting incarcerated persons' religious rights; it also explains the legal doctrine that has developed from judicial interpretation of the statute over the last thirty years. Part II turns to the doctrine of qualified immunity. It discusses the history of qualified immunity, the policy rationales proffered in support of the defense, the criticisms levied against it, and the dubious ways in which the judiciary has silently extended the defense from its constitutional origins to non-constitutional claims. Finally, Part III uses the lessons learned from the prior two parts to demonstrate why qualified immunity should not be an available defense to claims brought against federal prison offi-

Director barred by qualified immunity); Sabbath v. Hicks, No. 20-cv-00893-PAB-KMT, 2021 WL 1300602, at *8 (D. Colo. Feb. 19, 2021) (granting motion to dismiss RFRA claims on qualified immunity grounds); Smadi v. Michaelis, No. 19-CV-00217-JPG, 2020 WL 7491296, at *4–6 n.3 (S.D. Ill. Dec. 21, 2020) (assuming without deciding that the doctrine of qualified immunity operates as a defense to claims asserted under RFRA but ultimately denying qualified immunity after finding that the remaining RFRA claims concerned violations of clearly established law).

[36] *See generally infra* Part III.

[37] To be clear, while some of the points made in this Article echo arguments asserted against qualified immunity *in toto*, *see generally infra* Part II, this Article's purpose is narrower: to explain why the modern qualified immunity doctrine is fundamentally incompatible with RFRA's purpose and doctrine.

cials under RFRA. In short, Part III asserts that the Supreme Court's textual analysis in *Tanzin*, Congress's inclusion of an explicit affirmative defense in the RFRA statute, the burden-shifting framework created by the inclusion of that affirmative defense, and RFRA's history and purpose combine to demonstrate that a qualified immunity defense is incompatible with RFRA claims for damages against federal prison officials.

I
The Free Exercise of Religion in Prison and the Shifting Burdens of the Religious Freedom Restoration Act

The First Amendment's religion clauses delineate the first two rights protected by the U.S. Constitution's Bill of Rights: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[38] Through these clauses, Americans are guaranteed the right to freely exercise their religion, and the government is prohibited from creating a national religious orthodoxy.[39] In other words, the clauses guarantee "both religious liberty and religious equality."[40] But what these guarantees mean for incarcerated people has changed dramatically throughout the country's history.

Religion has always been central to the American carceral experience.[41] The system and structure of the early American prisons stemmed from religious ideals about penance and reform,[42] and as

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[38] U.S. Const. amend. I.

[39] *See* Martha C. Nussbaum, Liberty of Conscience: In Defense of America's Tradition of Religious Equality 3 (2008) ("The freedom of religion and a prohibition against setting up any religion as the national orthodoxy are the first two protections for citizens' rights mentioned in that all-important amendment.").

[40] *See id.* (positing that "no religion will become an orthodoxy that undercuts any citizen's claim to equal rights").

[41] *See* Thomas & Zaitzow, *supra* note 29, at 247 ("Religion has, in one way or another, been a cornerstone of the carceral in the United States.").

[42] *See* Marie Gottschalk, The Prison and the Gallows: The Politics of Mass Incarceration in America 47 (2006) (explaining that "[p]enal policies were heavily influenced by religion" and that "[m]inisters, notably Quakers, dominated the early leadership of the Philadelphia Society for Alleviating the Miseries of Public Prisons, which was established in the late eighteenth century and is considered the first major modern prison reform organization"); Jennifer Lawrence Janofsky, *"Hopelessly Hardened": The Complexities of Penitentiary Discipline at Philadelphia's Eastern State Penitentiary*, *in* Buried Lives: Incarcerated in Early America 106, 113 (Michele Lise Tarter & Richard Bell eds., 2012) (describing the efforts of "a Baptist minister from Philadelphia" to develop incarcerated people's interest in religious instruction at Eastern State Penitentiary in 1838); Rothman, *supra* note 23, at 106–07 (describing the Pennsylvania prison system as "purist" where incarcerated people "were given nothing to read except the Bible");

American states constructed more prisons in the 19th and early 20th centuries, prison architects "began including chapels in their design."[43] Nearly all U.S. prisons started to offer religious programming and to employ chaplains, and prison systems began to allow religious volunteers to enter prisons to provide religious services to incarcerated people.[44] However, more often than not, prisons extended religious offerings only to followers of Christianity and ignored the religious needs of people of other faiths.[45]

All of that changed in the 1960s as Black Muslim activists turned to the courts to challenge prison conditions generally; some of those challenges targeted the lack of accommodations afforded to non-Christian religious practice.[46] Until the 1960s, the federal courts had generally been unwilling to hear cases brought by incarcerated people, adopting an approach that became known as the "hands-off" doctrine.[47] In 1964, however, the Supreme Court effectively ended the "hands-off" era of diminished judicial review of prison administration when it released its per curiam opinion in *Cooper v. Pate*.[48] In *Cooper*, the Court held that Thomas Cooper, a Muslim, could sue prison officials under the 1871 Civil Rights Act for the officials' refusal to allow him to purchase religious literature and denial of other privileges "solely because of his religious beliefs."[49] *Cooper* and other pieces of litigation brought by Black Muslims pushed the federal courts to recognize that members of *all* religions, not just Christian religions, had the right to hold religious gatherings, purchase religious holy books,

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Thomas & Zaitzow, *supra* note 29, at 247 (describing the two earliest prison systems as "reflect[ing] what some see as the spirt of 'Protestant ethic'" (Auburn) and "a Quaker experiment to create a system in which prisoners would be confined to their cells to study and receive religious instruction so that they might reflect on their offenses" (Pennsylvania)).

43 Thomas & Zaitzow, *supra* note 29, at 247.

44 *Id.*

45 *Id.* ("[W]ith limited exceptions, religious rights extended primarily to the two Christian doctrines of Catholics and Protestants.").

46 GOTTSCHALK, *supra* note 42, at 174–75 (outlining Black Muslims' litigation strategy); *see also* SARAH BARRINGER GORDON, THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA 97 (2010) ("The origins and growth of the Black Muslim faith, and its campaign for recognition and protection even—or especially—behind prison walls, are landmarks in American religious and legal history.").

47 *See* Nicole B. Godfrey, *Institutional Indifference*, 98 OR. L. REV. 151, 165 (2020) (describing the "hands-off" doctrine as leaving prison officials a large amount of discretion in the operation of prison facilities). *But see* Danielle C. Jefferis, *Carceral Deference: Courts and Their Pro-Prison Propensities*, 92 FORDHAM L. REV. (forthcoming 2023) (manuscript at 25) (on file with author) (explaining that the hands-off "term is a bit misleading" because courts did review some claims brought by incarcerated people).

48 378 U.S. 546 (1964).

49 *Id.* at 546; *see also* MUSLIM ADVOCATES, *supra* note 30, at 11.

and receive visits from religious leaders, among other religious accommodations.[50]

While the 1960s and early 1970s saw an expansion of the recognized religious rights of incarcerated people, the Supreme Court began retracting those rights in the 1980s.[51] And, in 1990, with its seminal decision in *Employment Division v. Smith*,[52] the Court also contracted the free exercise doctrine as applied to free citizens, thereby holding that "laws that burden religious practice are not constitutionally suspect unless they single out religion. In other words, the fact that a local, state, or federal law imposed a burden on religious practice was not constitutionally problematic by itself."[53] Immediately, *Smith* proved controversial across the political spectrum, causing Congress to pass the Religious Freedom Restoration Act (RFRA), which sought to create a statutory right to be free from substantial burdens on religious practice by the government.[54] Congress expressly intended that RFRA's protections extend to incarcerated people,[55] and the law created a more formidable doctrinal test for prison officials seeking to burden religious exercise within prison walls than post-*Smith* First Amendment doctrine provided.[56] A more detailed history and description of the outcomes of these doctrinal and statutory developments are the subject of the rest of this Part.

A. The Doctrinal Development of the First Amendment's Free Exercise Clause for Claims Brought by Incarcerated People

The Supreme Court's 1964 decision in *Cooper* marked the beginning of the Supreme Court's attempts to develop a doctrine to govern claims brought by incarcerated people.[57] In that case, Thomas Cooper,

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[50] *See* GOTTSCHALK, *supra* note 42, at 174–75; MUSLIM ADVOCATES, *supra* note 30, at 11–12 (recognizing that litigation by Black Muslims advanced the cause of not just incarcerated Muslims but those of other religions and pointing out that "in 1972, the Supreme Court cited *Cooper v. Pate* in allowing religious discrimination claims by a Buddhist inmate to move forward").

[51] *See infra* Section I.A.

[52] 494 U.S. 872 (1990).

[53] Vladeck, *supra* note 1, at 704.

[54] *See id.* at 705–06 (noting that RFRA "attempt[ed] to require, as a matter of federal statute, that all laws burdening religious practice pass what's known as 'strict scrutiny,' i.e., that they be narrowly tailored to achieve a compelling government interest"); *see also infra* Section I.B.

[55] *See, e.g.*, 139 CONG. REC. 26411 (1993) (statement of Sen. Dole regarding the Reid Amendment's attempt to exempt prisons from the act).

[56] *See infra* Section I.C (describing RFRA's doctrinal framework).

[57] Some of the lower federal courts had begun to consider complaints raised by people in prison prior to *Cooper*. *See, e.g.*, MUSLIM ADVOCATES, *supra* note 30, at 10–11 (discussing a few other early cases in the lower courts). But *Cooper* is credited with opening the courthouse doors for claims by incarcerated people around the country. *See,*

incarcerated at the Illinois State Penitentiary,[58] brought suit against Frank J. Pate, the warden, alleging that Warden Pate and other prison officials denied him access to religious publications, permission to read the Qur'an, the ability to attend religious services, permission to talk to Islamic faith leaders, and equal treatment because of his faith.[59] The district court initially dismissed the case for failure to state a claim, and the Seventh Circuit affirmed.[60] In a short, per curiam opinion, the Supreme Court reversed, finding that "the complaint stated a cause of action and it was error to dismiss it."[61]

While the decision in *Cooper* proved significant in that it opened the courthouse doors for incarcerated litigants,[62] the lower courts continued to view those rights as less robust than those afforded to free-world citizens.[63] Even the lower courts' treatment of the claims in *Cooper* on remand demonstrated the courts' desire to give significant weight to the judgment of prison officials. After the Supreme Court's opinion, the district court enjoined the defendants after trial, finding that Mr. Cooper should be allowed to purchase a Qur'an, communicate by mail, and visit with Islamic faith leaders, including attending religious services conducted by an Islamic leader.[64] In affirming the district court's injunction, the Seventh Circuit noted that while it could

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e.g., Godfrey, *supra* note 47, at 165 (citing *Cooper* as signaling a change in the federal courts' approach to prison conditions).

58 Cooper v. Pate, 378 U.S. 546, 546 (1964).

59 Cooper v. Pate, 382 F.2d 518, 520 (7th Cir. 1967). Mr. Cooper brought his claims under both the First and Fifth Amendments, alleging violations of both the free exercise clause and the equal protection clause. *Id.*

60 *Id.* at 519–20; *see also* Cooper v. Pate, 324 F.2d 165, 166–67 (7th Cir. 1963) (focusing inquiry on whether the court should "take judicial notice of certain social studies" about the Black Muslim Movement, which "despite its pretext of a religious façade, is an organization that, outside of prison walls, has for its object the overthrow of the white race, and inside prison walls, has an impressive history of inciting riots and violence").

61 *Cooper*, 378 U.S. at 546.

62 *See* Godfrey, *supra* note 47, at 165; *see also* Judith Resnik, *The Puzzles of Prisoners and Rights: An Essay in Honor of Frank Johnson*, 71 ALA. L. REV. 665, 670 (2020) (citing *Cooper* as one in a series of "[k]ey decisions rendered by the U.S. Supreme Court between 1962 and 1964 [that] directed lower court judges to take up claims by criminal defendants and by prisoners").

63 *See, e.g.*, Sostre v. McGinnis, 334 F.3d 906, 908 (2d Cir. 1964) (citing *Cooper* for the notion that religious exercise in prison has "some measure of constitutional protection," but noting that the "protection is, however, subject to extensive limitations which would not be applicable were the plaintiffs not prisoners"); Walker v. Blackwell, 360 F.2d 66, 69 (5th Cir. 1966) (noting that the "particular circumstances" of prison cannot be "overlooked" despite "our zeal for the protection of freedom of religious belief and practice" (citing Pierce v. Le Vallee, 212 F. Supp. 865, 869 (N.D.N.Y. 1962))); Roberts v. Pepersack, 256 F. Supp. 415, 427 (D. Md. 1966) (clarifying that "[n]o romantic or sentimental view of constitutional rights or of religion should induce a court to interfere with" prison discipline).

64 *Cooper*, 382 F.2d at 521–22.

not afford complete deference[65] to prison administrators, "in a case like the present, weight is still given to the judgment of administrators in determining the practices which are necessary and appropriate in the conduct of a prison."[66] Moreover, the Seventh Circuit made clear that while prison authorities could not punish or discriminate against an incarcerated person because of their religion, the nature of incarceration meant "some curtailment of his freedom to exercise his beliefs."[67] Thus, while *Cooper* allowed incarcerated people the ability to seek redress for violations of their religious rights, the lower courts remained concerned with balancing incarcerated people's religious rights with the carceral judgments of prison officials.

Nearly a decade after *Cooper*, another case reached the Supreme Court involving the religious rights of incarcerated people: *Cruz v. Beto*.[68] On May 21, 1970, Fred Cruz filed a complaint in the Southern District of Texas, alleging that Texas prison officials denied his and other Buddhist adherents' rights to free exercise by refusing to hold Buddhist religious services, provide Buddhist religious counseling, or give Buddhist people religious books and literature.[69] The district court found that Mr. Cruz failed to state a claim because his requests fell within "the sound discretion of prison officials."[70] The Fifth Circuit affirmed, without analysis.[71]

The Supreme Court reversed in a per curiam opinion, finding Mr. Cruz's disparate treatment from incarcerated people of other faiths persuasive:

> If Cruz was a Buddhist and if he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts, then there was palpable discrimination by the State against the Buddhist religion, established 600 B.C., long before the Christian era.[72]

Chief Justice Burger concurred in the result but cautioned that the government need not "provide materials for every religion and sect practiced in this diverse country."[73] Justice Rehnquist dissented,

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[65] *See* Jefferis, *supra* note 47 (manuscript at 10) ("Carceral deference refers to the ways in which courts explicitly and implicitly, through application of the relevant doctrine and/or judicial practice, defer to prison officials when presiding over challenges to prison conditions.").

[66] *Cooper*, 382 F.2d at 521.

[67] *Id.*

[68] 405 U.S. 319, 319–21 (1972).

[69] Cruz v. Beto, 329 F. Supp. 443, 445–46 (S.D. Tex. 1970).

[70] *Id.* at 446.

[71] Cruz v. Beto, 445 F.2d 801, 802 (5th Cir. 1971).

[72] *Cruz*, 405 U.S. at 322.

[73] *Id.* at 323 (Burger, C.J., concurring).

indicating that he would not extend the protection of the equal protection clause to Mr. Cruz's claims when his religion might not have as many followers as more popular religions.[74] Justice Rehnquist instead indicated that he would grant "extensive administrative discretion [to] correction officials."[75]

Justice Rehnquist's deferential approach to the say-so of prison officials would become the governing doctrine applied to claims brought by incarcerated people fifteen years later when the Court decided *Turner v. Safley*.[76] The *Turner* Court held that a prison regulation, policy, or practice would be valid so long as: (1) there is a rational connection between the regulation and the reason the prison puts forward to justify it; (2) the incarcerated person has alternative means to exercise the right at issue; (3) the impact of accommodation of the right is not too overwhelming to guards, other incarcerated people, and the general allocation of prison resources; and (4) there are no other obvious, easy alternatives that allow the exercise of the right at issue while still protecting the governmental interest asserted.[77]

While *Turner* did not involve a free exercise challenge to prison policies, a case decided just eight days after *Turner* did: *O'Lone v. Estate of Shabazz*.[78] The Court used the *O'Lone* opinion, authored by Chief Justice Rehnquist, to demonstrate just how stringent the *Turner* standard would be for incarcerated people challenging prison policies that violated their constitutional rights.[79]

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[74] *Id.* at 325 (Rehnquist, J., dissenting). Justice Rehnquist's dissent is also full of assertions based on unsupported stereotypes of incarcerated litigants, including that those litigants assert frivolous claims so that they may gain a trip to the courthouse to escape the monotony of prison or that jailhouse lawyers knowingly assert frivolous claims on behalf of other incarcerated people in order to gain access to more commissary items like cigarettes. *Id.* at 326–27 ("The inmate stands to gain something and lose nothing from a complaint stating facts that he is ultimately unable to prove. Though he may be denied legal relief, he will nonetheless have obtained a short sabbatical to the nearest federal courthouse."). These types of stereotypes would later be used to convince Congress to pass the Prison Litigation Reform Act (PLRA). Despite that, many of the stereotypes and examples of frivolous suits were found to be false. *See* Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520–23 (1996).

[75] *Cruz*, 405 U.S. at 325 (Rehnquist, J., dissenting).

[76] 482 U.S. 78, 89 (1987). For a full discussion of the background, arguments, and decision in *Turner*, see Nicole B. Godfrey, *Suffragist Prisoners and the Importance of Protecting Prisoner Protests*, 53 AKRON L. REV. 279, 296–99 (2019).

[77] *Turner*, 482 U.S. at 89–91; Godfrey, *supra* note 76, at 298–99.

[78] 482 U.S. 342, 345 (1987) (explaining that the policies at issue "resulted in [the plaintiffs'] inability to attend Jumu'ah, a weekly Muslim congregational service regularly held in the main prison facility and in a separate facility known as 'the Farm'").

[79] *Id.* at 350–53 (applying *Turner* to uphold the regulation at issue).

O'Lone involved a challenge to certain prison policies applicable at New Jersey State Prison at Leesburg.[80] Ahmad Uthman Shabazz and Dar-Ud-Din Mateen, both Muslim, challenged the prison's refusal to allow them to attend Friday Jumu'ah services.[81] The Leesburg prison confined people in different buildings based on their custody status, with maximum and gang minimum custody living in the main prison building and full minimum custody living in a second building called "the Farm."[82] Between April 1983 and March 1984, New Jersey prison officials began to implement a number of policy changes at Leesburg, largely in response to issues related to overcrowding.[83] One such policy change required all people *except* those classified as maximum custody to participate in work details outside the prison, and another policy change required anyone on an outside work detail to remain with their detail throughout the day—i.e., no one could re-enter the institution during a normal work day absent an emergency.[84] The effect of these policy changes meant that practicing Muslims with outside work details (i.e., those with lower security classifications) could no longer participate in Friday's Jumu'ah service.[85] Because both Mr. Shabazz and Mr. Mateen had minimum classifications, they fell into the group of Muslims no longer able to attend their weekly religious service.[86]

Mr. Shabazz and Mr. Mateen filed suit, alleging that the policies operated to deny them their First Amendment right to freely exercise their religion.[87] The district court dismissed the plaintiffs' claims,[88] but

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[80] Shabazz v. O'Lone, 595 F. Supp. 928, 928 (D.N.J. 1984).

[81] *Id.* "The Jumu'ah service is a congregational service with a minister, or imam, presiding. It is the only congregational service of the week, and it therefore is comparable to the Saturday service of the Jewish faith and the Sunday service of the various Christian sects." *Id.* at 930.

[82] *Id.* at 929.

[83] *Id.* at 929–30. The time frame of these policy changes and overcrowding of the Leesburg prison coincides with an explosion in the number of people confined behind bars; this prison population expansion led to what we now call mass incarceration. *See generally* Godfrey, *supra* note 47, at 163–65 (discussing the rapidly expanding prison population of the 1970s and 1980s).

[84] *See O'Lone*, 595 F. Supp. at 929–30.

[85] *Id.* at 930.

[86] *Id.* During the course of the litigation, Mr. Mateen's classification dropped to full minimum, causing him to be reassigned to an inside work detail in the kitchen so he could attend Jumu'ah by the time of the district court's hearing on the preliminary and permanent injunction; the district court rejected the defendants' mootness arguments, nonetheless, because it concluded that Mr. Mateen could be reassigned to an outside detail at any time and again be subject to the policies at issue. *Id.* at 930–31.

[87] *Id.* at 928, 933. They also raised an equal protection claim. *Id.* at 934.

[88] *Id.* at 935 (concluding that the policies at issue were facially valid and not "adopted with the impermissible goal of restricting [the plaintiffs'] religious rights" after a combined hearing for a preliminary and permanent injunction).

the Third Circuit reversed.[89] Upon review, the Supreme Court applied the standard it had just announced in *Turner* to find in favor of the prison officials; in so doing, the Court demonstrated many of the *Turner* standard's flaws.[90]

First, the *O'Lone* Court determined that the New Jersey prison policies at issue "clearly" had a logical connection to legitimate governmental interests.[91] The Court deferred to prison officials' belief that the policy, among other things, allowed the prison to simulate "working conditions and responsibilities in society."[92] More importantly, the Court concurred with the prison's assertions that returning Muslims to the institution for the Jumu'ah prayer would create security issues by requiring guards supervising outside work details to make individual determinations as to whether a request to return to the institution was justified.[93]

Second, while the *O'Lone* Court acknowledged that the plaintiffs had "no alternative means of attending Jumu'ah," the Court blamed the "very stringent [faith-based] requirements as to the time at which Jumu'ah may be held" and refused to require prison officials "to sacrifice legitimate penological objectives" to honor those requirements.[94] Instead, the Court pointed to the plaintiffs' ability to "participate in other religious observances of their faith" (e.g., by observing Ramadan fasts and participating in congregate prayer when not at work) to conclude that the almost-total prohibition on participation in Jumu'ah was reasonable.[95]

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[89] Shabazz v. O'Lone, 782 F.2d 416, 419, 421 (3d. Cir. 1986) (finding that the district court had failed to assess whether "a 'mutual accommodation' between the important institutional objective of security and the constitutionally protected rights of [incarcerated people]" could be reached (quoting Wolff v. McDonnell, 418 U.S. 539, 556 (1974))).

[90] Notably, while *Turner* provided a previously unarticulated test meant, in theory, to balance the important constitutional rights at stake with the prison's interests in security, many commentators have criticized the standard as toothless because its application nearly always means that prison officials' interests win. *See, e.g.*, David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 988 (2016) (concluding that "regulations founded on flimsy rationales get upheld frequently enough, and the reasoning is often poor enough" that the standard has become almost meaningless).

[91] O'Lone v. Shabazz, 482 U.S. 342, 350 (1987).

[92] *Id.* at 351.

[93] *See id.* The Court also noted that the prison's policy that incarcerated people work in specific work details "was justified by concerns of institutional order and security." *Id.* at 350. But the *O'Lone* plaintiffs merely requested an exemption from the no return policy on Fridays for Jumu'ah services, and they only offered their assignment to work details in the prison as an alternative option. *O'Lone*, 595 F. Supp. at 932 (outlining alternatives offered by plaintiffs).

[94] *O'Lone*, 482 U.S. at 351–52.

[95] *Id.* at 352.

Finally, the Court combined its analysis of the third and fourth *Turner* factors (the impact accommodating the right would have on prison resources and the availability of alternative ways that the plaintiffs could exercise the right without compromising prison objectives) to conclude that "accommodations of [the plaintiffs'] request to attend Jumu'ah would have undesirable results in the institution."[96] To reach this conclusion, the Court deferred to prison officials' assertions that allowing Muslims to participate in weekend work details (rather than those on Fridays) would drain staff resources and grouping Muslims together in a way that would allow a single work group to return to the institution for Jumu'ah would encourage the Muslim individuals to organize in a way that challenged institutional authority.[97] Lastly, the Court affirmed prison officials' conclusion that creating an exemption from the work policies for incarcerated Muslims would be perceived as favoritism by other incarcerated people.[98]

In sum, the *O'Lone* Court refused to contradict "those charged with the formidable task of running a prison," and, consequently, concluded that the prison policies did not run afoul of the Free Exercise Clause of the First Amendment.[99] The Court therefore reversed the decision of the Court of Appeals.[100]

Justices Brennan, Marshall, Blackmun, and Stevens dissented, concluding that the "reasonableness of foreclosing [the plaintiffs'] participation in Jumu'ah ha[d] not been established."[101] Concerned that the majority's deferential approach abdicated the Court's role in holding official power accountable, the dissent criticized the Court's application of the *Turner* standard as too deferential for failing to "discriminate among degrees of deprivation."[102] Justice Brennan, writing for the dissenters, criticized the majority's willful disregard of the Constitution's purpose.[103] To the dissent, the Court's role was not to unduly defer to "the needs of those in power," but rather "to

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96 *Id.* at 353.

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.* at 354 (Brennan, J., dissenting). Notably, this is the same set of Justices who concurred in part and dissented in part in *Turner v. Safley*, 482 U.S. 75, 100 (1987).

102 *Id.* at 355–56. The dissent began its discussion by focusing on the "shadow world" of prisons, yet insisted that prisons and those who live within them remain a part of the "body politic" of society. *Id.* at 355. Thus, when incarcerated people assert a constitutional claim, "they speak the language of the charter upon which all of us rely to hold official power accountable. They ask us to acknowledge that power exercised in the shadows must be restrained as diligently as power that acts in the sunlight." *Id.*

103 *Id.* at 356 (noting that the Constitution "was meant to provide a bulwark against infringements that might otherwise be justified as necessary expedients of governing").

ensure that fundamental *restraints* on that power are enforced."[104] The dissent concluded by pronouncing that the *Turner* standard will only "represent anything more than reflexive deference to prison officials" if the reasonableness inquiry requires prison officials to truly justify any rationale for infringing on fundamental rights.[105]

While the *O'Lone* dissent offered a forceful critique of both the *Turner* standard and the majority's application of it, *Turner* remains the standard governing First Amendment free exercise claims brought by incarcerated people.[106] For decades, scholars have criticized the standard as unduly deferential to prison officials, making it nearly impossible for incarcerated people to succeed on constitutional claims challenging the violation of their religious rights.[107] But, due to developments in free exercise doctrine outside the prison context, Congress would soon intervene to create statutory free exercise rights offering more protection to the incarcerated and non-incarcerated alike.

B. Congressional Intervention: The Religious Freedom Restoration Act

As the Court expanded then dramatically retracted the free exercise rights of incarcerated people, it followed a similar path for the free exercise doctrine governing claims brought by the non-incarcerated. This retraction of rights for the non-incarcerated sparked public outcry and action by Congress—action that would significantly impact the rights of the incarcerated, too.

In 1963 and 1972, the Court decided a pair of cases, *Sherbert v. Verner*[108] and *Wisconsin v. Yoder*,[109] that would define the constitutional free exercise doctrine for non-incarcerated people for almost two decades. The *Sherbert-Yoder* framework required a person challenging a law or government practice to show that the challenged law or act burdened his sincere religious beliefs, even if those beliefs were not shared by all other members of the person's religious denomina-

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104 *Id.*

105 *Id.* at 367–68.

106 Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 301, 311 (2022) (explaining that "all non-Eighth Amendment constitutional claims brought by incarcerated plaintiffs" are governed by *Turner*).

107 *See, e.g.*, *id.* (concluding that "[i]t is hard to conceive of a more deferential standard" and that "simply by applying *Turner*, courts are able to find for defendants without needing to look too closely at either the facts of the case or the strength of the plaintiff's arguments"); Godfrey, *supra* note 76, at 300 n.161 (listing scholarly critiques of *Turner*).

108 374 U.S. 398 (1963) (invalidating a South Carolina statute that prohibited unemployment compensation for people who refused to work on Saturdays).

109 406 U.S. 205 (1972) (finding a state law requiring Amish children to attend school until they reached the age of sixteen placed an undue burden on Amish religious practice).

tion.[110] Once the challenger made this showing, the challenged law or practice would be subject to strict scrutiny; i.e., the burden shifted to the government to demonstrate that the law or practice served a compelling secular interest and that the burden is the least restrictive means of achieving that interest.[111]

While some scholars have described the *Sherbert-Yoder* framework as reflecting a "high water mark" of free exercise jurisprudence, others have questioned whether its application by the federal courts actually offered an expansive protection of free exercise rights.[112] No matter its effect, the Supreme Court largely rejected *Sherbert* and *Yoder* with its 1990 decision, *Employment Division v. Smith*, which held that neutral, generally applicable laws that incidentally burden religious exercise do not violate the First Amendment.[113] Importantly, *Smith* did not alter the framework for religious claims brought by incarcerated people, which remained subject to the analysis outlined in *Turner*.[114]

Criticism of *Smith* came fast and furious, in part because the parties had not asked the Court to reconsider free-exercise doctrine.[115] Perhaps most importantly, Congress also took near-immediate notice

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[110] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1417 (1990) (making clear that the claimant's beliefs "need not necessarily be consistent, coherent, clearly articulated, or congruent with those of the claimant's religious denomination").

[111] *Yoder*, 406 U.S. at 222 (explaining that "[w]here fundamental claims of religious freedom are at stake," courts "must searchingly examine the interests that the State seeks to promote" and "the impediment to those objectives that would flow from recognizing the claimed . . . exemption"); *see also Sherbert*, 374 U.S. at 406 (examining "whether some compelling state interest" justified "the substantial infringement of [the] First Amendment right").

[112] *See, e.g.*, Stephanie H. Barclay, *First Amendment "Harms*," 95 IND. L.J. 331, 340–41 (2020) (explaining that "[s]ome scholars have described *Yoder* as the 'high water mark' of the Court's constitutional religious exemption standard, but others question how consistently this constitutional standard was applied by the courts"); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 182, 183, 222 (1995) (explaining that "a number of pre-*Smith* decisions watered down the compelling interest test *Sherbert* and *Yoder* had employed" and pointing to cases where "the Supreme Court (pre-*Smith*) significantly weakened the stringency of free exercise review"); *see also* Bret Matera, Note, *Divining a Definition: "Substantial Burden" in the Penal Context Under a Post-*Holt *RLUIPA*, 119 COLUM. L. REV. 2239, 2244–45 (2019) (citing Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651, 684 (1991), and Robert M. Bernstein, Note, *Abandoning the Use of Abstract Formulations in Interpreting RLUIPA's Substantial Burden Provision in Religious Land Use Cases*, 36 COLUM. J.L. & ARTS 283, 290 (2013), for the proposition that *Yoder* "establish[ed] what some scholars referred to as a high-water mark for the Court's free exercise jurisprudence").

[113] 494 U.S. 872, 886 (1990).

[114] *See supra* Section I.A.

[115] *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1113 (1990) (describing the "briefs and arguments" as "focused

of the decision and began crafting legislation to "repair the damage to religious liberty."[116] The Religious Freedom Restoration Act of 1993 (RFRA) resulted.[117]

1. RFRA's History and Purpose

In the aftermath of the *Smith* decision, a diverse coalition of strange bedfellows formed, first to seek rehearing in the Supreme Court and then, when the Court refused to rehear the case, to craft legislation that would restore religious liberty protections.[118] The coalition included "such unlikely allies as the American Civil Liberties Union and the Traditional Values Coalition."[119] Because coalition members valued religious liberty for incredibly divergent reasons,[120] the group stayed singularly focused on its initial purpose: to restore the religious liberty protections that existed prior to the Supreme Court's decision in *Smith*.[121]

For its part, Congress never shied away from this purpose in drafting RFRA, stating explicitly in the statutory text that it meant to "restore the compelling interest test set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in *all* cases where free exercise of religion is substantially burdened."[122] In support of this statutory purpose, RFRA's drafters also provided a list of congressional findings that included a conclusion that even neutral laws should not burden religious exercise without a compelling reason.[123] Congress also expressly criticized the Court's decision in *Smith* as nul-

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entirely on whether the state ha[d] a sufficiently compelling interest in controlling drug use to overcome the free exercise rights of Native American Church members").

116 Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 210 (1994).

117 Pub. L. No. 103-141, 107 Stat. 1488 (codified principally at 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V 1993)).

118 Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 12 (1994) (explaining that "a large number of religious and civil liberties groups and more than fifty law professors" immediately sought rehearing of the *Smith* case in the Supreme Court, and, finding no success, then formed "a broad-based coalition of religious and civil liberties groups to pursue the next alternative, restoring religious freedom by statute").

119 *Id*. at 13.

120 *Id*. (describing civil liberties organizations' interest in protecting the rights of minority religious believers while religious groups' interests "var[ied] widely in their attitudes toward government support of and involvement with religion").

121 *Id*. at 14 (explaining that the "coalition . . . could agree on the general principle of restoring religious freedom, but consensus would evaporate if any of a number of other issues were . . . addressed in the statute").

122 42 U.S.C. § 2000bb(b)(1) (emphasis added).

123 42 U.S.C. § 2000bb(a)(2)–(3).

lifying the requirement that government justify burdens placed on religious exercise.[124]

RFRA made its way through Congress and onto the desk of President Clinton with little opposition.[125] Sponsored by Democrat Edward Kennedy and Republican Orrin Hatch, the bill crossed ideological lines and passed the U.S. Senate on October 27, 1993, by a vote of ninety-seven to three; it similarly passed the House of Representatives on November 3, 1993.[126] President Clinton signed the statute into law on November 16, 1993.[127] "[O]ne of the broadest coalitions in recent political history" supported the bill, "including Christians, Jews, Muslims, Sikhs, Humanists, and secular civil liberties organizations."[128] The act's extension of strict scrutiny to cases brought by incarcerated people, and the consequent increase in religious freedom protections afforded to those behind bars, became perhaps the most controversial aspects of the law, as discussed in the next Section.

2. RFRA in Prison

In its report to the Senate, the Committee on the Judiciary expressly addressed RFRA's application to prisons, making clear that the statute "would establish one standard for testing claims of Government infringement on religious practices."[129] Criticizing the Court's decision in *O'Lone*, the Judiciary Committee stated that RFRA intended to "restore the traditional protection afforded to prisoners to observe their religions."[130] Importantly, the Committee echoed the sentiments expressed by the *O'Lone* dissenters and warned that prison policies "grounded on mere speculation, exaggerated facts, or post-hoc rationalizations will not suffice to meet the act's requirements."[131]

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124 42 U.S.C. § 2000bb(a)(4).

125 While RFRA did stall in Congress after "anti-abortion groups attacked the bill on the ground that it might create a statutory right to choose abortion as a matter of religious conscience," the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and the election of President Clinton caused opposition to fade. Berg, *supra* note 118, at 15.

126 Laycock & Thomas, *supra* note 116, at 210.

127 *Id.*

128 *Id.*

129 S. REP. NO. 103-111, at 9 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1898; H.R. REP. NO. 103-88, at 7–8 (1993) (starting a section entitled "Application of the Act to Prisoners' Free Exercise Claims").

130 S. REP. NO. 103-111, at 9 (indicating that only "penological concerns of the 'highest order' could outweigh" an incarcerated person's right to freely exercise their religious beliefs).

131 *Id.* at 10.

After seeing the draft bill, prison officials sought to stop Congress from making the act applicable to prisons, writing a letter signed by all fifty state prison directors, which claimed that the law would "result in a dramatic increase in the amount and cost of litigation and will have a deleterious impact on security and limited prison resources."[132] In other words, the prison officials claimed that passing RFRA "would wreak havoc in the nation's prisons," causing prison officials to relitigate claims they had won under the more deferential *Turner* standard.[133] In response, Senator Harry Reid introduced an amendment that would have exempted incarcerated people from RFRA's protections.[134]

While the Senate vigorously debated the Reid Amendment,[135] it ultimately rejected it by a vote of fifty-eight to forty-one.[136] Supporters of the amendment "contended that RFRA would increase already burgeoning prisoner litigation, entice prisoners to dress frivolous claims in the vestments of religion, place a severe strain on prison resources and finances, endanger prison security, and frustrate the ability of prison officials to control prisoners."[137] But opposition to the Reid Amendment came from numerous sources, including religious groups,[138] senators,[139] and Attorney General Janet Reno, who, as head of the Department of Justice, had ultimate authority over the

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132 139 CONG. REC. S14,355 (daily ed. Oct. 26, 1993) (statement of Sen. Reid) (quoting letter).

133 Michael Hirsley, *Prisons Fear Law to Restore Religious Rights*, CHI. TRIB. (Aug. 1, 1993, 12:00 AM), https://www.chicagotribune.com/news/ct-xpm-1993-08-01-9308010251-story.html [https://perma.cc/BM7P-3T5W].

134 139 CONG. REC. S14,353 (daily ed. Oct. 26, 1993) (statement of Sen. Reid).

135 Daniel J. Solove, Note, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459, 472 (1996).

136 139 CONG. REC. S14,468 (daily ed. Oct. 27, 1993).

137 Solove, *supra* note 135, at 472. This opposition coincided with the beginning of the "tough on crime" era that resulted in other legislation meant to limit the rights of incarcerated people, like the PLRA and the Antiterrorism and Effective Death Penalty Act. *See, e.g.*, Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 1 (1997) (recalling the "tough on crime" era when "the Republican Congress and the Democratic President collaborated on two major statutes affecting the legal protections available" to people convicted of crimes).

138 *See* 139 CONG. REC. S14,534 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch).

139 *See, e.g.*, Solove, *supra* note 135, at 472 & nn.123–24 (quoting Senator Bob Dole as saying, "if religion can help just a handful of prison inmates get back on track, then the inconvenience of accommodating their religious beliefs is a very small price to pay" and Senator Kennedy as stating that "[w]e would encourage prisoners to be religious. There is every reason to believe that doing so will increase the likelihood that a prisoner will be rehabilitat[ed]" (citing 139 CONG. REC. S14,466 (daily ed. Oct. 27, 1993) (for Senator Dole statement), and 139 CONG. REC. S14,351 (daily ed. Oct. 26, 1993) (for Senator Kennedy statement))).

federal prison system.[140] While Attorney General Reno recognized the concerns voiced by prison officials, she ultimately concluded that dangerous and disruptive activities would still be regulated under RFRA, thereby implying that the officials' concerns were overblown.[141] Ultimately, the Senate's rejection of the Reid Amendment signaled agreement that prison officials' concerns did not warrant excluding incarcerated people from RFRA's protections.[142]

Thus, when President Clinton signed RFRA into law on November 16, 1993, the legislative history made clear that the RFRA standard would apply to claims brought by incarcerated people. Yet, despite the dire warnings of prison officials during the legislative process, RFRA did not initially result in a significant increase in wins for religious rights claims brought by incarcerated people.[143] Instead of applying the strict scrutiny standard articulated in the statute, lower federal courts would often revert back to *O'Lone*'s more lenient analytical frame by refusing to critically examine prison officials' penological interests to determine whether they truly outweighed the free exercise interests at stake.[144] And, by 1997, the Supreme Court had declared RFRA unconstitutional as applied to the states, so only people incarcerated in federal prisons could seek to utilize the force of its protections.[145] Once again, Congress went to work to create more robust protections for religious liberty; within three years, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[146] Known as RFRA's sister statute, RLUIPA uses Congress's spending and commerce authority to regulate the free exercise of religion in state prisons and, like RFRA, requires prison officials to demonstrate a compelling government interest in bur-

140 Solove, *supra* note 135, at 472 n.20 (citing 139 CONG. REC. S14,351 (daily ed. Oct. 26, 1993)).

141 Hirsley, *supra* note 133.

142 *See id.*

143 Solove, *supra* note 135, at 474 ("Despite the hope of its drafters, RFRA has not significantly increased the protection of prisoners' religious rights.").

144 *Id*. (describing lower courts' failure to adhere to the strict requirements of the statute); *see also* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 596 (1998) (explaining how lower courts initially misapplied the RFRA standard by finding "ways to undercut the rigors of these statutory requirements").

145 City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding that Congress overstepped its authority under the Fourteenth Amendment when it enacted RFRA); *see also* JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 143 (3d. ed. 2011) (explaining that the Supreme Court determined that Congress overstepped its authority under section 5 of the Fourteenth Amendment in enacting RFRA in *City of Boerne v. Flores* but reaffirming that the law remains valid against the federal government).

146 42 U.S.C. §§ 2000cc to 2000cc-5.

dening religious practice.[147] In the years since the passage of the RLUIPA, the Supreme Court's interpretation of the protections afforded by the two statutes has continued to strengthen their effectiveness in protecting the rights of incarcerated people, as discussed in the next Section.

C. RFRA's Doctrinal Framework: A Statute of Shifting Burdens

The text of RFRA is straightforward:

> **Free exercise of religion protected**
>
> **(a) In General**
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> **(b) Exception**

147 Adeel Mohammadi, Note, *Sincerity, Religious Questions, and the Accommodation Claims of Muslim Prisoners*, 129 Yale L.J. 1836, 1847 (2020) (describing RLUIPA "carveouts for congressional regulation of state activity in the arenas of land-use regulation and prisons"). While both RFRA and RLUIPA provide the same level of free exercise protections to people incarcerated in state and federal prisons, the remedies afforded under the statutes diverge because of the different powers that granted Congress the authority to create the statutes. In 2011, the Supreme Court held that Congress did not waive state sovereign immunity in enacting RLUIPA, thereby precluding RLUIPA claims for damages against the state or state prison officials in their official capacities. Sossamon v. Texas, 563 U.S. 277, 285–88 (2011). And a number of circuit courts have held that individual state officers are not the recipients of federal funds such that they could be liable in their individual or personal capacities for violations of statutes passed pursuant to Congress's spending power. *See, e.g.*, Wood v. Yordy, 753 F.3d 899, 902–04 (9th Cir. 2014) (declining to allow RLUIPA suit against individual-capacity defendants); Washington v. Gonyea, 731 F.3d 143, 145–46 (2d Cir. 2013) (same); Sharp v. Johnson, 669 F.3d 144, 154–55 (3d Cir. 2012) (same); Stewart v. Beach, 701 F.3d 1322, 1333–35 (10th Cir. 2012) (same); Nelson v. Miller, 570 F.3d 868, 889 (7th Cir. 2009) (same), *abrogated on other grounds by* Jones v. Carter, 915 F.3d 1147, 1149 (7th Cir. 2019); Rendelman v. Rouse, 569 F.3d 182, 188–89 (4th Cir. 2009) (same); Sossamon v. Lone Star State of Tex., 560 F.3d 316, 328–30 (5th Cir. 2009), *aff'd on other grounds by* 563 U.S. 277 (2011) (same); Smith v. Allen, 502 F.3d 1255, 1271–75 (11th Cir. 2007), *abrogated on other grounds by Sossamon*, 563 U.S. 277 (same). While the question of whether the commerce clause authority might empower Congress to allow for individual-capacity suits against individual prison defendants is not definitively answered, it is rare for a RLUIPA claim to be litigated on the basis of the commerce clause authority because doing so would require a demonstration that the restriction of religious rights impacted interstate commerce. *See, e.g.*, *Washington*, 731 F.3d at 146 (declining to reach question of whether commerce clause basis for RLUIPA allows for individual-capacity suits for damages where plaintiff "pled no facts indicating that the restriction of his religious rights had any effect on interstate or foreign commerce"). People confined to state prisons do have a damages remedy under § 1983 for violations of their free exercise rights under the Constitution. *See* Godfrey, *supra* note 10, at 926 (explaining that people confined to state prisons have a damages remedy for constitutional free exercise violations after *Bivens* that is unavailable to people confined in federal prisons).

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> **(1)** is in furtherance of a compelling governmental interest; and
>
> **(2)** is the least restrictive means of furthering that compelling government interest.[148]

Yet, despite the clear statutory text, the doctrine governing how claims brought under the statute should be analyzed took time to develop, particularly for claims brought by incarcerated people.

As the lower courts began to grapple with RFRA's meaning in the mid-1990s, it became clear that the judiciary needed more guidance on how the statute should apply to claims brought by incarcerated people.[149] That guidance would not come until the Supreme Court's 2015 decision in *Holt v. Hobbs*.[150] *Holt* involved a claim brought by a person incarcerated in the Arkansas Department of Corrections under RFRA's sister statute, RLUIPA.[151] As mentioned above, Congress enacted RLUIPA after the Supreme Court had declared RFRA unconstitutional as applied to the states, and its provisions mirror RFRA.[152] Thus, both RFRA and RLUIPA allow incarcerated people "to seek religious accommodations pursuant to the same standard."[153]

In *Holt*, Gregory Houston Holt used RLUIPA to challenge Arkansas prison officials' denial of his request for a religious accommodation that would allow him to grow a half-inch beard, which was not allowed by prison policy.[154] Proceeding pro se, Mr. Holt sought a preliminary injunction in the district court that would free him to grow his beard.[155] The district court initially granted the injunction but then referred his case to a magistrate judge for an evidentiary hearing.[156] After the evidentiary hearing, the magistrate judge recommended that

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148 42 U.S.C. § 2000bb-1(a)–(b).

149 Solove, *supra* note 135, at 474 (finding that "[n]umerous courts articulate RFRA's strict scrutiny standard but nevertheless continue to decide cases in a manner that impersonates *O'Lone*" and concluding that "RFRA has spawned a mass of confusing and inconsistent case law in which many courts have shown little respect and understanding for prisoners' religious claims and have neglected to examine prison policies in any meaningful way").

150 574 U.S. 352 (2015).

151 *See id.* at 356 ("Congress enacted RLUIPA and its sister statute [RFRA] . . . 'in order to provide very broad protection for religious liberty.'" (quoting *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 693 (2014))).

152 *Id.* at 357–58; *see also* 42 U.S.C. §§ 2000cc to 2000cc-5.

153 Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 436 (2006).

154 Holt v. Hobbs, 574 U.S. 353, 358–59 (2015).

155 *Id.* at 359.

156 *Id.*

the district court vacate the preliminary injunction and dismiss Mr. Holt's case.[157] The magistrate judge based her decision on the deference owed prison officials, who had testified that the prison policy was justified because (1) incarcerated people can hide contraband in their beards, even those that are only one-half inch, and (2) an incarcerated person with a beard could escape and change his appearance by shaving his beard.[158] At the time of the evidentiary hearing, Mr. Holt had a short beard because of the initial injunction, "and the Magistrate Judge commented: 'I look at your particular circumstance and I say, you know, it's almost preposterous to think that you could hide contraband in your beard.'"[159] Nevertheless, the judge deferred to the prison officials' unsupported justifications.[160]

The district judge adopted the magistrate's recommendations, and Mr. Holt appealed to the Eighth Circuit.[161] The Eighth Circuit issued a brief *per curiam* opinion, finding that "'courts should ordinarily defer to [prison officials'] expert judgment' in security matters unless there is substantial evidence that a prison's response is exaggerated."[162] Declining to give weight to evidence offered by Mr. Holt that other prisons allowed incarcerated people to have facial hair, the Eighth Circuit affirmed the deferential decision of the district court.[163]

The Supreme Court reversed, and, for the first time, clarified the burden-shifting framework to be applied to RFRA and RLUIPA claims brought by incarcerated people.[164] While the Supreme Court had previously recognized the strength of RFRA's protections in cases brought by non-incarcerated people,[165] *Holt* presented the Court questions about the scope of RFRA and RLUIPA's protections for the incarcerated for the first time. Relying on its prior precedents interpreting the statutes, the Court made clear that lower courts should abide by RFRA's original congressional purpose: The statutes are meant to provide "greater protection for religious exercise than is available under the First Amendment."[166]

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157 *Id.* at 360.

158 *Id.* at 359.

159 *Id.* at 359–60.

160 *Id*. at 360.

161 *Id.*

162 *Id.*

163 *Id.*

164 *Id.* at 361–70.

165 *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 695 n.3 (2014) (citing to *City of Boerne* for the proposition that the Supreme Court has long recognized that "RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions").

166 *Holt*, 574 U.S. at 357 (citing *Hobby Lobby*, 573 U.S. at 694–95).

First, an incarcerated plaintiff must establish that they sought to engage in the exercise of religion and that the defendant prison or its officials substantially burdened that exercise.[167] Then, the pleading and evidentiary burden shifts to the defendant prison or its officials to demonstrate that the religious burden furthers a compelling government interest and is the least restrictive means of accomplishing that interest.[168] In other words, the Supreme Court confirmed that the unqualified deference to prison officials that had for so long characterized the approach to constitutional claims by incarcerated people would not apply to claims brought under the religion statutes.

What this means is that in order to state a claim under RFRA for damages, an incarcerated plaintiff need only plead and prove that a prison official placed a substantial burden on their sincerely held religious belief.[169] Importantly, the plaintiff's burden is not heavy; the statute's definition of what constitutes a religious burden is broad and includes "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief."[170] Moreover, because RFRA restored the pre-*Smith* standards articulated in *Yoder* and *Sherbert*, a plaintiff can demonstrate a substantial burden on religious exercise in one of two ways: (1) showing that they were forced to choose between following the precepts of their religion, and therefore forfeiting benefits available to other incarcerated people, or abandoning the precepts of their religion in order to receive a benefit; or (2) showing that the government actor put substantial pressure on the plaintiff to modify

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[167] *Id.* at 361; *see also* Sabir v. Williams, 52 F.4th 51, 59 (2022) ("To establish a prima facie RFRA violation, the plaintiffs must demonstrate that they sought to engage in the exercise of religion and that the defendant-officials substantially burdened that exercise.").

[168] *Holt,* 574 U.S. at 362.

[169] *See* Ghailani v. Sessions, 859 F.3d 1295, 1305 (10th Cir. 2017) (making clear that a plaintiff's initial burden at the pleading stage is simply to demonstrate a substantial burden on a sincerely held religious belief).

[170] 42 U.S.C. § 2000cc-5(7)(A) (emphasis added); *see also* Adeel Mohammadi, Note, *Sincerity, Religious Questions, and the Accommodation Claims of Muslim Prisoners*, 129 YALE L.J. 1836, 1848 n.62 (2020) (noting that RFRA was "amended to define 'exercise of religion' in the same way that RLUIPA does").

his behavior to violate his beliefs.[171] Importantly, the government actor's pressure or coercion need not be direct.[172]

Once the plaintiff makes that initial showing, the statute allows the government actor to raise an affirmative defense demonstrating that the burden imposed on religious exercise furthers a compelling government interest and is the least restrictive means of achieving that interest.[173] The Supreme Court has called this requirement, colloquially referred to as strict scrutiny, the "most demanding test known to constitutional law."[174] The government actor cannot merely assert "broadly formulated interests" that, at a high level of generality, sound compelling.[175] RFRA "requires the government to demonstrate that the compelling interest test is satisfied through application of the challenged law '*to the person*'—the particular claimant whose sincere exercise of religion is being substantially burdened."[176] In other words, to satisfy their burden, the government official must show that they have a compelling interest in refusing to accommodate *the particular plaintiff's* accommodation request.

It is this burden-shifting framework and requirement of individualized assessment that makes RFRA claims particularly incompatible with qualified immunity, which is primarily focused on determining whether the right at issue has been clearly established.[177] Because the rights at issue in RFRA cases are so specific "to the person,"[178] the burden-shifting framework either makes qualified immunity available in *every* case or a nullity because the right is so clear from the statute

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171 *See* Washington v. Klem, 497 F.3d 272, 280 (3d Cir. 2007) (utilizing *Sherbert-Yoder* precedent to articulate the standard for analyzing the substantial burden prong in a RLUIPA case). While *Washington* predates *Holt*, nothing in *Holt* changes the analysis required on this prong. *See generally Holt*, 574 U.S. at 361–62 (criticizing lower courts for importing "reasoning from cases involving prisoners' First Amendment rights" and reiterating that "the availability of alternative means of practicing religion is a relevant consideration [in those cases], but RLUIPA provides greater protection" and simply "asks whether the government has substantially burdened religious exercise").

172 *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963) (making clear that indirect pressure "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand" amounts to an unlawful burden on religious practice).

173 *See Ghailani*, 859 F.3d at 1306 (citing Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 429 (2006), for the proposition that RFRA contains an affirmative defense that must be pleaded and proved by the government officials subject to suit).

174 City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

175 *Holt*, 574 U.S. at 362 (quoting Burwell v. Hobby Lobby Stores, 573 U.S. 682, 726 (2014)).

176 *Hobby Lobby*, 573 U.S. at 725 (emphasis added) (quoting *Gonzales*, 546 U.S. at 430–31).

177 *See infra* Section II.B.

178 *Hobby Lobby*, 573 U.S. at 705.

itself.[179] For that reason, and other reasons described in Part III, the qualified immunity defense should not be available to federal prison officials sued for damages under RFRA. Before turning to that analysis, however, it is useful to first examine the history, purpose, and critique of the qualified immunity defense.

II
The Doctrinal Dinosaur of Qualified Immunity

Qualified immunity has been a particularly hot topic in popular discourse about the Supreme Court and the racial justice movement since the killing of George Floyd in 2020.[180] Even prior to the current moment, qualified immunity had begun to face intense scrutiny from academics, activists, judges, and litigators.[181] As this Part explains in more detail, the concerted and well-founded criticisms of the doctrine should make it a "doctrinal dinosaur," a term coined by Justice Kagan to refer to the type of "legal last-man-standing" that will sometimes cause the Supreme Court to depart from *stare decisis*.[182] By borrowing the term here, this Article attempts to suggest that the oft-criticized doctrine should be entering its sunset period.

A. Section 1983 and Constitutional Claims

The doctrine of qualified immunity developed in direct response to the civil rights activism of the mid-twentieth century, which led to the resuscitation of § 1983.[183] Any modern discussion of qualified immunity, then, must begin with a primer on § 1983's purpose and impact. As the history described below reveals, similar to RFRA, it took time for the federal courts to fully actualize the intent of Congress in passing § 1983.

Section 1983 "has its origins in the Civil War and 'Reconstruction,' the brief era that followed the bloodshed. If the Civil War was the only war in our nation's history dedicated to the proposition that Black lives matter, Reconstruction was dedicated to the proposition that Black futures matter, too."[184] But the

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179 *See infra* Section III.C.

180 *See supra* note 2 and accompanying text.

181 *See* Katherine Mims Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, 71 Duke L.J. 1701, 1704 (2022) [hereinafter Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*] ("[E]ven before the recent spotlight on police violence, calls to rethink qualified immunity had become common among legal and political commentators[.]").

182 *See* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 458 (2015).

183 *See, e.g.*, Jamison v. McClendon, 476 F. Supp. 3d 386, 396–409 (S.D. Miss. 2020) (tracing the history of qualified immunity doctrine).

184 *Id.* at 397.

Reconstructionist efforts to protect and maintain the freedom and equality of the formerly enslaved through the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, among other pieces of legislation, led to "white supremacist backlash, terror, and violence."[185] Most significantly, the Ku Klux Klan formed and grew rapidly in response to the Reconstruction Amendments, spearheading a wave of racial terror meant to curb any progress towards equality.[186] Notably, "[m]any of the perpetrators of racial terror were members of law enforcement."[187]

Congress responded to this "reign of terror" by passing 42 U.S.C. § 1983 as part of the Civil Rights Act of 1871, also known as the Ku Klux Klan Act.[188] In particular, Congress sought to open the federal courts to victims of constitutional rights violations perpetrated by state and local authorities.[189] The Act's legislative history made clear Congress's intent that damages be an available remedy for these rights violations,[190] and the original statutory text made similarly clear that Congress intended to "displace any common-law immunities."[191]

Unfortunately, for nearly a century after its passage, the federal courts ignored § 1983's legislative history and limited the reach of the Reconstruction Amendments and their accompanying legislation.[192] But as "[l]ynchings, race riots, and other forms of unequal treatment

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185 *Id.* at 398.

186 *Id.* at 398–99. The "savagery and depravity" experienced by Black people in the years after emancipation are hard to comprehend, and the number of people "beaten, flogged, mutilated, and murdered in the first years of emancipation will never be known." *Id.* at 399 (quoting LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 276–77 (1979)). "[A]t least 2,000 Black women, men, and children were killed by white mobs in racial terror lynchings during Reconstruction. Thousands more were assaulted, raped, or injured in racial terror attacks between 1865 and 1877." *Id.* at 399 n.73 (citing *Reconstruction in America*, EQUAL JUST. INITIATIVE, https://eji.org/report/reconstruction-in-america [https://perma.cc/5DVB-ACA4]).

187 *Jamison*, 476 F. Supp. 3d at 399 (citing, inter alia, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 434 (1988)) ("Much Klan activity took place in those Democratic counties where local officials either belonged to the organization or refused to take action against it.").

188 42 U.S.C. § 1983; *Jamison*, 476 F. Supp. 3d at 399; *see also* Godfrey, *supra* note 10, at 931 (summarizing this history of 42 U.S.C. § 1983).

189 Godfrey, *supra* note 10, at 931; *see also Jamison*, 476 F. Supp. 3d at 400 ("While the Act as a whole 'had the Klan "particularly in mind,"' Section 1 recognized the local officials who created the 'lawless conditions' that plagued 'the South in 1871.'").

190 *See* Godfrey, *supra* note 10, at 931 (quoting Monroe v. Pape, 365 U.S. 167, 179–80 (1961) as authorizing a cause of action even for nominal damages).

191 Reinert, *supra* note 2, at 204.

192 *See Jamison*, 476 F. Supp. 3d at 400–01, 400 n.91 (noting that this judicial embrace of white supremacy "is not surprising since many of these judges were members of the Klan, supporters of the Confederacy, or both").

were permitted to abound in the South and elsewhere,"[193] civil rights activists continued to mount "legal assault[s] on Jim Crow"[194] to "realize the broken promise of Reconstruction."[195]

Due in large part to this continued activism, the Supreme Court finally recognized the purpose of § 1983 nearly a century after its passage.[196] In the 1961 case *Monroe v. Pape*, the Court expressly recognized a cause of action against state and local officials for constitutional violations under § 1983.[197] The statute's "purpose was finally realized" as the federal courts became the "guardians of the people's federal rights."[198] Almost immediately, litigation brought pursuant to § 1983 began to steadily expand, becoming "one of the largest sources of federal court business."[199] But, "[j]ust as the 19th century Supreme Court neutered the Reconstruction-era civil rights laws, the 20th century Court limited the scope and effectiveness of Section 1983 after *Monroe v. Pape*," in part through the creation of the qualified immunity doctrine.[200]

B. History and Purpose of Qualified Immunity

The doctrine of qualified immunity first appeared in Supreme Court jurisprudence just six short years after the Court opened the federal courthouse doors to victims of civil rights violations in *Monroe*.[201] In the 1967 case of *Pierson v. Ray*, the Supreme Court allowed a group of police officers to assert a "good faith" defense to allegations of constitutional violations.[202] That good faith defense allowed the officers to escape liability for arresting a group of ministers seeking to use a bus terminal waiting room and accompanying restaurant designated "White Only."[203] Because the police officers

193 *Id.* at 401 (quoting Katherine A. Macfarlane, *Accelerated Civil Rights Settlements in the Shadow of Section 1983*, 2018 UTAH L. REV. 639, 662 (2018)).

194 JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION, at xvii (1994) (recounting Thurgood Marshall's drafting of a charter for what would become the National Association for the Advancement of Colored People (NAACP) Legal Defense and Educational Fund, Inc. (LDF)).

195 *Jamison*, 476 F. Supp. 3d at 401 (describing the work of civil rights groups to challenge "oppressive laws and practices of discrimination").

196 *Id.* at 401–02.

197 365 U.S. 167, 187 (1961).

198 *Jamison*, 476 F. Supp. 3d at 401 (quoting Haywood v. Drown, 556 U.S. 729, 735 (2009)).

199 *Monroe v. Pape*, FED. JUD. CTR., https://www.fjc.gov/history/timeline/monroe-v-pape [https://perma.cc/8YFQ-WGMM].

200 *Jamison*, 476 F. Supp. 3d at 402.

201 *See* Pierson v. Ray, 386 U.S. 547 (1967).

202 *Id.* at 557.

203 *Id.* at 552–53.

observed the ministers enter the room and believed that such entry violated a lawful statute (albeit a statute the Supreme Court later found unconstitutional), the Supreme Court allowed the officers to raise their good faith defense as a factual question to be presented to the jury.[204] In deciding to afford the officers this defense, the Court appeared primarily concerned with the consequences of saddling police officers with financial liability in situations where they are faced with the quandary of enforcing an unconstitutional law or disobeying direct orders.[205]

To support its grant of limited immunity to police officers, the *Pierson* Court looked to § 1983's legislative record, recent precedent extending legislative immunity to claims brought under § 1983, and state common-law doctrine governing non-constitutional tort claims.[206] As Professor Alexander Reinert has recently explained, the *Pierson* Court found that absolute judicial and legislative immunity was well-established at common law, and the Court found no clear revocation of common-law immunities by Congress when it enacted § 1983.[207] Nevertheless, Professor Reinert explains, "the Court concluded that while there was no tradition in the common law of an 'absolute and unqualified immunity,' a more limited good-faith immunity was appropriate" for police officers.[208] The source of that immunity, according to the Court, could be found in state tort law.[209] Therefore, because the police officers acted under Mississippi law, and Mississippi recognized a good faith immunity for false arrest and imprisonment claims, such limited immunity should extend to § 1983

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[204] *Id.* at 555–58.

[205] *See id.* at 555 ("A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he had probable cause, and being mulcted in damages if he does."); *see also* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 13 (2017) (explaining the initial impetus of the qualified immunity defense).

[206] *See* Reinert, *supra* note 2, at 209–10 (describing the *Pierson* court's analysis).

[207] *Id.* at 209 (explaning that "the Court found no 'clear indication' in the legislative record that Congress intended to abrogate 'wholesale all common-law immunities'") (quoting *Pierson*, 386 U.S. at 554).

[208] *Id*. (quoting *Pierson*, 386 U.S. at 555).

[209] *Pierson*, 386 U.S. at 556–57 ("[Section] 1983 should be read against the backdrop of tort liability that makes a man responsible for the natural consequences of his actions. Part of this background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause." (internal citations and quotations omitted)).

claims.[210] But this limited "good faith" defense and the rationale put forth to justify it would soon expand.[211]

In 1982, the Supreme Court dramatically enlarged the scope of the qualified immunity defense and the policy goals it intended to realize by allowing the defense.[212] *Harlow v. Fitzgerald* established the modern qualified immunity doctrine: A government actor is shielded from liability for his unconstitutional act so long as the right at issue has not been clearly established in a prior case.[213] *Harlow*, then, "rejected the common-law 'good-faith' version of qualified immunity applied in *Pierson* and its progeny, choosing instead an objective test that focused on the reasonableness of the officer's behavior in light of 'clearly established' law."[214]

To justify this expansive defense, the *Harlow* Court abandoned its focus on the common law defenses available to government officials and instead turned its attention to policy rationales justifying a need to protect government officials from suit.[215] The Court reasoned qualified immunity was necessary not only to protect government officials from financial liability, but also to protect against "the diversion of official energy from pressing public issues," "the deterrence of able citizens from acceptance of public office," and "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"[216]

Thus, since *Harlow*, qualified immunity has operated not as a factual defense a jury should consider (as imagined in *Pierson*) but as a legal defense that can wholly protect an official from the burdens of

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[210] *See id.* ("[T]he defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983.").

[211] *See, e.g.*, Reinert, *supra* note 2, at 210–11 (discussing the expansion of *Pierson*'s good faith immunity to Ohio's governor and other state officials after the National Guard's killing of four students during anti-war protests at Kent State University in *Scheuer v. Rhodes*, 416 U.S. 232 (1974) and to school board members involved in student disciplinary proceedings in *Wood v. Strickland*, 420 U.S. 308 (1975)).

[212] *See* Harlow v. Fitzgerald, 457 U.S. 800, 813–15, 817–19 (1982).

[213] *Id.* at 818.

[214] Reinert, *supra* note 2, at 212.

[215] Gary S. Gilden, *Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of* Harlow v. Fitzgerald *to Section 1983 Actions*, 38 EMORY L.J. 369, 383 (1989) (noting that "[t]he *Harlow* opinion did not pretend to tie its widening of the qualified immunity to a parallel expansion of the common law defense for government officials, but instead rested entirely on the Court's perception of the demands of public policy").

[216] Schwartz, *supra* note 205, at 14 (quoting *Harlow*, 457 U.S. at 814).

suit.[217] In other words, qualified immunity as it exists today offers much broader protections from suit than *Pierson*'s good-faith defense.[218] In *Harlow*, the Court justified this expansive protection from suit by characterizing its qualified immunity decisions as an "attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also 'the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'"[219] But critics have long noted that the actual outcomes of qualified immunity cases don't often demonstrate such a balancing.[220] The next Section briefly summarizes some of the multitudes of criticisms that have been levied against qualified immunity in the decades that have followed *Harlow*.

C. Criticisms of Qualified Immunity

In August 2020, just a few months after George Floyd's murder, Judge Carlton W. Reeves of the United States District Court of the Southern District of Mississippi issued a seminal decision in a sadly routine civil rights case.[221] Although Judge Reeves reluctantly[222] granted qualified immunity to a police officer who had subjected Clarence Jamison, "a Black man driving a Mercedes convertible," to a grueling roadside search of his car, he cautioned that "[i]mmunity is not exoneration" and bemoaned "the harm done to the nation by this manufactured doctrine."[223] In a robust seventy-page opinion, Judge Reeves then described the qualified immunity doctrine's myriad problems and highlighted some particularly egregious cases where qualified immunity protected officers from liability:

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[217] Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2069 (2018) ("[B]ecause qualified immunity is an immunity from suit and not just a defense to liability, defendants who assert the defense are entitled to many procedural protections.").

[218] William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 55 (2018) (noting that qualified immunity "is much broader than a good-faith defense").

[219] *Harlow*, 457 U.S. at 807 (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).

[220] *See, e.g.*, Jamison v. McClendon, 476 F. Supp. 3d 386, 403–04 (S.D. Miss. 2020) (providing a list of cases demonstrating "that the [Supreme] Court has dispensed with any pretense of balancing competing values"); *see also* Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 263 (1995) (noting that the "standard-like formulation of qualified immunity allocates great discretion to" federal judges).

[221] *Jamison*, 476 F. Supp. 3d at 390–91.

[222] *See id*. at 392 (noting that he was "required to apply the law as stated by the Supreme Court," but warning that "[q]ualified immunity has served as a shield for [police] officers, protecting them from accountability").

[223] *Id*. at 391–92.

> Our courts have shielded a police officer who shot a child while the officer was attempting to shoot the family dog; prison guards who forced a prisoner to sleep in cells "covered in feces" for days; police officers who stole over $225,000 worth of property; a deputy who body-slammed a woman after she simply "ignored [the deputy's] command and walked away"; an officer who seriously burned a woman after detonating a "flashbang" device in the bedroom where she was sleeping; an officer who deployed a dog against a suspect who "claim[ed] that he surrendered by raising his hands in the air"; and an officer who shot an unarmed woman eight times after she threw a knife and glass at a police dog that was attacking her brother.[224]

Judge Reeves is not alone in his criticism of qualified immunity. In the past several years, qualified immunity has been the subject of judicial,[225] academic,[226] and popular criticism.[227] The grounds for that

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[224] *Id.* at 403–04 (citing Corbitt v. Vickers, 929 F.3d 1304, 1323 (11th Cir. 2019); Taylor v. Stevens, 946 F.3d 211, 220 (5th Cir. 2019), *vacated*, Taylor v. Riojas, 141 S. Ct. 52 (2020); Jessop v. City of Fresno, 936 F.3d 937, 942 (9th Cir. 2019); Kelsay v. Ernst, 933 F.3d 975, 980 (8th Cir. 2019); Dukes v. Deaton, 852 F.3d 1035, 1039 (11th Cir. 2017); Baxter v. Bracey, 751 F. App'x 869, 872 (6th Cir. 2018); Willingham v. Loughnan, 261 F.3d 1178, 1181 (11th Cir. 2001), *vacated*, 537 U.S. 801 (2002). Notably, the Supreme Court reversed the grant of qualified immunity in *Taylor* (the feces-covered cell case) after Judge Reeves issued his opinion, but this reversal occurred six years after Trent Taylor filed his case pro se and two lower courts had granted immunity to the prison officials responsible for his conditions. *See* Joanna C. Schwartz, *Civil Rights Without Representation*, 64 WM. & MARY L. REV. 641, 670–75 (2023) (describing Mr. Taylor's pro se litigation history).

[225] *See, e.g.*, Ziglar v. Abbasi, 582 U.S. 120, 157 (2017) (Thomas, J., concurring in part and concurring in the judgment) (expressing "growing concern with our qualified immunity jurisprudence"); Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (criticizing the Court's "one-sided approach to qualified immunity" and its use as "an absolute shield for law enforcement").

[226] *See, e.g.*, Reinert, *supra* note 2, at 204–05 (arguing that "there is no foundation to the interpretive premise upon which qualified immunity rests"); Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, *supra* note 181, at 1704 (asserting that "[q]ualified immunity, at least in its current form, should have no place in federal law"); Patrick Jaicomo & Anya Bidwell, *Recalibrating Qualified Immunity: How* Tanzin v. Tanvir*,* Taylor v. Riojas*, and* McCoy v. Alamu *Signal the Supreme Court's Discomfort with the Doctrine of Qualified Immunity*, 112 J. CRIM. L. & CRIMINOLOGY 105, 108 (2022) (positing that the current approach to qualified immunity "would have been unrecognizable to the founders"); Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. 305, 348 (2020) (demonstrating that "eliminating qualified immunity would return courts to the more limited role that they played in the early republic"); Joanna C. Schwartz, *Qualified Immunity's Selection Effects*, 114 NW. L. REV. 1101, 1163 (2020) (using empirical research to demonstrate that qualified immunity is failing to meet its policy goals); Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1460–61 (2019) [hereinafter Crocker, *Qualified Immunity and Constitutional Structure*] (recognizing that *Harlow* involved a *Bivens* claim and providing an "account of the doctrine that sounds in constitutional structure and resonates throughout the relevant jurisprudence" to support rejecting qualified immunity); Lynn Adelman, *The Erosion of Civil Rights and What to Do About It*, 2018 WIS. L. REV. 1, 6 (2018) (pointing to the extreme harms qualified immunity doctrine has wrought on civil

criticism range from qualified immunity's unfounded basis in history and text, to its practical implications, to its ineffectiveness in meeting the Court's policy goals as expressed in *Harlow*.[228] While a comprehensive survey of the criticisms levied against qualified immunity since *Harlow* is beyond the scope of this piece, this Section will briefly summarize some pertinent critiques.

First, many scholars, advocates, and jurists claim that qualified immunity runs afoul of the text and purpose of § 1983.[229] Most recently, Professor Alexander Reinert unearthed the original statutory text of the 1871 Civil Rights Act, the statute which created § 1983.[230] The original text makes clear that Congress intended to

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rights cases); Baude, *supra* note 218, at 47 ("The modern doctrine of qualified immunity is inconsistent with conventional principles of law applicable to federal statutes[.]"); Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1935 (2018) (urging the Supreme Court to adopt the doctrine of respondeat superior in § 1983 litigation, which "would 'fix' the doctrine of qualified immunity by making it largely irrelevant"); Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1937–38 (2018) (highlighting "qualified immunity's foundational jurisprudential tensions" to demonstrate that the "doctrine's central dilemmas" are intractable problems without solution); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1799–1800 (2018) (demonstrating that qualified immunity does little to protect government officials from financial liability or the burdens of suit).

227 *See, e.g.*, Billy Binion, *The Cops Who Killed Tyre Nichols Could Be Convicted of Murder and* Still *Get Qualified Immunity*, REASON (Feb. 8, 2023, 10:29 AM), https://reason.com/2023/02/08/the-cops-who-killed-tyre-nichols-could-be-convicted-of-murder-and-still-get-qualified-immunity [https://perma.cc/6Z2A-35ZA] (arguing that qualified immunity often prevents victims of police brutality from being able to hold officers accountable); Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point amid Protests*, N.Y. TIMES (Oct. 18, 2021), https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html [https://perma.cc/G4PL-S5B9] (noting that advocates see qualified immunity "as one of the biggest problems with policing"); Kimberly Kindy, *Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill*, WASH. POST (Oct. 7, 2021, 6:00 AM), https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html [https://perma.cc/963R-HMGR] (highlighting state legislators' efforts to eliminate qualified immunity); Jordain Carney, *GOP Senator to Offer Measure Changing Qualified Immunity for Police*, THE HILL (June 17, 2020, 1:39 PM), https://thehill.com/homenews/senate/503195-gop-senator-to-offer-measure-changing-qualified-immunity-for-police [https://perma.cc/TUM2-8DLS] (discussing legislative reform to qualified immunity aimed at ensuring police transparency and accountability); Alan Feuer, *Advocates from Left and Right Ask Supreme Court to Revisit Immunity Defense*, N.Y. TIMES (July 11, 2018), https://www.nytimes.com/2018/07/11/nyregion/qualified-immunity-supreme-court.html [https://perma.cc/7X9Y-ZLJN] (reporting on a bipartisan group of criminal justice advocates insisting that the Court revisit qualified immunity to increase officer accountability and public trust in the police).

228 *See* Reinert, *supra* note 2, at 203–04 (outlining critical arguments against qualified immunity).

229 *See id.* at 203 n.3.

230 *See id.* at 235 (describing the distinction between the version of § 1983 one finds in the United States Code and the version in the Civil Rights Act of 1871 as enacted).

create constitutional liability for state actors "*notwithstanding* any state law to the contrary."[231] The implications of this lost language, according to Professor Reinert, are that "state law immunity doctrine, however framed, has no place in Section 1983," and the *Pierson* Court's original derivation of the doctrine from Mississippi common law was wrong.[232]

But even without looking to the original statutory text, other scholars have long argued that "immunity doctrine is inconsistent with Section 1983's text and purpose."[233] In 2018, Professor William Baude published a seminal article challenging the lawfulness of qualified immunity, which demonstrates that the alleged common-law basis upon which qualified immunity relies is suspect upon historical examination of the rules that existed "when Section 1983 was adopted."[234] Justice Clarence Thomas took note of a draft of Professor Baude's piece in his 2017 concurrence in *Ziglar v. Abbasi*, noting that modern qualified immunity doctrine has become untethered to both "the common-law backdrop against which Congress enacted" the statute and the text itself.[235]

In addition to these textual and historical attacks on qualified immunity doctrine, jurists and scholars have also criticized the practical results of allowing government actors to escape liability for constitutional violations.[236] Civil rights practitioners have long decried the doctrine as detrimental to the laudable goal of vindicating the constitutional rights of poor and minority clients,[237] and advocates have long recognized that potential meritorious cases never reach a courtroom because of the doctrine's deterrent effect:

> The harsh and unpredictable nature of qualified immunity also deters meritorious lawsuits from being filed in the first place. In

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231 *Id.*

232 *Id.* at 236.

233 *Id.* at 203 (citing Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 57–70 (1989)) (textual challenge); *see also* Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 774, 794 (1987) (purpose challenge).

234 Baude, *supra* note 218, at 51.

235 Ziglar v. Abbasi, 582 U.S. 120, 159 (2017) (Thomas, J., concurring in part and concurring in the judgment); *see also* Baxter v. Bracey, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting) ("The text of § 1983 'ma[kes] no mention of defenses or immunities.'" (quoting *Ziglar*, 582 U.S. at 157 (Thomas, J., concurring in part and concurring in the judgment))).

236 *See, e.g.*, Reinert, *supra* note 2, at 203 (noting claims that qualified immunity "imposes insuperable barriers to relief in important civil rights litigation" and leaves a questionable gap "between rights and remedies").

237 *See, e.g.*, Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 494–95 (2011) (concluding that qualified immunity limits the innovation of civil rights litigation).

> some cases, even when potential clients have a strong argument on the merits, experienced civil rights attorneys may nevertheless recognize that the limited case law in their jurisdiction will preclude them from being able to identify "clearly established law." Or, the cost and uncertainty inherent in the doctrine might mean that prosecuting a Section 1983 case is simply not worth the time and effort even if an attorney could, in principle, prevail on the merits.[238]

Dean Erwin Chemerinsky has argued that this leads to a lack of accountability that ultimately protects bad cops.[239] Similarly, and perhaps most notably, Justice Sonia Sotomayor has criticized the role qualified immunity has played in supporting "a 'culture' of '"shoot first, think later" . . . policing,'"[240] which results in "a purportedly 'qualified' immunity" turning into "an absolute shield for unjustified killings, serious bodily harm, and other grave constitutional violations."[241] These types of untenable results led Justice Sotomayor to end the 2022 Supreme Court term with a call for the Court to "reexamine the doctrine of qualified immunity and the assumptions underlying it" because litigants and "society deserve better from our courts."[242]

Not only is the doctrine criticized for its practical effects, it is also viewed as failing to meet the policy purposes outlined by the Supreme Court in *Harlow*.[243] As Professor Joanna Schwartz has succinctly explained:

> The Court's qualified immunity decisions paint a clear picture of the ways in which the Court believes the doctrine should operate: it

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238 JAY R. SCHWEIKERT, CATO INST., QUALIFIED IMMUNITY: A LEGAL, PRACTICAL, AND MORAL FAILURE 10 (2020), https://www.cato.org/sites/cato.org/files/2020-09/pa-901-update.pdf [https://perma.cc/754S-NNR8].

239 *See* Erwin Chemerinsky, Opinion, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES (Aug. 26, 2014), https://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html [https://perma.cc/7AY3-E43Q].

240 Crocker, *Qualified Immunity, Sovereign Immunity, and Systemic Reform*, *supra* note 181, at 1714 (quoting Mullenix v. Luna, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting)).

241 N.S. v. Kansas City Bd. of Police Comm'ns, 143 S. Ct. 2422, 2424 (Mem.) (2023) (Sotomayor, J., dissenting) (opposing denial of certiorari and asserting that "[o]fficers are told 'that they can shoot first and think later,' because a court will find some detail to excuse their conduct after the fact.").

242 Lombardo v. City of St. Louis, 143 S. Ct. 2419 (Mem.), 2421 (2023) (Sotomayor, J., dissenting) (opposing denial of certiorari and highlighting the problem of courts granting "qualified immunity based on the clearly established prong without ever resolving the merits," which "inhibits the development of the law" because "[i]mportant constitutional questions go unanswered precisely because those questions are yet unanswered," leaving judges to "rely on that judicial silence to conclude there's no equivalent case on the books" (internal quotations and citations omitted)).

243 *See, e.g.*, Schwartz, *supra* note 205, at 8–12 (arguing that the policy rationales had become baseless, even if they had not been baseless at the time the Court decided *Harlow*).

> should be raised and decided at the earliest possible stage of the litigation (at the motion to dismiss stage if possible), it should be strong (protecting all but the plainly incompetent or those who knowingly violate the law), and it should, therefore, protect defendants from the time and distractions associated with discovery and trial in insubstantial cases.[244]

But Professor Schwartz's empirical study of civil rights cases filed in five federal district courts over a span of two years[245] showed that "qualified immunity rarely functions as expected," meaning that it does not dispose of cases at the earliest stage of litigation nor "protect defendants from the time and distractions associated with . . . trial."[246] Consequently, Professor Schwartz has suggested that it is both ill-suited and unnecessary to dispose of cases that lack merit, and it fails to "protect government officials 'from harassment, distraction, and liability.'"[247] Moreover, even in cases where government officials are unprotected by qualified immunity, those officials are not subjected to the financial ruin anticipated by the Supreme Court because they are nearly universally indemnified.[248]

Nevertheless, despite its critics, skeptics, and naysayers, qualified immunity doctrine persists and has been applied to cases outside the § 1983 context.[249] This extension of qualified immunity to non-constitutional claims is discussed in the next Section.

D. Qualified Immunity's Dubious Extension to Non-Constitutional Claims

To understand how qualified immunity, often cited as a defense to constitutional claims,[250] has been extended as a defense to statutory

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244 *Id.* at 48.

245 *See id.* at 19–25 (discussing study methodology).

246 *Id.* at 48.

247 *Id.* at 59 (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)).

248 *See, e.g.*, James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 566–67 (2020); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (finding that police officers paid less than one percent of the money spent by government bodies in damages to civil rights plaintiffs).

249 *See, e.g.*, Tapley v. Collins, 211 F.3d 1210, 1216 (11th Cir. 2000) (allowing the defense to proceed against a claim brought under the Federal Wiretap Act); Blake v. Wright, 179 F.3d 1003, 1012 (6th Cir. 1999) (same); Gonzalez v. Lee Cnty. Hous. Auth., 161 F.3d 1290, 1299 (11th Cir. 1998) (allowing the defense to proceed against a claim brought under the Fair Housing Act); Torcasio v. Murray, 57 F.3d 1340, 1343 (4th Cir. 1995) (allowing the defense with respect to Americans with Disabilities Act and Rehabilitation Act claims).

250 *See, e.g.*, Osagie K. Obasogie & Anna Zaret, *Plainly Incompetent: How Qualified Immunity Became an Exculpatory Doctrine of Police Excessive Force*, 170 U. PA. L. REV. 407, 432 (2022) (describing the *Pierson-Harlow* cases "that led qualified immunity to emerge as a viable defense to constitutional tort claims").

claims, we must first return to *Harlow*. Qualified immunity's expansive reach can in part be attributable to the express language that the *Harlow* Court used to announce its holding, which said that officers should be protected from suit unless they can be shown to have violated "clearly established *statutory* or constitutional rights."[251] As Justice Thomas has recognized, however, "*Harlow* involved an implied constitutional cause of action against federal officials, not a § 1983 action" and criticized the extension of its holding to § 1983 "without pausing to consider the statute's text."[252] But the *Harlow* Court made clear that it intended to extend its holding to § 1983 suits by including the following in a footnote:

> This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under 42 U.S.C. § 1983. We have found previously, however, that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials."[253]

Therefore, it is likely that the Court meant to use the language in *Harlow*'s holding about statutory claims to signal that it intended *Harlow*'s new qualified immunity test to extend beyond the *Bivens*-type constitutional claims at issue in *Harlow* to constitutional claims brought under § 1983.[254] This extension does not necessarily mean, however, that the *Harlow* Court intended its holding to extend qualified immunity doctrine to non-constitutional claims.

Nevertheless, lower federal courts have extended the availability of qualified immunity as a defense to federal statutory claims brought under the Fair Housing Act,[255] the Federal Wiretap Act,[256] and RFRA.[257] In allowing for these extensions of qualified immunity, the

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251 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (emphasis added).

252 Baxter v. Bracey, 140 S. Ct. 1862, 1863 (2020) (Thomas, J., dissenting).

253 *Harlow*, 457 U.S. at 818 n.30 (quoting Butz v. Economou, 438 U.S. 478, 504 (1978)).

254 *See* Crocker, *Qualified Immunity and Constitutional Structure*, *supra* note 226, at 1432–33 (explaining the extension of the *Harlow* standard to § 1983 claims, and detailing that most scholars have understood *Harlow* as extending the doctrine to constitutional claims brought under § 1983).

255 *See, e.g.*, Gonzalez v. Lee Cnty. Hous. Auth., 161 F.3d 1290, 1299 (11th Cir. 1998) (concluding that qualified immunity is an available defense).

256 *See, e.g.*, Tapley v. Collins, 211 F.3d 1210, 1216 (11th Cir. 2000); Blake v. Wright, 179 F.3d 1003, 1012–13 (6th Cir. 1999) (concluding that it would be illogical to extend the defense to constitutional claims but not to statutory claims). *But see* Berry v. Funk, 146 F.3d 1003, 1013 (D.C. Cir. 1998) (finding that when Congress creates a defense in a statute "it is hardly up to the federal court to graft common law defenses on top of those Congress creates").

257 *See, e.g.*, Ajaj v. Fed. Bureau of Prisons, 25 F.4th 805, 813 (10th Cir. 2022). The flaws of the Tenth Circuit's reasoning in *Ajaj* are discussed more fully in Section III.B. Notably, the *Ajaj* court relies on a footnote in *Gonzalez* that the *Ajaj* court believed showed the

lower federal courts have broadly concluded that Congress exhibited no intent to abrogate the defense of qualified immunity *available at common law* when enacting the statute at issue.[258] But, as Justice Thomas has recognized, modern qualified immunity doctrine "is no longer grounded in the common-law backdrop,"[259] so the lower courts' assumption of a common law defense to various statutory causes of action is not grounded in reality. In the specific instance of RFRA, the application of qualified immunity runs contrary to the precedential, textual, practical, and normative realities of the statute, as discussed in the next Part.

III
The Incongruence of Qualified Immunity as a Defense to RFRA Claims Against Federal Prison Officials

Since *Tanzin* announced that RFRA allows for damages claims against individual federal officials, the lower federal courts are now faced with the formidable task of grappling with whether and how the defense of qualified immunity applies to claims brought by people incarcerated in federal prisons under RFRA, particularly given the doctrinal framework understood to apply to RFRA claims brought by

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extension of qualified immunity to eight other federal statutes, but a review of those cites reveals several inaccuracies. *Id.* at 814 (citing *Gonzalez*, 161 F.3d at 1300 n.34). First, in *Lussier v. Dugger*, the only discussion of qualified immunity occurs in the *dissent* and occurs *after* the dissenting judge acknowledged that the Circuit had never found that individual capacity suits were available under the Rehabilitation Act of 1973. *See* Lussier v. Dugger, 904 F.2d 661, 672–73 (11th Cir. 1990). In *Cullinan v. Abramson*, the Sixth Circuit analyzed the defense of qualified immunity to Racketeer Influenced and Corrupt Organizations Act (RICO) claims without questioning whether the doctrine applied. *See* Cullinan v. Abramson, 128 F.3d 301, 309 (6th Cir. 1997). The Fifth Circuit did the same with regard to the Food Stamp Act of 1977 in *Cronen v. Texas Department of Human Services*, *see* Tex. Dep't Hum. Serv., 977 F.2d 934, 939 (5th Cir. 1992), as did the Second Circuit in *Christopher P. ex rel. Norma P. v. Marcus*, 915 F.2d 794, 798 (2d Cir. 1990), when analyzing the defense's application to the Education for All Handicapped Children Act of 1975. Finally, the *Ajaj* court also ignored that one of the cases cited in *Gonzalez* found that "qualified immunity is *not* an available defense in retaliation claims brought under the False Claims Act." *Gonzalez*, 161 F.3d at 1300 n.34 (emphasis added) (citing Samuel v. Holmes, 138 F.3d 173, 178 (5th Cir. 1998)).

[258] *See, e.g.*, *Gonzalez*, 161 F.3d at 1299 (finding that nothing in the text or legislative history of the Fair Housing Act demonstrated an intent to abrogate qualified immunity); *Blake*, 179 F.3d at 1012 (concluding "that the Court intended to apply qualified immunity to statutory violations"). *But see* Mitchell v. Forsyth, 472 U.S. 511, 558 (1985) (Brennan, J., concurring in part and dissenting in part) (making clear that the qualified immunity question "arises only when considering the legality of the wiretap *under the Constitution*" (emphasis added)).

[259] Ziglar v. Abbasi, 582 U.S. 120, 159 (2017) (Thomas, J., concurring in part and concurring in the judgment).

incarcerated people since *Holt*.[260] As outlined below, however, the qualified immunity defense is so incongruent to the history, text, and purpose of RFRA that it should not be allowed.

This argument rests on four principal claims. First, federal courts cannot remain true to the Supreme Court's analysis in *Tanzin* and reach the conclusion that qualified immunity should remain an available defense. Second, Congress provided an affirmative defense to government actors in the RFRA statute, thereby signaling its disfavor of qualified immunity as a defense. Third, the burden-shifting framework created by Congress's inclusion of an affirmative defense in the statute makes application of modern qualified immunity doctrine unworkable in RFRA cases. And fourth, allowing qualified immunity to block RFRA claims asserted against federal prison officials runs contrary to the history and purpose of RFRA. Each of these claims is further expounded upon below.

A. Tanzin*'s Textual Analysis, Examination of the Historical Availability of Damages as a Remedy, and Rejection of the Government's Policy-Laden Arguments*

In recent decades, the Supreme Court has been increasingly concerned with respecting separation of powers principles, and it has repeatedly cautioned federal courts not to appropriate legislative power.[261] In issuing this warning, the Court has reminded lower courts that "lawmaking involves balancing interests and often demands compromise," and that courts are ill-suited to evaluate the range of policy considerations that a legislative body must consider when enacting laws.[262] The Court has most often invoked these words of caution in *Bivens* cases where a party seeks a damages remedy for a constitutional violation perpetrated by a federal official,[263] but the Court used similar language in its analysis in *Tanzin*.

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[260] *See, e.g.*, Sabir v. Williams, 52 F.4th 51, 59 (2d Cir. 2022); *Ajaj*, 25 F.4th at 813.

[261] *See, e.g.*, Hernandez v. Mesa, 140 S. Ct. 735, 741 (2020) (cautioning that "when a court recognized an implied claim for damages on the ground that doing so furthers the 'purpose' of the law, the court risks arrogating legislative power"); Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 373–74 (1986) (reminding lower courts to first look at the "plain language of the statute itself" to determine congressional intent because "the final language of the legislation may reflect hard-fought compromises").

[262] *See Hernandez*, 140 S. Ct. at 742; *see also* Egbert v. Boule, 142 S. Ct. 1793, 1802–03 (2022) (listing policy considerations that Congress is more competent to consider than the judiciary).

[263] *See, e.g.*, *Hernandez*, 140 S. Ct. at 742–43; *Egbert*, 142 S. Ct. at 1802 (cautioning that "creating a cause of action is a legislative endeavor"); *Ziglar*, 582 U.S. at 135–36 (explaining that Congress is far better positioned to decide when to provide for a damages remedy).

The Court's decision in *Tanzin*, as discussed in the Introduction, is a textualist analysis that resists the policy-laden arguments put forth by the government in support of its position that damages should not be an available remedy under the statute.[264] The Court first looked to RFRA's text to determine whether the statute unambiguously authorized suits against individual federal officials in their personal capacities.[265] Answering in the affirmative, the Court pointed to Congress's use of the phrase "persons acting under color of law" to define "a government" as evidence of congressional intent to allow the same type of suits under RFRA as those that are allowed under § 1983, which uses identical language and allows for personal capacity suits against government actors.[266]

Thus, having determined that suits could be brought against individual government officials, the Court turned its attention to the meaning of "appropriate relief" in the statute.[267] Finding no statutory definition, the Court looked for "the phrase's plain meaning at the time of enactment," concluding that damages have historically been available against government officials and RFRA's origin story "made clear that [Congress] was reinstating both the pre-*Smith* substantive protections of the First Amendment *and* the right to vindicate those protections by a claim."[268]

In reaching this conclusion about the meaning of "appropriate relief" in the RFRA statute, the *Tanzin* Court rejected the government's policy-laden arguments against a damages remedy by stating in relevant part: "To the extent the Government asks us to create a new policy-based presumption against damages against individual officials, we are not at liberty to do so. *Congress is best suited to create such a policy. Our task is simply to interpret the law as an ordinary person would*."[269] Thus, the *Tanzin* Court returned to the separation of powers' theme invoked so often in the *Bivens* cases: it is Congress, not the Court, that is best suited "to determine whether, and the extent to which, monetary and other liabilities should be imposed on individual officers and employees of the Federal Government."[270]

This same reasoning and rejection of the Court as a policymaking body should apply to the availability of qualified immunity as a

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264 *See* Tanzin v. Tanvir, 141 S. Ct. 486, 493 (2020) (declining to "create a new policy-based presumption against damages against individual officials").

265 *Id.* at 490.

266 *Id.*; *see also* Jaicomo & Bidwell, *supra* note 226, at 137 (summarizing the *Tanzin* Court's textual analysis of the phrase "persons acting under color of law").

267 *See Tanzin*, 141 S. Ct. at 491.

268 *Id.* at 491–92.

269 *Id.* at 493 (emphasis added).

270 Ziglar v. Abbasi, 582 U.S. 120, 134 (2017).

defense to RFRA claims. That is, federal courts considering the applicability of the qualified immunity defense should follow the Supreme Court's lead in *Tanzin*, where the unanimous Court examined RFRA's text, its legislative history, and the historical availability of damages against individual government officials.[271] Doing so leads to the inevitable conclusion that Congress did not intend to allow for a qualified immunity defense in the statute.

As to the text and legislative history of RFRA, nothing in the statutory text indicates that Congress intended to confer any immunities on government actors who impose substanial burdens on religious exercise, and the legislative history makes clear that Congress wanted RFRA to provide as expansive protections for religious rights as possible.[272] The difficult question then becomes whether the historical availability of damages against individual government officials carries with it a concomitant history of immunity available to those individuals.

A simplistic answer to this question might be to point to the *Tanzin* Court's invocation of the identical language used in RFRA and § 1983 to support the conclusion that the Court would readily allow § 1983's best-known defense—qualified immunity—to be similarly extended to RFRA. But the rest of *Tanzin*'s analysis, the Court's hesitance to wade into the policymaking purview of Congress, and signals from some members of the Court that the doctrinal dinosaur of qualified immunity needs to be revisited call this rudimentary conclusion into question.

First, the *Tanzin* Court cited a number of cases to "establish the historical availability of damages" as a remedy.[273] As Patrick Jaicomo and Anya Bidwell have astutely observed, these same cases also establish "the historical *un*availability of court-created immunities" like qualified immunity.[274] In addition to relying on cases that should call into question qualified immunity's historical basis, the *Tanzin* Court flatly rejected the government's request to use "the policy decisions

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[271] *See Tanzin*, 141 S. Ct. at 491–92; *see also* Jaicomo & Bidwell, *supra* note 226, at 137 (noting "[t]he Court also explored the historical role damages played against individual government officials" in *Tanzin*).

[272] *See supra* Part I.

[273] Jaicomo & Bidwell, *supra* note 226, at 139; *see also Tanzin*, 141 S. Ct. at 491 (citing Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804) (allowing damages against a navy captain); Elliott v. Swartwout, 35 U.S. 137, 150 (1836) (allowing damages against a tax collector); Mitchell v. Harmony, 54 U.S. 115, 137 (1851) (allowing damages against an army officer); Buck v. Colbath, 70 U.S. 334, 347 (1865) (allowing damages against a U.S. marshal); Belknap v. Schild, 161 U.S. 10, 25–27 (1896) (finding damages against federal officers to be appropriate in some cases); Philadelphia Co. v. Stimson, 223 U.S. 605 (1912) (same)).

[274] Jaicomo & Bidwell, *supra* note 226, at 139.

underlying the Court's creation of qualified immunity" to create "a similar exemption for damages under RFRA."[275] In making this request, the government "even cit[ed] *Harlow* and other qualified immunity cases for the proposition that damages claims would prevent government officials from properly discharging their duties."[276] Unmoved by these arguments, Justice Thomas reiterated that there "may be policy reasons why Congress may wish to shield Government employees from personal liability, and Congress is free to do so. But there are no constitutional reasons why we must do so in its stead."[277] Thus, the analysis in *Tanzin* already implictly rejected many of the policy rationales for allowing a qualified immunity defense.

Second, as described above, the Court has become increasingly hesitant to usurp the legislature's role in deciding whether and when government actors should be liable in damages for violations of federal law,[278] and Part II highlighted some of the calls by members of the Court to revisit qualified immunity doctrine.[279] Perhaps one of the most important of those calls for purposes of RFRA is Justice Thomas's dissent in *Baxter v. Bracey*, to which Jaicomo and Bidwell have pointed for its use of the same cases cited in *Tanzin* to demonstrate the historical availability of damages as a remedy against government actors.[280]

Baxter involved a petition for certiorari that asked the Supreme Court to reverse the Sixth Circuit Court of Appeals's grant of qualified immunity.[281] The Court denied the certiorari petition, and Justice Thomas authored a dissent in which he stated that he would grant the petition in order to review whether qualified immunity should apply to § 1983 claims at all.[282]

In *Baxter*, Justice Thomas engaged in a similar analysis to the one he would undertake in *Tanzin*. First, he examined § 1983's text to conclude that it does not mention immunities.[283] Then, after recounting the development of modern qualified immunity doctrine, he turned to the historical backdrop in which Congress enacted § 1983, concluding

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[275] *Id.* at 138.

[276] *Id.* (citing Petition for Writ of Certiorari at 13–14, *Tanzin*, 141 S. Ct. 486 (2020) (No. 19-71)) (other citations omitted).

[277] *Tanzin*, 141 S. Ct. at 493.

[278] *See, e.g.*, Ziglar v. Abbasi, 582 U.S. 120, 133–34 (2017) (invoking separation-of-powers principles to caution courts against creating liability for federal officials).

[279] *See supra* Part II.

[280] *See* Jaicomo & Bidwell, *supra* note 226, at 139 (citing Baxter v. Bracey, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from denial of certiorari)).

[281] *See Baxter*, 140 S. Ct. at 1862 (Thomas, J., dissenting from denial of certiorari).

[282] *Id.* ("Because our § 1983 qualified immunity doctrine appears to stray from the statutory text, I would grant this petition.").

[283] *See id*. at 1862–63.

that there is no historical basis for the modern iteration of the doctrine.[284] In reaching this conclusion, he noted that at the time Congress enacted § 1983, "officials were not *always* immune from liability for their good-faith conduct," relying on at least one of the cases he also relied on in *Tanzin* to conclude that damages have long been an available remedy.[285] In that case, *Little v. Barreme*, the Supreme Court found a Navy captain "answerable in damages" when he unlawfully seized another vessel upon orders from the President of the United States.[286] The Navy captain enjoyed no immunity, even though he had a good-faith belief in the lawfulness of orders from the President, "whose High duty it is to 'take care that the laws be faithfully executed.'"[287] Thus, the historical availability of a damages remedy does not necessarily imply the historical availability of an immunity defense.

In critiquing the development of modern qualified immunity doctrine as articulated in *Harlow*, Justice Thomas pointed to the Supreme Court's abandonment of an approach focused on "specific [historical] analogies to the common law" for an immunity doctrine formulated from policy and "practical considerations."[288] But *Tanzin* reminds lower federal courts that it is Congress's job, not the courts' role, to decide policy issues such as the availability of a damages remedy or a qualified immunity defense.[289] In matters of statutory interpretation, the courts are confined by what Congress has said unless Congress has acted contrary to its constitutional authority. With RFRA, the Supreme Court has already confirmed that Congress acted within its authority regarding the federal government.[290] So, under *Tanzin*, unless the statutory text says otherwise, the federal courts should not read a policy-laden qualified immunity defense into the RFRA statute.

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[284] *See id*. at 1864 ("There likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe.").

[285] *Id*. (citing Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804)).

[286] *Little*, 6 U.S. (2 Cranch) at 170.

[287] *Id*. at 177.

[288] *Baxter*, 140 S. Ct. at 1863.

[289] *See* Tanzin v. Tanvir, 141 S. Ct. 486, 493 (2020) (expressing that Congress was better suited than the Court to "create a new policy-based presumption against damages against individual officials").

[290] *See id.*; City of Boerne v. Flores, 521 U.S. 507, 519, 535–36 (1997) (finding Congress exceeded its authority in RFRA with regard to its applicability to state and local governments but was within its authority as applied to the federal government).

B. RFRA's Affirmative Defense

Not only does the text of RFRA fail to identify qualified immunity as an available defense, the statute itself *does* contain an explicit affirmative defense, which the Supreme Court recognized in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*.[291] That defense requires the government official subject to suit to plead and prove that they had a compelling government interest in burdening a plaintiff's religious practice and that the burden imposed was the least restrictive means of honoring that interest.[292] Nothing in the RFRA statute expressly states or implies that qualified immunity should be an additional defense available to the government actor. Thus, federal courts should heed Justice Thomas's warning in *Tanzin* that judges are not "at liberty" "to create a new policy-based presumption against damages against individual officials."[293] Because the Supreme Court made clear that specific policy concerns drove its decision in *Harlow*, allowing a qualified immunity defense to RFRA claims would be engaging in the type of judicial policymaking that the *Tanzin* Court warned against.[294]

The United States Court of Appeals for the District of Columbia Circuit has recognized the impropriety of a federal court applying common law defenses when analyzing claims brought under congressional statutes where Congress has created statutory defenses.[295] In reaching this conclusion, the D.C. Circuit explained that "[q]ualified immunity is typically invoked in two types of cases: *Bivens* actions—constitutional torts brought against federal officials and claims brought against state officers under 42 U.S.C. § 1983."[296] Such immunity, the court said, "is understandable" because "these causes of action were largely 'devised by the Supreme Court without any legislative or constitutional (in the sense of positive law) guidance.'"[297] In contrast, "[w]hen Congress itself provides for a defense to its own

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[291] 546 U.S. 418, 429–30 (2006) (confirming that the government bears the burden to prove "the first prong of the compelling interest test" at all stages of the case because it is an affirmative defense).

[292] 42 U.S.C. § 2000bb-1(a)–(b); *see also* Sabir v. Williams, 52 F.4th 51, 59 (2d Cir. 2022).

[293] *Tanzin*, 141 S. Ct. at 493.

[294] *See, e.g.*, Wyatt v. Cole, 504 U.S. 158, 165–67 (1992) (making clear that qualified immunity doctrine arose from "special policy concerns involved in suing government officials").

[295] Berry v. Funk, 146 F.3d 1003, 1013 (D.C. Cir. 1998).

[296] *Id.*

[297] *Id.* (quoting Crawford-El v. Britton, 93 F.3d 813, 832 (D.C. Cir. 1996) (en banc) (Silberman, J., concurring), *rev'd on other grounds*, 523 U.S. 574 (1998)).

cause of action, it is hardly open to the federal court to graft common law defenses on top of those Congress creates."[298]

Despite this caution, the Tenth Circuit Court of Appeals in *Ajaj v. Federal Bureau of Prisons* chose to allow the defense of qualified immunity to claims asserted under RFRA.[299] In so doing, the *Ajaj* court claimed that it was not engaging in judicial policymaking but rather "constru[ing] statutory language in light of a background presumption that was well-established when RFRA was established."[300] It also rejected Mr. Ajaj's argument that Congress did not intend "to include a qualified-immunity defense (or any other unstated defenses) when it included a specific defense in the statute's text."[301] Claiming to have "a different view," the *Ajaj* court classified the compelling government interest and least restrictive means portions of the statute as exceptions to the substantial burden section of the statute rather than an affirmative defense.[302] The *Ajaj* court then went on to say that it is unreasonable to think that the compelling government interest and least restrictive means sections of the statute are "the only ground on which an official can defend against personal liability."[303]

The *Ajaj* court's analysis is flawed in many respects. First, it ignores Supreme Court and Tenth Circuit precedents that expressly hold that the compelling government interest and least restrictive means portions of the statute constitute an affirmative defense for which the governmental defendant has the burden to plead and prove.[304] Second, the *Ajaj* court ignores the Supreme Court's warnings in both *Tanzin* and older precedent that caution that when Congress intervenes on a question "previously governed" by federal court decisionmaking, "the need for such an unusual exercise of law-

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[298] *Id.* at 1013 (citing City of Milwaukee v. Illinois, 451 U.S. 304, 314 (1981) ("[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.")).

[299] Ajaj v. Fed. Bureau of Prisons, 25 F.4th 805, 813 (10th Cir. 2022).

[300] *Id.* at 815–16.

[301] *Id.* at 816.

[302] *Id.* at 816–17.

[303] *Id.* at 817. The *Ajaj* court also makes much of the fact that the compelling government interest and least restrictive means defense would also preclude liability for injunctive claims. *See id.* at 816. It would, but that is *because it is an affirmative defense laid out in the statute*, not because it somehow implies congressional intent as to the qualified immunity defense's availability for individual government actors.

[304] *See* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 429, 439 (2006); Ghailani v. Sessions, 859 F.3d 1295, 1306 (10th Cir. 2017) (citing *Gonzales*, 546 U.S. at 429). *Ajaj* fails to cite either of these two cases.

making by federal courts disappears."[305] Thus, it is of no import that federal courts accepted qualified immunity as an established defense when Congress governed in RFRA. Congress declined to include the policy-laden doctrine of qualified immunity when it enacted the RFRA statute, and the federal courts should not now create new policymaking precedent to allow qualified immunity as a defense to a statute that has such a clearly defined affirmative defense in its text.

Some may argue that Congress knew that courts would follow prior practice of applying qualified immunity to free exercise claims and so, by its silence, accepted that qualified immunity would be an available defense. This is the position recently adopted by the Third Circuit Court of Appeals in *Mack v. Yost*.[306] While the *Mack* court acknowledged the Supreme Court's holding that neither RFRA nor § 1983 mention immunities nor abrogate them,[307] it nevertheless concluded that it did not have the power to reconsider whether qualified immunity "should continue in its current form," and so it must allow the defense in cases brought under RFRA.[308]

Like the *Ajaj* court, the *Mack* court failed to consider the import of Congress's inclusion of an affirmative defense in the statute. Unlike § 1983, which contains no express affirmative defenses, the RFRA statute expressly provides for such a defense. Additionally, neither court looked to RFRA's legislative history, which also makes no mention of qualified immunity but does make clear that Congress had no intention, through the RFRA statute, to disturb *other* constitutional doctrines.[309] Thus, given Congress's express inclusion of an affirmative defense in the statutory text and its express mention of other constitutional doctrines (but not qualified immunity) in the legislative history, the *Ajaj* and *Mack* courts' assumption that it is a foregone conclusion that Congress intended qualified immunity to be an available defense to RFRA claims is unsupportable. A comprehensive analysis of both the statute's text and legislative history make clear

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[305] City of Milwaukee v. Illinois, 451 U.S. 302, 314 (1981); *see also* Tanzin v. Tanvir, 141 S. Ct. 486, 493 (2020) (noting that courts should not create then retroactively impose presumptions upon prior Congresses).

[306] 63 F.4th 211, 222–26 (3d Cir. 2023) ("There is no reason to believe that the robust safeguards RFRA put in place to defend religious freedom effected a departure from the existing practice of allowing officers to invoke qualified immunity.").

[307] *See id*. at 222–23 (acknowledging that neither statute mentioned immunities and "§ 1983 did not abrogate . . . common-law immunities" and concluding "[i]t is therefore appropriate to presume that Congress drafted RFRA mindful of and consistent with that status quo").

[308] *Id*. at 235.

[309] *See* S. REP. NO. 103-111, at 13 (1993) (explaining that Congress had no intention, through RFRA, to disturb the Supreme Court's Establishment Clause or free speech jurisprudence).

that the matter is far less settled than the Third and Tenth Circuits presume it to be. Moreover, the very structure of RFRA's burden-shifting framework, created by Congress's inclusion of the affirmative defense, makes it incredibly difficult to apply modern qualified immunity doctrine in a coherent way, as discussed in the next Section.

C. Defining the Right at Issue Under RFRA's Burden-Shifting Framework

As described above in Section I.C, RFRA doctrine makes clear that the statute is one of shifting burdens. Under the statute, federal officials may impose a substantial burden on a person's religious exercise only when the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[310] In the prison context, then, it is the incarcerated person's burden to make a prima facie showing that the government is substantially burdening their sincerely-held religious belief.[311] Then, "[o]nce the plaintiff has established the threshold requirements by a preponderance of the evidence, the burden shifts to the government to demonstrate that the challenged regulation furthers a compelling state interest in the least restrictive manner."[312]

Superimposing the qualified immunity inquiry into this doctrinal framework poses two interrelated problems that, together, make qualified immunity an unworkable defense to RFRA claims. *First*, because the inquiry at each stage of the framework is an individualized inquiry into the religious beliefs and practice of the individual bringing the RFRA claim, courts will face inherent difficulty in defining the clearly established law required to overcome qualified immunity. *Second*, because allegations demonstrating facts that will meet the plaintiff's burden are all that is required to move past the pleading stage, seeking clearly established law that is relevant to the compelling state interest and least restrictive means put forth by the governmental actor can only occur at summary judgment, which undermines qualified immunity's express purpose of saving the government actor from the burdens of suit. A discussion of the proof required at each stage helps explain these two problems.

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310 42 U.S.C. §§ 2000bb-1(a)–(b).

311 *See* Ghailani v. Sessions, 859 F.3d 1295, 1305–06 (10th Cir. 2017) (holding that the government's compelling interest burden applies to cases in which the plaintiff is an incarcerated person).

312 United States v. Meyers, 95 F.3d 1475, 1482 (10th Cir. 1996) (laying out the government's burden in a RFRA case).

To begin, a plaintiff seeking to assert a RFRA claim must allege facts in their complaint showing that the government actor being sued burdened their sincerely held religious exercise.[313] To meet this pleading burden, then, the plaintiff must essentially demonstrate three things: (1) that the activity in question is religious in nature, (2) that the plaintiff is sincere in their belief, and (3) that the defendant has substantially burdened the adherent's religious practice. The first two of these inquiries are factual in nature and involve little to no legal inquiry that could be relevant to the clearly established inquiry, leaving only the third as a potential place where courts may inquire as to whether the government official had sufficient notice that his conduct violated the law. But, as discussed below, because the inquiry of whether a burden is substantial is so contingent on the individual plaintiff's beliefs, attempting to define clearly established law governing this inquiry becomes a doctrinal mismatch. I address each of these three inquiries and how they intersect with the question of qualified immunity in turn.

First, RFRA defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[314] In construing this provision, federal courts must abide by the statute's admonition that it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution."[315] *Second*, and relatedly, RFRA doctrine makes clear that courts should not inquire "whether a particular belief or practice is 'central' to a [person's] religion"[316] or whether other members of the same faith share the plaintiff's beliefs.[317] In analyzing the religious and sincerity aspects of RFRA claims, federal courts have emphasized that neither judges nor prison official (or other governmental) defendants are properly in the

313 *See Ghailani*, 859 F.3d at 1305; *see also* Ramirez v. Collier, 142 S. Ct. 1264, 1277 (2022) (explaining that an incarcerated person asserting a claim under RLUIPA (RFRA's sister statute that is identical in its protections) must demonstrate that his religious request is "sincerely based on a religious belief") (quoting Holt v. Hobbs, 574 U.S. 352, 360–61 (2015)).

314 42 U.S.C. § 2000bb-2(4). RFRA applies the definition of religious exercise provided in the Religious Land Use and Institutionalized Persons Act (RLUIPA). *See* 42 U.S.C. § 2000bb-2(4) (incorporating 42 U.S.C. § 2000cc-5(7)(A)).

315 42 U.S.C. § 2000cc-3(g).

316 Abdulhaseeb v. Calbone, 600 F.3d 1301, 1314 (10th Cir. 2010) (quoting Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005)).

317 *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 725 (2014) (emphasizing that courts' "narrow function" is not to decide whether religious beliefs are "mistaken or insubstantial," but to determine only whether the beliefs reflect "an honest conviction" (quoting Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 716 (1981) (internal quotation marks omitted)).

position to determine the propriety of an adherent's beliefs.[318] Thus, "[s]incerity is generally presumed or easily established. When [judges] have inquired as to sincerity, however, [they] have looked to the words and actions of the [plaintiff]."[319] Thus, the inquiry into whether a given RFRA case presents a sincerely held religious belief is fact-specific, and the adherents' claim will rise or fall on its facts. Consequently, there is no easy way to examine whether the sincerity of a particular religious claimant's belief is clearly established because the question has nothing to do with prior law—it is a question of only whether the plaintiff's beliefs are sincere and religious in nature.

Third, the substantial burden inquiry will be similarly specific to an individual plaintiff because what may have a substantial impact on one person's religious exercise may have little impact on another person of the same religious faith. In other words, the substantial burden inquiry is inexorably intertwined with the inquiry into the sincere religious belief: "In short, a burden on religious exercise is 'substantial' under [RFRA] if it denies a plaintiff reasonable opportunities to engage in such exercise."[320] Because the substantial burden inquiry, like the sincere religious belief inquiries, is so intertwined with an individual person's beliefs, the clearly established law inquiry required by qualified immunity is similarly difficult to unpack here. Nevertheless, if qualified immunity applies to RFRA claims, this is the only part of the doctrinal framework where courts could legitimately inquire into whether a defendant, through clearly established law, was properly on notice that his conduct violated the statute.

A "substantial burden" need not be a complete or total burden.[321] Generally speaking, federal courts recognize three ways that a plaintiff may demonstrate a substantial burden on religious

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[318] *See, e.g.*, *Abdulhaseeb*, 600 F.3d at 1314 n.7 ("Neither this court nor defendants are qualified to determine that a non-pork or vegetarian diet *should* satisfy [plaintiff's] religious beliefs.").

[319] Moussazadeh v. Tex. Dep't of Crim. Just., 703 F.3d 781, 791 (5th Cir. 2012), *as corrected* (Feb. 20, 2013); *see also* Hoeck v. Miklich, No. 13-cv-00206-PAB-KLM, 2014 WL 641734, at *6 (D. Colo. Feb. 19, 2014) (holding that an incarcerated person's repeated requests for official recognition of his religion, attempts to follow special diet, and observance of holy days even when threatened with punishment are sufficient to establish a sincerely-held belief); Koger v. Bryan, 523 F.3d 789, 797 (7th Cir. 2008) ("[T]he duration of time over which [plaintiff] sought to have his dietary request accommodated, and the fact that he sought that accommodation primarily as an [Ordo Templi Orientis] member, clearly demonstrates that his beliefs were sincerely held.").

[320] Vigil v. Jones, No. 09-cv-01676-PAB-KLM, 2011 WL 1480679, at *5 (D. Colo. Mar. 15, 2011), *report and recommendation adopted sub nom.*, Vigil v. Colo. Dep't of Corr., No. 19-cv-01676-PAB-KLM, 2011 WL 1526567, at *1 (D. Colo. Apr. 19, 2011) (internal quotations omitted).

[321] Yellowbear v. Lampert, 741 F.3d 48, 55 (10th Cir. 2014) (citing *Thomas*, 450 U.S. at 718).

practice. First, they can show that a government actor is requiring participation in an activity that is prohibited by a sincerely held religious belief.[322] Second, they can demonstrate that the government actor is preventing their participation in conduct motivated by a sincerely held religious belief.[323] Finally, they can demonstrate that the government actor has placed substantial pressure on them to act in a way that would violate their beliefs.[324]

No matter how a plaintiff attempts to demonstrate the substantial burden test, it seems that the law governing the violation should either be always clearly established or *never* clearly established. In other words, courts either need to define the right at issue in RFRA cases at too high a level of generality such that the law is always clearly established,[325] or courts need to define the right with too much granularity such that the individualized inquiry inherent to RFRA makes it impossible to identify prior cases with similar enough facts, unless the individual litigating the claim has, for some reason, brought a prior case that established the right specific to them.[326] Therefore, qualified

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[322] *See* Holt v. Hobbs, 574 U.S. 352, 361 (2015) (holding that defendant's grooming policy required plaintiff to "engage in conduct that seriously violates [his] religious beliefs") (quoting *Hobby Lobby*, 573 U.S. at 720 (internal quotation marks omitted)); Smith v. Owens, 848 F.3d 975, 981 (11th Cir. 2017) (adopting the substantial burden test using language in *Holt* that focused the substantial burden inquiry on whether the government requires a religious believer to "engage in conduct" that violates their beliefs); Schlemm v. Wall, 784 F.3d 362, 364 (7th Cir. 2015) (same); *Abdulhaseeb*, 600 F.3d at 1315.

[323] *Abdulhaseeb*, 600 F.3d at 1315.

[324] *Id.*; Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006) (articulating the "substantial pressure" test).

[325] This is the position taken by the government defendants in a petition for certiorari filed in *Williams v. Sabir* in May 2023. *See* Petition for Writ of Certiorari, Williams v. Sabir, 2023 WL 3778769 (U.S. May 30, 2023) (No. 22-1166). There, the government defendants argued that the Second Circuit erred by "holding that qualified immunity's particularity requirement does not apply to RFRA claims" and that allowing courts to define the rights at issue in RFRA cases at too high a level of generality would "eliminate[] qualified immunity in RFRA cases as a practical matter." *Id.* at *4 (asking for summary reversal of the particularity requirement holding); *id.* at *7 (arguing that the Second Circuit eliminated qualified immunity with its decision). After the government filed its petition in *Williams*, the parties reached a settlement and stipulated to the dismissal of the case. *See* Joint Stipulation to Dismiss, Williams v. Sabir, No. 22-1166 (U.S. Jul. 7, 2023).

[326] Defining clearly established law poses problems for qualified immunity doctrine outside the RFRA context. *See, e.g.*, John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 854–58 (2010) (explaining that defining "clearly established law" is difficult for courts because of the level of particularity required); *see also* Manzanares v. Roosevelt Cnty. Adult Det. Ctr., 331 F. Supp. 3d 1260, 1293 n.10 (D.N.M. 2018) ("Factually identical or highly similar factual cases are not . . . the way the real world works. Cases differ. . . . The Supreme Court's obsession with the clearly established prong assumes that officers are routinely reading [federal cases] in their spare time . . . ."); Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 611, 668, 683 (2021) (explaining that "officers are not actually educated about the facts and holdings of court decisions that"—theoretically—"clearly establish the law," "[t]here could

immunity doctrine as articulated in *Harlow* proves an impractical fit to claims asserted under RFRA.

Importantly, however, some courts have cited the statute itself as sufficient to put defendants on notice that their conduct is unlawful.[327] In *Potts v. Holt*, for example, the Third Circuit reversed the district court's grant of qualified immunity in a case challenging a prison system's failure to provide religiously acceptable meals to incarcerated people during a lockdown.[328] Rejecting the district court's definition of the right at issue as encompassing the district court's justification for the burden (i.e., that the lockdown was necessary due to an outbreak of food poisoning), the Third Circuit instead focused the qualified immunity inquiry on whether failing to provide religious meals burdened the plaintiffs.[329] Under that narrow inquiry, the Third Circuit determined that the right at issue had been clearly established by the RFRA statute itself, "which already anticipate[s] that prison officials are called upon to act in a variety of factual scenarios and that the lawfulness of their actions will be judged in the context of those specific scenarios."[330]

The Third Circuit followed similar logic in *Mack*. There, after deciding that qualified immunity is an available defense under the RFRA statute, the Court went on to deny immunity to the defendants.[331] Like in *Potts*, the Third Circuit rejected the district court's framing of the right at issue and defined the right as a "right to engage in prayer free of substantial, deliberate, repeated, and unjustified disruption by prison officials."[332] Using this framing, the Third Circuit determined that "broad principle[s] of law" gave "fair warning" to the defendants that their actions burdened the plaintiff's religious exercise in violation of RFRA.[333]

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never be sufficient time to train officers about the hundreds—if not thousands—of court cases that could clearly establish the law for qualified immunity purposes," and even if there were time for training, "[d]ecades of research" demonstrate that officers could not recall and apply that kind of information when making critical decisions). But in these other, non-RFRA contexts, the legal inquiry is not focused "on the person" making the claim in the same way that the RFRA inquiry is; this unique focus of RFRA claims makes defining clearly established law even more troublesome.

327 *See* Potts v. Holt, 617 F. App'x 148, 151–52 (3d Cir. 2015) ("RFRA clearly establishes that defendants may not substantially burden a[] [person's] exercise of religion without satisfying the burden set forth in 42 U.S.C. § 2000bb-1(b).").

328 *Id.* at 151–53.

329 *Id.* at 151–52.

330 *Id.* at 152.

331 Mack v. Yost, 63 F.4th 211, 217 (3d Cir. 2023) ("While, as a matter of law, qualified immunity can be asserted as a defense under RFRA, the officers have not—at least on this record—met their burden of establishing that defense.").

332 *Id.* at 230.

333 *Id.* at 233 (quoting Schneyder v. Smith, 653 F.3d 313, 330–31 (3d Cir. 2011)).

Following this logic, it makes little sense to allow the qualified immunity defense for claims asserted under RFRA because such a defense should always be overcome by looking to the statute itself and the broad principles of law that flow from it. Because a plaintiff need only plead facts demonstrating that a government actor substantially burdened their sincere religious exercise to survive a motion to dismiss a RFRA claim,[334] any qualified immunity inquiry will necessarily be focused on whether the substantiality of the burden at issue has been clearly established. But for the reasons outlined above, the defense will likely *always* be overcome because the substantial burden test has been established for decades, as the cases from the Third Circuit discussed above demonstrate.[335] As the Second Circuit has explained, RFRA is not a context where a high degree of specificity is required to clearly establish the law; rather, unlike the Fourth Amendment context, it is not difficult for a government official to know whether his actions violate the statute.[336] Alternatively, if federal courts require a more specific factual inquiry, qualified immunity will *always* be granted because of the individualized nature of the RFRA inquiry.[337] Thus, qualified immunity is simply incompatible with the RFRA inquiry.

This remains true if you imagine how the qualified immunity might apply at a later stage of the case, when the government can put forth evidence of its compelling government interest and least restrictive means. As described above, once the plaintiff meets their prima facie burden, the burden shifts to the governmental defendant to demonstrate their actions were both "in furtherance of a compelling government interest" and are "the least restrictive means of furthering

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334 *See* Ghailani v. Sessions, 859 F.3d 1295, 1305–06 (10th Cir. 2017).

335 *See, e.g.*, Sabir v. Williams, 52 F.4th 51, 60–61, 65–66 (2d Cir. 2022) (noting that "prison officials *necessarily* violate RFRA when they substantially burden a plaintiff's exercise of religion" without some justification but recognizing that the interest must be obvious from the complaint); *Ghailani*, 859 F.3d at 1305–06 (making clear that a plaintiff need not plead facts showing that the alleged violation was not reasonably related to the government's interests); *see also* Ramirez v. Collier, 142 S. Ct. 1264, 1281 (2022) (rejecting the state's argument that plaintiff has the burden to identify less restrictive means); Fernandez v. Clean House, LLC, 883 F.3d 1296, 1299 (10th Cir. 2018) (noting that "[a] plaintiff need not anticipate in the complaint an affirmative defense that may be raised by the defendant").

336 *Sabir*, 52 F.4th at 65 (rejecting the argument that an "abstract legal principle . . . cannot establish law for purposes of qualified immunity" in the RFRA context (internal quotations omitted)).

337 While it is true that qualified immunity has long been criticized for the specificity required in finding cases with analogous facts to demonstrate that the actions at issue violate clearly established law, that specificity is heightened here because RFRA's focus is on the particularized beliefs and burdens *of the person* bringing the claims. *See generally supra* notes 173–76 and accompanying text.

that . . . interest."[338] This test is "borrowed . . . [from] the strictest form of judicial scrutiny known to American law"[339] and is not "satisfied by the government's bare say-so."[340] It is clear that this test is an "affirmative defense," and "the burden is placed squarely on the Government" to plead and prove it.[341]

Thus, under the shifting burdens framework of RFRA, how would the qualified immunity inquiry superimpose on the compelling government interest and least restrictive means inquiries? In order to understand the government interest at stake, the government would need to come forward with evidence that justifies the burdens imposed on the religious adherent.[342] And it is insufficient for the government to offer "very broad terms"; rather, RFRA demands a "more focused inquiry" that "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law . . . to *the particular claimant* whose sincere exercise of religion is being substantially burdened."[343] This distinguishes RFRA claims from constitutional claims brought under § 1983 and subject to strict scrutiny.[344] This individualized inquiry once again makes qualified immunity an uneasy fit—either a court must first determine whether the interest asserted is sufficiently specific and compelling, allowing the court to decide the case on its merits, or every case is a case in which the defendants will get qualified immunity because no prior law has examined the government's specific justifications "to the particular claimant."[345]

Moreover, because both qualified immunity and the compelling government interest test are affirmative defenses, the traditional order of inquiries used in the qualified immunity cases becomes muddled.

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338 42 U.S.C. § 2000bb-1(b); *Ghailani*, 859 F.3d at 1306 (citing cases interpreting § 2000bb-1(b)).

339 Yellowbear v. Lampert, 741 F.3d 48, 59 (10th Cir. 2014).

340 *Id.*

341 *Ghailani*, 859 F.3d at 1306 (quoting Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 429 (2006)) (internal quotation marks omitted).

342 *See, e.g.*, Sabir v. Williams, 52 F.4th 51, 61–62 (2d Cir. 2022) (requiring prison official defendants to come forward with actual evidence of interest relied upon because the court cannot "manufacture facts out of thin air" (quoting Salahuddin v. Goord, 467 F.3d 263, 275 (2d Cir. 2006) (internal quotation marks omitted)).

343 *Id.* at 62 (quoting Burwell v. Hobby Lobby, 573 U.S. 682, 726 (2014)) (emphasis added).

344 *See* Tanner Bean, *"To the Person": RFRA's Blueprint for a Sustainable Exemption Regime*, 2019 BYU L. REV. 1, 4–7 (arguing that RFRA's "'to the person' language" will "allow[] the otherwise important purposes of generally applicable statutes to proceed while meaningfully vindicating the religious liberties of minority groups" and explaining that Congress deviated from prior constitutional cases by focusing RFRA on "a particular religious adherent, as opposed to an entire religious group or society at large").

345 *Hobby Lobby*, 573 U.S. at 726.

The Supreme Court has encouraged the lower courts to decide questions of qualified immunity at the earliest possible stage, or on a motion to dismiss.[346] But a plaintiff does not need to plead facts related to the compelling government interest prong.[347] So how can the court define the right at issue with the compelling interest in mind without having the government prove the interest? Having the government prove that interest would necessarily take the case into discovery, which undermines one of the purposes the Supreme Court has said qualified immunity serves: relieving government officials from the burdens of suit.

Even where qualified immunity is decided at the summary judgment stage, after discovery, questions remain about how the no-less-restrictive-alternatives prong fits into the analysis. Because the alternatives must necessarily be tied to the interest, where do they fit into the qualified immunity inquiry? How do adequate alternatives become clearly established? No good answer to these questions exists, and applying qualified immunity to the RFRA doctrinal framework becomes hopelessly incoherent.

Ultimately, qualified immunity makes little sense when applied to a statutory framework that clearly defines the rules such that any violations are inherently unreasonable.[348] Because there is no clear way to apply the doctrine of qualified immunity to claims subject to RFRA's burden-shifting framework, the defense should not be available to claims asserted under the statute. Disallowing the defense also aligns with honoring the purpose of RFRA, as described in the final Section of this Part.

D. Applying Qualified Immunity to Claims Against Federal Prison Officials Runs Contrary to the Purpose of RFRA

Congress enacted RFRA to provide greater protection for religious exercise than is available under the First Amendment.[349] In other words, RFRA is meant to provide very broad protections for

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346 *See, e.g.*, Hunter v. Bryant, 502 U.S. 224, 227 (1991) (noting that qualified immunity should be resolved "at the earliest possible stage in litigation"); *see also* Reinert, *supra* note 217, at 2069 (explaining that "qualified immunity is an immunity from suit" that "can be raised at any time: at the motion to dismiss stage . . ." among others).

347 *See Ghailani*, 859 F.3d at 1305–06.

348 *See, e.g.*, Chen, *supra* note 220, at 309 (positing that qualified immunity is "necessary only in a world where constitutional boundaries are set by common law-like development rather than positivist directives," and concluding that "[i]f all rules were clear *ex ante*, then no violations of those rules could be reasonable").

349 Holt v. Hobbs, 574 U.S. 352, 357 (2015) (noting that Congress enacted RFRA following Supreme Court cases that limited religious liberty protections).

religious liberty.[350] As discussed above, these protections extend to people behind bars, and the legislative histories of RFRA and its sister statute, RLUIPA, are replete with references to why such protection is particularly important for incarcerated people.[351] In particular, RFRA sought to protect incarcerated people from burdens imposed by "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations."[352] Religious minorities are often subject to disproportionately high levels of faith-based discrimination in prisons and jails, and discriminatory incidents against Muslims and Jews are disproportionately higher than incidents against other religions.[353]

The well-founded criticisms levied against qualified immunity in general, discussed *supra* in Section II.C, are equally applicable to RFRA claims as well. Not only is qualified immunity often unworkable and unrealistic, but it is also unjust.[354] It "formalizes a rights-remedies gap" that leads to "unqualified impunity," where fundamental rights violations go "unchecked."[355] To allow such a doctrine to impugn congressional intent to provide wide-ranging remedies for free exercise violations under RFRA would undermine the very purpose of the statute itself.

Conclusion

"To deny the opportunity to affirm membership in a spiritual community . . . may extinguish an [incarcerated person's] last source of hope for dignity and redemption."
—O'Lone v. Estate of Shabazz (Brennan, J., dissenting), 1987[356]

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350 Ackerman v. Washington, 16 F.4th 170, 180 n.5 (6th Cir. 2021) (noting that both RFRA and RLUIPA are meant to provide robust protections of religious exercise).

351 *See generally supra* Section I.B.2.

352 146 Cong. Rec. S7774-01, S7775 (daily ed. July 27, 2000) (statement of Sens. Hatch & Kennedy) (quoting S. Rep. No. 103-111, at 10 (1993)).

353 U.S. Dep't of Just., Update on the Justice Department's Enforcement of the Religious Land Use and Institutionalized Persons Act: 2010–2016, at 1, 4 (2016), https://www.justice.gov/crt/file/877931/download [https://perma.cc/C4RJ-4W3K] (noting that the number of discrimination investigations "involving Jewish institutions is disproportionate to the percentage of the overall U.S. population that is Jewish"); U.S. Comm'n on C.R., Enforcing Religious Freedom in Prison 1, 70 tbl.3.8, 82 tbl.4.1 (2008), https://www.usccr.gov/files/pubs/docs/STAT2008ERFIP.pdf [https://perma.cc/B39Z-MPYK] (demonstrating the frequency with which incarcerated Muslims and Jewish people file requests for religious accommodation because their religious practice is being burdened).

354 *See* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (explaining that qualified immunity doctrine "sends an alarming signal . . . that palpably unreasonable conduct will go unpunished").

355 Cole v. Carson, 935 F.3d 444, 447, 470–71 (5th Cir. 2019) (en banc) (Willett, J., dissenting).

356 O'Lone v. Estate of Shabazz, 482 U.S. 342, 368 (1987) (Brennan, J., dissenting).

Rights clashes between religious exercise and other fundamental rights are hot topics in modern constitutional law,[357] and there have been concerted efforts to re-examine the reach of RFRA in recent years.[358] But there remains an important class of people protected by RFRA: people incarcerated in federal prisons. The operations of prisons in the United States have been inexorably linked to religious beliefs since the first penitentiaries opened during the country's infancy. From that time, religion has served both as a tool of rehabilitation and a mechanism for expanding the rights afforded to people inside prison walls. Despite this, the Supreme Court was "stingy in extending rights" to incarcerated people until Congress passed RFRA and its sister statute, RLUIPA.[359]

With its latest decision in *Tanzin*, the Supreme Court recognized RFRA provided people incarcerated in federal prisons a heretofore unavailable remedy: damages for the violation of their religious rights by prison officials. Access to that remedy will be significantly curtailed if those prison officials are able to assert the defense of qualified immunity. But the qualified immunity defense is incompatible with RFRA's doctrine and purpose. Criticisms of the qualified immunity doctrine have been levied for decades, and calls to abolish or substantially rework the doctrine have grown with increasing ferocity since the 2020 murder of George Floyd. Declining to extend qualified immunity to claims brought under RFRA will protect an important class of people, serve RFRA's purpose, and begin to correct the harms qualified immunity has wrought on individuals stripped of redress for violations of their constitutional rights and on a society struggling to atone for a lack of law enforcement accountability.

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357 *See, e.g.*, Kyle C. Velte, *Why the Religious Right Can't Have Its (Straight Wedding) Cake and Eat It Too: Breaking the Preservation-Through-Transformation Dynamic in* Masterpiece Cakeshop v. Colorado Civil Rights Commission, 36 L. & INEQ. 67, 67–68 (2018) (noting that the "[a]ntidiscrimination question . . . has been percolating through lower courts for nearly a decade").

358 *See* Asma T. Uddin, *Religious Liberty Interest Convergence*, 64 WM. & MARY L. REV. 83, 96 (2022) ("Some of the same advocates who supported the RFRA in 1993 are now part of a coalition that is trying to . . . prevent the use of religious freedom to 'discriminate' against vulnerable populations" and "eliminate RFRA claims in many civil rights cases.").

359 Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 504 (2005).