MAKING STATE RELIGIOUS FREEDOM RESTORATION AMENDMENTS EFFECTIVE

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INTRODUCTION

For over two centuries, the First Amendment to the United States Constitution and similar provisions of state constitutions have prevented the federal and state governments from "prohibiting the free exercise" of religion.[1] After almost two centuries of developing a workable test to determine the validity of government action under the Free Exercise Clause, the Supreme Court came up with the compelling interest standard.[2] Using this approach, no government could substantially burden the free exercise of religion unless it was furthering a compelling government interest using the least restrictive means. This test struck a sensible balance between the necessity of governments regulating the conduct of their citizens and the rights of people to freely practice their religion. In doing so, the compelling interest test recognized that while government action was integral to

1. U.S. CONST. amend I.
2. *See* Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

the well-being and smooth operation of society, judicial relief would sometimes be required to ensure that people were able to freely exercise their religious beliefs. The latter part of this principle was important for two main reasons. First, as the regulatory state grew throughout the twentieth century, government actions came to touch every facet of American life. Second, legislatures could always adopt laws that would curtail the ability of minority groups to practice their religion; however, because of the compelling interest test, burdened minority groups had adequate redress against the government.

In 1990, the Supreme Court abandoned the compelling interest test, replacing it with the rule that laws could not burden religion if they were generally applicable and neutral to religion.[3] This abandonment highlights the concerns outlined above: with so many laws being passed on so many levels, how could people protect themselves from government interference with their religion? Particularly, how could minority religious groups prevent unreasonable government regulation of their religious exercise? In response to such concerns, twelve states passed Religious Freedom Restoration Acts ("RFRAs"), statutes that reinstated the compelling interest standard for state government actions.[4] This Note explores the practical effectiveness of the RFRAs and identifies two challenges facing RFRAs in the future. First, courts have continued to use a law's general applicability as a factor that weighs against the aggrieved citizen in their RFRA analyses, essentially returning to the test that RFRAs were designed to eradicate. Second, some courts have adopted definitions of "substantial burden" that are so stringent as to effectively bar plaintiffs from success on the merits of their RFRA claims. Before concluding, this Note will propose some moderate changes that current RFRA states may adopt and that states wishing to adopt RFRAs should take under consideration before drafting their statutes.

I. BACKGROUND

The seeds for state RFRAs were sown in the middle of the twentieth century, when the Supreme Court interpreted the Free Exercise Clause in a number of key cases that established the "compelling interest" test

3. *See* Employment Div. of the Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).

4. The following states have passed a Religious Freedom Restoration Act: Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Missouri, New Mexico, Oklahoma, Rhode Island, South Carolina, and Texas. *See* ALA. CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. § 41-1493 (1999); CONN. GEN. STAT. ANN. § 52-571b (West 2005); FLA. STAT. ANN. §§ 761.01–05 (West 2005); IDAHO CODE ANN. § 73-402 (2006); 775 ILL. COMP. STAT. ANN. 35/1–99 (West 2000); MO. REV. STAT. § 1.302 (2009); N.M. STAT. ANN. §§ 28-22-1 to -5 (LexisNexis 2000); OKLA. STAT. ANN. tit. 51, § 251 (West 2009); 71 PA. STAT. ANN. § 2404 (West 2008); R.I. GEN. LAWS §§ 42-80.1-1 to -4 (1998); S.C. CODE ANN. §§ 1-32-10 to -60 (1999); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001–.012 (Vernon Supp. 2000).

adopted in today's RFRAs. The constitutions of the United States and each of the states that have enacted mini-RFRAs guarantee that citizens have the right to freely exercise their religions, though not all of these documents use identical language.[5] Scholars have noted the broad agreement that the Free Exercise Clause basically stands for the proposition that "the government may not punish someone solely for his religious opinions, and that a law or regulation may not single out religious conduct for prohibition."[6] The U.S. Supreme Court reaffirmed the latter concept in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*.[7] There, followers of Santeria, a small Afro-Cuban sect, successfully argued that several city ordinances that prohibited cruelty to animals violated the Free Exercise Clause because, in reality, the ordinances contained so many exceptions that the only conduct actually prohibited was Santerian religious rituals.[8]

The rule against singling out religious conduct is not wholly effective in today's heavily regulated society. As Justice O'Connor points out, "few states would be so naïve as to enact a law directly prohibiting or burdening a religious practice as such."[9] Instead, most conflicts between religious practice and the law occur when a generally applicable, religion-neutral law incidentally restricts conduct that is required or heavily motivated by a person or group's faith.[10] These conflicts occur every day in America because America is highly bureaucratic and regulated, yet it contains a multitude of faiths and religious practices.[11]

A. Origins of the Compelling Interest Standard: Sherbert *and* Yoder

Beginning in the mid-1960s, the Supreme Court attempted to use an interest-balancing test to resolve the conflicts presented under the First Amendment's Free Exercise Clause. In *Sherbert v. Verner*,[12] the Court

5. *See, e.g.*, MO. REV. STAT. § 1.302 (2009) ("A governmental authority may not restrict a person's free exercise of religion, unless: (1) [t]he restriction is in the form of a rule of general applicability, and does not discriminate against religion, or among religions; and (2) [t]he governmental authority demonstrates that application of the restriction to the person is essential to further a compelling governmental interest, and is not unduly restrictive considering the relevant circumstances."); FLA. STAT. ANN. § 761.03 (West 2005) ("The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (a) [i]s in furtherance of a compelling governmental interest; and (b) [i]s the least restrictive means of furthering that compelling governmental interest.").

6. *See* Thomas C. Berg & Frank Myers, *The Alabama Religious Freedom Amendment: An Interpretive Guide*, 31 CUMB. L. REV. 47, 48 (2000).

7. 508 U.S. 520 (1993).

8. *Id.* at 521–22.

9. Employment Div. of the Dep't of Human Res. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring).

10. *See* Berg, *supra* note 6, at 49.

11. *See id.*

12. 374 U.S. 398 (1963).

found that a state impermissibly violated the Free Exercise Clause where it denied a Seventh-Day Adventist's unemployment benefits because she refused to accept a job that required her to work on Saturday, her Sabbath.[13] In reaching this result, the Court articulated a test to determine future Free Exercise Clause violations, whereby a law was unconstitutional if it imposed a significant burden on the practice of religion and was not the least restrictive means of serving a "compelling" or "overriding" state interest.[14]

The Court reaffirmed this test in *Wisconsin v. Yoder*,[15] where it found that the Free Exercise Clause prevented the state from forcing Amish children to attend formal high school.[16] The plaintiffs claimed that compulsory school attendance damaged their 300-year-old community by exposing their children "to worldly influences" at a sensitive time in their development, drawing them away from the insular Amish community.[17] The Court found that the compulsory education proved a "severe" burden to the plaintiffs' religion, and weighed this burden against the state's interests in requiring the Amish children to be formally educated.[18] Ultimately, the Court determined that the state's interests were insufficient to merit the burden it had placed on the Amish, most notably because the Amish had a successful record of work and self-reliance as farmers and artisans.[19] Thus, as many of the state RFRAs themselves indicate, the compelling interest test came to be the standard by which the Free Exercise Clause was upheld for almost thirty years.[20]

B. Rejection of the Compelling Interest Test: Smith

In 1990, the Supreme Court reversed the course of its Free Exercise jurisprudence and abandoned its compelling interest test in *Employment Division v. Smith*.[21] In *Smith*, two drug counselors were fired and denied unemployment benefits by Oregon because they took peyote, a drug used for worship purposes by their church, the Native American Church.[22] In an opinion written by Justice Scalia, the Court determined that generally

13. *Id.* at 410.
14. Berg, *supra* note 6, at 50.
15. 406 U.S. 205 (1972).
16. *Id.* at 234.
17. *Id.* at 218.
18. *Id.*
19. *Id.* at 222–29.
20. *See* 775 ILL. COMP. STAT. ANN. 35/10(b)(1)–(2) (West 2000). *But see* Mary Jean Dolan, *The Constitutional Flaws in the New Illinois Religious Freedom Restoration Act: Why RFRAs Don't Work*, 31 LOY. U. CHI. L.J. 153, 162 (2000) ("[T]he Supreme Court's pre-*Smith* approach to free exercise is best described as 'context-dependent balancing,' in which the standard of review is calibrated to the factual setting.").
21. Employment Div. of the Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).
22. *Id.* at 872.

applicable, religion-neutral laws are able to burden religion without violating the First Amendment.[23] Justice Scalia viewed this as acceptable because "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'"[24] To do so would create anarchy, allowing each believer "to become a law unto himself."[25] According to Justice Scalia, the First Amendment has only barred application of a nondiscriminatory law to religiously motivated conduct where either: (1) "hybrid rights," such as the parental rights in *Wisconsin v. Yoder*, are implicated;[26] or (2) the case involves unemployment compensation and the government is already doing individualized assessments of the reasons for the relevant conduct, as in *Sherbert v. Verner*.[27]

C. Congress' Response: The Religious Freedom Restoration Act

The reaction to *Smith* was immediate, with a broad spectrum of opposition from liberal and conservative religious and civil liberties groups.[28] The common fear forging this unlikely alliance was that legislatures would tend, as *Smith* itself acknowledged, to favor politically powerful groups and "widely engaged in" religious practices.[29] After three years of petitioning Congress to respond to *Smith*, this broad coalition was rewarded with the Religious Freedom Restoration Act of 1993 ("RFRA").[30] RFRA mandated that federal, state, and local legislatures could not "substantially burden" the free exercise of religion unless imposing the burden was the least restrictive means of accomplishing a compelling government interest.[31] Further, RFRA could be used to invalidate even generally applicable laws.[32] Congress extended RFRA to the states by relying on its power under Section Five of the Fourteenth Amendment to enforce the provisions of the Amendment by "appropriate legislation." By enacting RFRA, Congress asserted that it was enforcing the right of free exercise of religion, a right that had been "incorporated" into the Fourteenth Amendment's Due

23. *Id.* at 878.
24. *Id.* at 885 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).
25. *Id.* at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).
26. *See id.* at 881–82 (citing Wisconsin v. Yoder, 406 U.S. 205, 219–20 (1972)).
27. *See id.* at 884 (citing Sherbert v. Verner, 374 U.S. 398, 410 (1963)); *see also* Dolan, *supra* note 20, at 163.
28. *See* Berg, *supra* note 6, at 53 (noting that the coalition opposed to *Smith* included "entities as divergent as the ACLU and the Traditional Values Coalition").
29. *Smith*, 494 U.S. at 890; *see also* Berg, *supra* note 6, at 53.
30. 42 U.S.C. § 2000bb-1 to -3 (Supp. 2000), *amended by* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 115 Stat. 803 (Sept. 22, 2000).
31. 42 U.S.C. § 2000bb-1 to -3 (Supp. 2000).
32. Berg, *supra* note 6, at 54.

Process Clause half a century earlier.[33] For four years, RFRA stood as a protection against any level of government substantially burdening religious exercise.

D. Limitation of the RFRA: City of Boerne

The Supreme Court stripped RFRA of much of its authority in *City of Boerne v. Flores*,[34] essentially allowing the states to operate under the standard it had articulated in *Smith*. The Court held that RFRA exceeded Congress' power to enforce the Fourteenth Amendment against state and local laws because *Smith* had already determined the meaning of the Free Exercise Clause, and Congress was therefore limited to legislating to enforce that meaning.[35] In the wake of *Boerne*, "RFRA probably remains applicable to burdensome federal laws and regulations,"[36] but it certainly does not apply to state or local government actions.[37] Therefore, "the responsibility for protecting religious freedom from state and local laws has returned largely to states themselves."[38] Against the backdrop of *Boerne*, twelve states have adopted the compelling interest test set forth in RFRA.[39]

II. STATE RFRAS

A. The Compelling Interest Test

Although none of the state RFRAs use identical language, they all have a number of common features that make state-by-state comparison useful. First, each RFRA contains a provision outlining the compelling interest standard outlined above. The standard invariably has two components: a prohibitory general rule and a permissive exception. Arizona's Religious Freedom Act is typical of statutory compelling interest standards.[40] The Act states in part:

> B. Except as provided in subsection C, government shall not substantially burden[41] a person's exercise of religion even if the burden results from a rule of general applicability.

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33. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
34. 521 U.S. 507 (1997).
35. *Id.* at 512–14, 519; *see also* Berg, *supra* note 6, at 54; Dolan, *supra* note 20, at 164–65.
36. Berg, *supra* note 6, at 54–55.
37. *Id.* at 55.
38. *Id.* The federal government passed post-*Boerne* legislation of its own, culminating in the Religious Land Use and Institutionalized Persons Act (RLUIPA). 42 U.S.C. §§ 2000cc to cc-5 (2008).
39. *See supra* note 4.
40. ARIZ. REV. STAT. ANN. § 41-1493.01 (1999). Alabama is the only state that has incorporated the compelling interest standard directly into its Constitution. *See* ALA. CONST. art. I, § 3.01.
41. While the cases highlighted in this article come from states that use the "substantially burden" language, states differ on even this seemingly basic point. For example, Alabama and Connecticut use

> C. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is both:
>
> 1. In furtherance of a compelling governmental interest.
>
> 2. The least restrictive means of furthering that compelling governmental interest.[42]

This language is typical of, but not necessarily identical to, the other state RFRAs focused on herein. Of particular note is the phrase "even if the burden results from a rule of general applicability."[43] This language, which is in every state RFRA, seems to be a direct shot at the Supreme Court's holding in *Smith* permitting religion-neutral laws of general applicability to substantially burden religious exercise.[44] Thus, state RFRAs adopt the amalgam of *Sherbert* and *Yoder* that came to stand for pre-*Smith* Free Exercise jurisprudence.[45]

B. Legislative Findings

Beyond the core of the RFRA, the compelling interest standard outlined above, states differ greatly with regard to the provisions that make up a RFRA statute. Perhaps the most noticeable discrepancy between RFRAs relates to legislative findings. Some states[46] do not include any form of legislative finding within the RFRA statute, while others include a modest sentence outlining the purpose of the Act.[47] A few states, however, have highly illustrative legislative findings; Illinois' RFRA, for example, states that its purpose is "[t]o restore the compelling interest test as set forth in *Wisconsin v. Yoder* and *Sherbert v. Verner*."[48] The Illinois Legis-

simply "burden" rather than "substantially burden." *See* ALA. CONST. art. I, § 3.01; CONN. GEN. STAT. ANN. § 52-571b (West 2005); Murphy v. Zoning Comm'n of New Milford, 289 F. Supp. 2d 87, 115 (D. Conn. 2003), *rev'd on other grounds*, 402 F.3d 342 (2d Cir. 2005). Alabama's Religious Freedom Amendment has not been the basis of any decision, and relatively few courts have definitively addressed Connecticut's burden test. *See, e.g.*, *Murphy*, 402 F.3d at 346; Cambodian Buddhist Soc'y of Conn. v. Planning & Zoning Comm'n on Human Rights & Opportunities, 911 A.2d 319, 327–28 (Conn. App. Ct. 2006). Further, New Mexico and Rhode Island use the word "restrict" in place of "substantially burden." *See* N.M. STAT. ANN. §§ 28-22-1 to -5 (LexisNexis 2000); R.I. GEN. LAWS §§ 42-80.1-1 to -4 (1998). Again, no court has decided whether "to restrict" is any different than "to substantially burden."

42. ARIZ. REV. STAT. ANN. §§ 41.1493.01 (1999).

43. *Id.*

44. Employment Div. of the Dep't of Human Res. v. Smith, 494 U.S. 872, 878 (1990).

45. *But see* Dolan, *supra* note 20, at 162.

46. *E.g.*, Connecticut, Florida, Idaho, New Mexico, Oklahoma, Rhode Island, and Texas.

47. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 41.1493.01 (1999) ("Free exercise of religion is a fundamental right that applies in this state even if laws, rules or other government actions are facially neutral."); 71 PA. STAT. ANN. § 2404 (2008).

48. 775 ILL. COMP. STAT. ANN. 35/10(b)(1)–(2) (West 2000) (citations omitted) (italics added). *See*

lature expressed its discontent with the Supreme Court's holding in *Smith* by stating: "[i]n *Employment Division v. Smith*, the Supreme Court virtually eliminated the requirement under the First Amendment to the United States Constitution that government justify burdens on the exercise of religion imposed by laws neutral toward religion."[49] Regardless of whether the legislature specifically included its rationale for passing a RFRA in its statute, the purpose of these acts is clear—to restore the compelling interest test struck down in *Smith* and again in *Boerne*.[50]

C. Prisoner Litigation: Altering the Compelling Government Interest Prong

Another interesting feature shared by a minority of state RFRAs is a provision that deals specifically with inmate complaints of correctional facilities regulations. Oklahoma[51] and Pennsylvania[52] both alter the compelling interest standard in cases where inmates allege that the State Department of Corrections burdens his or her exercise of religion. Oklahoma's RFRA creates an irrebuttable presumption that correctional facility regulations further compelling governmental interests if the facility proves that the religious activity in question is presumptively dangerous to the health or safety of the plaintiff prisoner or impairs the health, safety, and security of the correctional facility.[53] Pennsylvania takes a different approach with prisoner litigation by stating that its RFRA is not violated where a correctional facility's policy "is reasonably related to legitimate penological interests, including the deterrence of crime, the prudent use of institutional resources, the rehabilitation of prisoners or institutional security."[54] It is worth noting that these two states found it necessary to address prisoner litigation given the low frequency of prisoner suits under the federal RFRA:

> At its height, the federal RFRA only produced an increase in reported prisoner religious freedom decisions by a per-state average of about 1.5 cases a year. The state attorneys general's own reported data showed that RFRA caused an increase per-state of only about 3.5 prisoner religious freedom *filings* a year, which is consistent with a figure of 1.5 *reported* decisions. Both of these

also S.C. CODE ANN. § 1-32-40 (2003).

49. 775 ILL. COMP. STAT. ANN. 35/10(a)(4) (West 2000) (citations omitted) (italics added). The Alabama Religious Freedom Amendment contains nearly identical language. *See* ALA. CONST. art. I, § 3.01.

50. *See supra* Part I.

51. OKLA. STAT. ANN. tit. 51, § 254 (West 2000).

52. 71 PA. STAT. ANN. § 2404(g) (West 2008).

53. OKLA. STAT. ANN. tit. 51, § 254 (West 2000).

54. 71 PA. STAT. ANN. § 2404(g) (West 2008).

> numbers are insignificant considering the enormous volume of prisoner lawsuits brought every year during this same period—more than 4,000 per state.[55]

Despite the historically negligible increase in prisoner litigation, and perhaps to prevent courts from imposing their will on the states' correctional facilities, two states have altered the burden of proof for prisoners seeking to uphold Free Exercise claims under the states' RFRAs. This is particularly interesting given the fact that the federal law that would seem to apply, the Religious Land Use and Institutionalized Persons Act (RLUIPA), contains a "straight" compelling interest test, with no presumption that correctional facilities are furthering compelling governmental interests.[56] Thus, although the courts in Oklahoma and Pennsylvania have never reached this issue, it seems as though a prisoner suing under both RLUIPA and the state RFRA could be successful under the former but not the latter.

D. Defining "Substantial Burden"

Although there are a few other provisions in RFRAs that are peculiar to individual states,[57] perhaps the most important variation for the purposes of this Note is whether states choose to include a definition of "substantial burden" within their statute. As this Note will later demonstrate, the most substantial bar to a successful claim under state RFRAs is proving that a plaintiff's free exercise of religion has been substantially burdened, so this area needs to be examined in depth. Eight states—Alabama, Connecticut, Florida, Illinois, New Mexico, Rhode Island, South Carolina and Texas[58]—have omitted a statutory definition of "substantial burden," leaving the courts to define this term. To avoid this problem, four state legislatures included some reference to their understanding of substantial burden in their respective RFRAs. Arizona has the broadest definition, noting that "the term substantially burden is intended solely to ensure that this article

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55. RELIGIOUS INSTITUTIONS PRACTICE GROUP, SIDLEY AUSTIN BROWN & WOOD LLP, QUESTIONS AND ANSWERS ABOUT STATE RELIGIOUS FREEDOM RESTORATION ACTS 7 (4th ed. 2005), http://www.sidley.com/religionlaw (select title under "Publications") (emphasis in original) (footnote omitted). *See also* Lee Boothby & Nicholas P. Miller, *Prisoner Claims for Religious Freedom and State RFRAs*, 32 U.C. DAVIS L. REV. 573, 597–600 (1999).

56. 42 U.S.C. § 2000cc-1 (2006).

57. *See, e.g.*, 775 ILL. COMP. STAT. ANN. 35/30 (West 2000) ("Nothing in [the Illinois RFRA] limits the authority of the City of Chicago to exercise its powers under the O'Hare Modernization Act for the purposes of relocation of cemeteries or the graves located therein."). *See also* Berg, *supra* note 6, at 61 (noting that Alabama's Religious Freedom Amendment "establish[ed] that some 'pedagogical interests' may be compelling (without saying which) and warn courts to give weight in the balance to the goal of 'alleviat(ing) interference with the educational process.'").

58. *See supra* note 4 for citations to each state's RFRA statute.

is not triggered by trivial, technical or de minimis infractions."[59] Idaho and Oklahoma both say that to substantially burden religious exercise is to "inhibit or curtail religiously motivated practices."[60] Pennsylvania has the most specific statutory definition of any state RFRA:

> "Substantially burden." An agency action which does any of the following:
>
> (1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs.
>
> (2) Significantly curtails a person's ability to express adherence to the person's religious faith.
>
> (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion.
>
> (4) Compels conduct or expression which violates a specific tenet of a person's religious faith.[61]

This definition gives courts the smallest amount of discretion in determining whether a plaintiff's religious exercise has been substantially burdened. Stated differently, Pennsylvania courts are guided by their state RFRA more than any other state that has a RFRA; consequently, those courts are least able to impose a judge-made definition of substantial burden onto the statute. This Note argues that Pennsylvania's approach is correct and courts should not make such decisions. The eight states lacking any statutory guidance regarding the meaning of statutory burden are the states in which plaintiffs are least likely to mount a successful Free Exercise claim against a government action.

In short, state RFRAs take a number of different forms, each purporting to prevent government interference with religious exercise in its own way. Four states do not require a plaintiff to be substantially burdened in his or her exercise of religion—two states prohibit a mere burden and two more states prohibit "restrictions."[62] While most states omit legislative findings that explicitly tie the passage of the state RFRA to the *Smith* and *Boerne* decisions,[63] other states clearly stipulate the backdrop against which courts are to frame the statutes.[64] Two states, Oklahoma and Penn-

59. ARIZ. REV. STAT. ANN. § 41-1493.01(E) (1999).
60. IDAHO CODE ANN. § 73-401(5) (2006); OKLA. STAT. ANN. tit. 51, § 252(7) (West 2000).
61. 71 PA. STAT. ANN. § 2403 (2008).
62. *See supra* note 41.
63. *See supra* note 46.
64. *See supra* notes 47–49 and accompanying text.

sylvania, explicitly alter the compelling interest standard for prisoners suing correctional facilities for alleged burdens on their free exercise of religion; these statutes create presumptions that correctional facilities' actions further compelling governmental interests.[65] Finally, four states define a substantial burden in their RFRAs, from Arizona's broad, low threshold to Pennsylvania's more comprehensive, four-part definition.[66] United by the common purpose of reinstating the pre-*Smith* compelling interest test, the twelve state legislatures that have enacted RFRAs thus far have done so using a wide variety of methods.

III. DISCUSSION

Despite the best efforts of twelve state legislatures to allow citizens to more successfully claim that the state was impinging on their right to the free exercise of religion, state RFRAs have been made less effective at achieving their goals than may be expected. Before turning to the ways in which the effectiveness of RFRAs has been diluted, one must understand that a starting point for this analysis is that legislatures intended to make it easier for plaintiffs to state Free Exercise claims by passing state RFRAs. This assumption is buttressed by the backdrop against which these statutes were passed—outlined above—and the legislatures' statements of purpose in three of the RFRAs.[67] Therefore, any judicial action which makes it more difficult for citizens to pursue these claims should be seen as wrongful because it goes against the will of the legislature. While RFRAs seemingly facilitate claims of government interference with a plaintiff's free exercise, RFRA litigation faces two distinct challenges in practice. First, despite legislative insistence that courts reject *Smith* and its progeny, state courts have included the general applicability and religion-neutral language used in *Smith* as factors that weigh in favor of a state defending its actions. Second, a number of courts have embraced a judicially constructed definition of "substantial burden" that sets too high a bar for many legitimate complaints to pass. Both of these developments in RFRA litigation are unacceptable as they impede citizens' ability to successfully state Free Exercise claims.

A. Smith *Through the Backdoor*

Despite clearly expressed legislative distaste with the *Smith* standard, state courts have gradually been importing elements of *Smith* into their

65. *See supra* notes 51–54 and accompanying text.
66. *See supra* notes 58–61 and accompanying text.
67. *See* ALA. CONST. art. I, § 3.01; 775 ILL. COMP. STAT. ANN. 35/10(b)(1)–(2) (West 2000); S.C. CODE ANN. § 1-32-40 (1999).

RFRA analysis. To refresh, *Smith* held that generally applicable, religion-neutral laws are able to burden religion without violating the First Amendment.[68] Every state legislature firmly rejected this standard by stating that states may not substantially burden the free exercise of religion, "*even if the burden results from a rule of general applicability*."[69] Regardless, three of the states in which the RFRA is most often used as a basis for suit—Connecticut, Florida, and Illinois—have incorporated a law's general applicability as a factor that weighs against the plaintiff.

In *Cross Street, LLC v. Zoning Board of Appeals of Westport*,[70] the plaintiff sought a variance to allow the construction of an orthodox synagogue in a residential area.[71] After the town's Zoning Board of Appeals denied the variance due to parking concerns,[72] the plaintiff appealed under Connecticut's Religious Freedom Amendment.[73] The court stated that "churches and religious organizations can be regulated under the police power as long as the regulation is religiously neutral and for secular purposes."[74] Therefore, because "[t]he zoning regulations are facially neutral and by their terms apply to all properties in the same zone as [the proposed synagogue]"[75] and there was "no evidence that the ZBA denied the variance application on any pretext,"[76] the plaintiff's appeal was denied. It is worth noting that *First Church of Christ, Scientist*, decided soon after Connecticut passed its RFRA and cited in *Cross Street*, explicitly adopts *Smith*'s general applicability language.[77] Connecticut's willingness to impose *Smith*'s general applicability standard into a statute clearly designed to countermand that decision is a helpful illustration of the challenges that RFRAs continue to face.

Beyond Connecticut, Florida and Illinois have mixed *Smith* doctrine into a (theoretically) anti-*Smith* statutory analysis. In *First Baptist Church of Perrine v. Miami-Dade County*,[78] a zoning appeals board denied a church's application for special exceptions and non-use variances to expand a school.[79] The church sued the board under Florida's then-recent

68. Employment Div. of the Dep't of Human Res. v. Smith, 494 U.S. 872, 878 (1990).
69. 775 ILL. COMP. STAT. 35/15 (West 2000) (emphasis added).
70. No. CV064008077, 2007 WL 448684 (Conn. Super. Ct. Jan. 26, 2007).
71. *Id.* at *1.
72. *Id.*
73. CONN. GEN. STAT. ANN. § 52-571b (West 2005). While more pertinent for the discussion in Part III.B, *infra*, note that Connecticut's statute only requires a "burden" rather than a "substantial burden." *Id.* Presumably, then, the plaintiffs would not face so hard a task in order to be successful with their action.
74. *Cross Street*, 2007 WL 448684, at *5 (citing First Church of Christ, Scientist v. Historic Dist. Comm'n, 738 A.2d 224, 231 (Conn. Super. Ct. 1998)).
75. *Id.*
76. *Id.*
77. 738 A.2d at 231.
78. 768 So. 2d 1114 (Fla. Dist. Ct. App. 2000).
79. *Id.* at 1115.

RFRA.[80] The appellate court explained that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[81] The court then went on to outline a three-part test it used to determine whether there had been a violation of Florida's Act: "(1) the ordinance must regulate religious conduct, not belief; (2) the law must have a secular purpose and secular effect; and (3) once these threshold tests are met, the court must balance the competing governmental and religious interests."[82] Using these precepts to guide it, the court then held that:

> [t]he County's zoning code is entirely secular in purpose and effect. The record does not demonstrate that the County's zoning ordinances are aimed at impeding religion, that they are based on a disagreement with religious beliefs or practices, or that they negatively influence the pursuit of religious activity or expression of religious belief.[83]

Thus, the court held, the plaintiff failed to carry the burden required of a successful Florida RFRA suit.[84]

An Illinois court imported *Smith*'s general applicability test as a RFRA factor in *Family Life Church v. City of Elgin*.[85] In that case, a church and homeless person sued the city after the city required the church to obtain a conditional use permit to operate a homeless shelter and allegedly delayed the issuance of such permit.[86] The court began its analysis by stating the rule "[e]ven if detrimental to religious exercise, a merely incidental effect of a neutral and generally applicable regulation need not be justified in strict scrutiny terms."[87] The court rejected Family Life's RFRA claims because:

> the harm to Family Life's religious exercise was no more than incidental to Elgin's neutral land use ordinances. . . . No evidence

80. *Id.* at 1116–17.

81. *Id.* at 1117 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993)).

82. *Id.* (citing Grosz v. City of Miami Beach, 721 F.2d 729 (11th Cir. 1983)).

83. *Id.*

84. *Id.* at 1118.

85. 561 F. Supp. 2d 978 (N.D. Ill. 2008).

86. *Id.* at 983.

87. *Id.* at 987. The court was actually determining whether or not the city's actions violated RLUIPA; however, the court wrote in its RFRA analysis that "Family Life's state law claim is a loser on the merits for the same reason that its Free Exercise and [RLUIPA] claims have failed. . . ." *Id.* at 992.

> exists that it seeks to exclude religious organizations (either generally or Family Life in particular) because of their nature.[88]

Again, despite statutory insistence that laws may burden the free exercise of religion "even if the burden results from a rule of general applicability,"[89] at least three states have adopted general applicability as a factor that weighs in favor of the state.

The imposition of *Smith*-esque general applicability requirements onto state RFRA analyses is a strong challenge to the practical effectiveness of these acts. Courts in Connecticut, Florida, and Illinois have usurped the legislature's intent and authority by considering general applicability to be a factor weighing against the aggrieved plaintiff. The general applicability requirement violates legislative intent in two ways. First, every RFRA contains a plain statement that generally applicable laws *can* substantially burden the free exercise of religion, and thus courts should not treat general applicability as dispositive. However, in the cases discussed *supra*, the courts have clearly determined that general applicability can be a de facto defense against RFRA suits. In doing so, courts are returning to the rule, as stated in *Smith*, that the RFRAs were designed to overturn, which is the second sign of judicial violation of legislative intent. The RFRAs were all passed at such a time, and with such legislative history and findings, that *Smith* was clearly to be abandoned when analyzing state laws. The legislatures sent a message to the courts that, while federal courts would continue to decide statutes such as RLUIPA in light of *Smith*, state courts were to adopt a straight version of pre-*Smith* Free Exercise jurisprudence—the compelling interest test. Today, however, state RFRAs have seen their effectiveness diluted because courts are willing to freely mix in a general applicability test and use it to find that state action does not substantially burden free exercise. This is a wrongful distortion of the compelling interest test, and one that states contemplating RFRAs should take note of.

B. Substantial Burdens: Too High a Bar?

The second significant challenge facing state RFRAs is the significant hurdle of proving a substantial burden that plaintiffs face in some jurisdictions. As previously stated, four states have statutorily defined substantial burden in some way, leaving courts less room to impose their own definition of this critical term.[90] In some states that do not define substantial

88. *Id.* at 987.

89. CONN. GEN. STAT. ANN. § 52-571b (West 2005).

90. *See supra* notes 59–62. *But see* Steele v. Guilifoyle, 76 P.3d 99, 102 (Okla. Civ. App. 2003). Despite Oklahoma's low-threshold statutory definition of substantial burden, the court found that housing a Muslim inmate with a non-Muslim did not constitute a substantial burden because the hous-

burden in the RFRA, the burden on the plaintiff to prove that his religious exercised has been actionably impinged by government action is quite high. In *Warner v. City of Boca Raton*,[91] the Florida Supreme Court, responding to a certified question posed by the Eleventh Circuit, outlined the three judicial tests for determining whether a substantial burden exists:

> The Fourth, Ninth, and Eleventh Circuits define "substantial burden" as one that either compels the religious adherent to engage in conduct that his religion forbids (such as eating pork, for a Muslim or Jew) or forbids him to engage in conduct that his religion requires (such as prayer). The Eighth and Tenth Circuits use a broader definition—action that forces religious adherents "to refrain from religiously motivated conduct," or that "significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a [person's] individual beliefs," imposes a substantial burden on the exercise of the individual's religion. The Sixth Circuit seems to straddle this divide, asking whether the burdened practice is "essential" or "fundamental."[92]

After finding that the Sixth Circuit's definition was inconsistent with the Florida RFRA's language, the Florida Supreme Court adopted the narrow version used by the Fourth, Ninth, and Eleventh Circuits because they felt that an inquiry into whether a practice was "obligatory or forbidden" was preferable to one that required courts "to question the centrality of a particular religious belief."[93] The "obligatory or forbidden" inquiry preferred by the Florida Supreme Court can, however, lead to alarming results that ultimately prevent plaintiffs from defending their right to freely exercise their religion.

The *Warner* case is an excellent illustration of the disturbing results that the narrow definition of substantial burden can lead to. Eleven relatives of people who were buried in a cemetery owned by the City of Boca Raton sued the city after it passed a regulation prohibiting vertical grave markers, memorials, monuments, and structures on cemetery plots.[94] Each relative had a unique reason for wanting a vertical grave marker; for example, a Jewish family "placed ground cover and edging stones on their family members' graves in observance of a Jewish tradition that grave

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ing arrangement "does not inhibit or constrain Plaintiff's religious conduct . . . curtail Plaintiff's ability to express adherence to his faith . . . [or] deny Plaintiff a reasonable opportunity to engage in those activities that are fundamental to his religion." *Id.* This may suggest that courts will be willing to supplant or fill in statutory definitions of substantial burden with their own interpretations of the term.

91. 887 So. 2d 1023 (Fla. 2004).

92. *Id.* at 1033 (citations omitted).

93. *Id.* at 1033–34.

94. *Id.* at 1025.

sites are to be protected and never walked upon."[95] While this practice seems sincerely religiously motivated, perhaps even obligatory to the relatives suing under Florida's RFRA, the Florida Supreme Court found that the "restrictions on the manner in which religious decorations may be displayed *merely inconvenience* the plaintiffs' practices of marking graves and decorating them with religious symbols."[96] Thus, according to the Florida Supreme Court, a line can be drawn between religious conduct that is obligatory or forbidden and that which is merely convenient, with protecting the gravesites of deceased relatives presumably falling in the latter.

Perhaps the most extreme example of the narrow substantial burden test is *Nelson v. Miller*.[97] The plaintiff in that case was an inmate in the custody of the Illinois Department of Corrections who experienced an evolution of his Catholic faith during his time in custody. Originally, he abstained from eating meat on Fridays and during Lent, until he began to further adhere to the Rule of St. Benedict, which he believed forbade him from eating the flesh of four-legged animals. Ultimately, he followed a strict construction of St. Benedict's Rule, refusing the consumption of meat at all times.[98] The correctional facility in which he was housed offered only regular diets (which possibly contained meat), a vegan diet (which contained no animal or animal by-products), and some medical diets.[99] The prison chaplain, a Lutheran minister, continually denied the plaintiff's requests for diet changes because the "plaintiff was free to 'choose to not eat meat . . . on Fridays'" and the "requested diet 'is not required by the Roman Catholic faith.'"[100] After four years of requests, the warden directed the prison chaplain to approve the diet changes sought by the plaintiff "based on the seriousness of his religion."[101] While the plaintiff tried to maintain a steadfast observance of his religious diet during his four-year wait, "skipping the meat on his meal tray also required skipping a substantial portion of the meal, for example when spaghetti with meat sauce was served."[102] During this time, the plaintiff's weight dropped from 161 pounds to 119 pounds, he was hospitalized three times "due to his weight loss," he was hungry, his bones began to protrude, he was cold, and he was depressed and anxious.[103] Despite all of this, the court determined that, because the prison dietician testified that "if all

95. Warner v. City of Boca Raton, 64 F. Supp. 2d 1272, 1277 (S.D. Fla. 1999).
96. *Id.* at 1287 (emphasis added).
97. No. 03-254-CJP, 2008 WL 904735 (S.D. Ill. Mar. 31, 2008).
98. *Id.* at *1.
99. *Id.* at *2.
100. *Id.*
101. *Id.* at *5.
102. *Id.*
103. *Id.*

meat of four-legged animals were skipped, the regular diet would still be nutritionally adequate . . . [the] plaintiff did not require [the chaplain's] permission and/or the vegan diet in order to be able to comply with his religious beliefs."[104] Thus, the "plaintiff's adherence to the Rule of St. Benedict, as he interpreted it, was not impeded or burdened in any way."[105]

This is not to say that every case in which the court uses the narrow definition of substantial burden is wrongly decided. In *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*,[106] a zoning ordinance prevented a church from holding worship services in the building it owned, causing it to rent space for worship services.[107] The church sued the city under the Illinois RFRA, alleging that its free exercise of religion was substantially burdened because of the money it was forced to spend on rent and the inconvenience of setting up in the rented space.[108] The court, however, found for the city, determining that the church's free exercise was not substantially burdened because it "remain[ed] able to hold worship services, and the possibility remain[ed] that [the church] might be able to find a suitable property and sell the building" that it already owned.[109] This result seems to make sense because the church seemed to be carrying on as usual despite its inability to use the land it already owned; for example, the congregation was 500-strong at the time of the lawsuit, and these churchgoers were still able to worship together.[110] The church's suit may not have been successful even under the broader interpretation of substantial burden ("significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a [person's] individual beliefs" [111]), because a more fact-based inquiry surrounding the rent paid by the church could have shown that the church was not significantly constrained by renting. While the broader interpretation is preferable, this is not to say that the narrow interpretation gets it wrong every time.

104. *Id.* at *7.
105. *Id.*
106. 250 F. Supp. 2d 961 (N.D. Ill. 2003).
107. *Id.* at 964.
108. *Id.* at 986.
109. *Id.* at 993. *But see* Barr v. City of Sinton, No. 13-03-727-CV, 2005 WL 3117209, at *4 (Tex. App. Nov. 23, 2005). An ordinance prohibited a pastor from operating a religiously-motivated rehabilitation facility within 1000 feet of residential areas, schools, parks, recreation areas, and places of worship. According to the City Manager, this ordinance made the pastor's ability to operate a rehabilitation facility "pretty close to nonexistent" in the city. However, the court determined that there was no substantial burden because "nothing in the ordinance . . . precludes [the pastor] . . . from providing instruction, counsel and helpful assistance in other facilities in Sinton, or from housing these persons outside the City and providing his religious ministry to them there." *Id.*
110. *Vineyard Christian Fellowship*, 250 F. Supp. 2d at 971.
111. Warner v. City of Boca Raton, 887 So. 2d 1023, 1033 (Fla. 2004) (alteration in original) (quoting Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995)).

The narrow definition of substantial burden should be replaced for two main reasons: its tendency to produce bizarre outcomes and its violation of legislative intent. As noted repeatedly, a narrow definition of substantial burden can lead to startling results, loved ones' inability to protect the gravesites of the deceased and a prisoner's frustrated quest to follow monastic practices being highlights. The area of church/zoning law conflicts provides a picture of murky line-drawing, where neither churches that can continue to exist despite the zoning laws nor those that must fail due to the laws are substantially burdened. The solution to the practical problems posed by the "ordinary or prohibitory" inquiry adopted in the narrow interpretation of substantial burden is likely the broader concept of substantial burden utilized in the Eighth and Tenth Circuits.

The narrow definition of substantial burden also violates the legislative intent behind the state RFRAs. As this note explained in the *Smith*-importation context, state legislatures saw a problem in *Smith*: citizens were denied effective relief when they felt their right to freely exercise their religion was abridged. In other words, the implicit legislative intent behind state RFRAs suggests that they were passed to allow citizens to successfully sue the government in order to practice their religion. As cases such as *Nelson* indicate, however, when courts try to determine whether a practice is obligatory or forbidden, they can easily end up rejecting a plaintiff's seemingly legitimate claim by finding unworkable solutions around his or her burden. This line of analysis effectively acts as a deterrent or bar to citizens' claims against the government, for it takes too much to prove a substantial burden to make litigation worthwhile, curtailing citizens' ability to freely exercise religion.

In short, a judicially-crafted rule that effectively prevents people from freely exercising their religion is undesirable. In order to prevent "every citizen [from becoming] a law unto himself,"[112] sometimes government regulations must trump religious practices—this is an undeniable point, but the crux of this issue is where to draw the line where the trumping may begin. The Supreme Court has said that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[113] The state legislatures recognized this principle by enacting the RFRAs, forcing states to offer up evidence of a compelling interest for their actions.

State courts and legislatures subject to the RFRA should replace the inadequate narrow definition of substantial burden with the broader definition. Under the broad definition, a substantial burden is any "action that forces religious adherents to 'refrain from religiously motivated conduct,'

112. Employment Div. of the Dep't of Human Res. v. Smith, 494 U.S. 872, 879 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 166–67 (1878)).

113. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

or that 'significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a [person's] individual beliefs.'"[114] The broader definition of substantial burden is more in keeping with the *Yoder* principle[115] than the narrow definition is, and despite the Florida Supreme Court's claim that the narrow analysis is preferable,[116] federal courts analyzing Free Exercise claims and the original RFRA used the broad definition routinely and effectively.[117] Theoretically, the cases that would pass the narrow substantial burden test would also pass the broader one, along with other cases to be determined on a factually driven, case-by-case basis. This method is preferable for a number of reasons.

First, the broad definition of substantial burden would likely lead to more successful free exercise actions by allowing courts to determine the substantiality of the burden on a sort of sliding scale, rather than the all-or-nothing approach offered by the narrow definition. In fact, the narrow definition may be another "*Smith* through the backdoor" measure, rejecting the broad definition in light of Justice Scalia's words: "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."[118] In a sense, the narrow definition of substantial burden may be preferable because it draws a brighter line for courts to follow, leading to more certainty for state and local governments when they enact possibly burdensome measures. However, this measure of certainty must not belie the courts' mission to uphold the laws of the state, in this case meaning the statute allowing people redress for the infringement of their rights. As Justice Blackmun wrote in his dissent to *Smith*, "courts must [not] turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion."[119] By using the broad definition of substantial burden courts could take into account the plaintiff in *Nelson*'s weight loss and medical problems and correctly conclude that his dietary restrictions were a substantial burden. The broad definition of substantial burden is thus preferable because it does not take a direct contradiction of a plaintiff's beliefs for him to be successful. At the same time, the balance is preserved such that the government will not always by impeded by the RFRA.[120] A sensible balance can be drawn.

This sensible balance approach leads to the second reason that the broad definition should replace the narrow: it comports with the legislative

114. Warner v. City of Boca Raton, 887 So. 2d 1023, 1033 (Fla. 2004) (alterations in original) (citations omitted).

115. *See supra* note 112.

116. *Warner*, 887 So. 2d at 1033.

117. *See* Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995); Brown-El v. Harris, 26 F.3d 68 (8th Cir. 1994); Bryant v. Gomez 46 F.3d 948 (9th Cir. 1995).

118. Employment Div. of the Dep't of Human Res. v. Smith, 494 U.S. 872, 887 (1990).

119. *Id.* at 919 (Blackmun, J., dissenting).

120. *E.g.*, *Brown-El*, 848 F.2d 404.

intent behind the RFRA. This point has been belabored thus far, so there is little reason to rehash it here, but a broader interpretation allows for more successful suits against the government, in turn allowing less free exercise infringement by the government, which was the purpose of the state RFRAs. Thus, the broad definition of substantial burden is closer to the intent and purpose behind the RFRAs than the narrow definition.

CONCLUSION

Historical context and legislative intent show that state RFRAs were passed in order to protect citizens from government conduct that infringed upon their right to freely exercise their religion. Looking back on the first decade of state RFRA enactment, however, two distinct patterns have emerged that challenge the practical effectiveness of these statutes. First, courts have incorporated elements of *Smith*, the case which RFRAs were designed to countermand, as analytical factors weighing in favor of the government entity being sued. This judicial imposition makes it more difficult for plaintiffs to be successful than the legislatures seemed to envision when passing the RFRAs, and thus state courts and legislatures should clarify that elements of *Smith* are improper under state RFRA analysis. Second, some jurisdictions define one of the prongs of the RFRA test—a plaintiff's showing that government action substantially burdened their free exercise of religion—so narrowly that many seemingly valid plaintiffs are denied relief. This narrow definition also contradicts the intent of the legislatures by making RFRA suits more difficult for plaintiffs, and thus the narrow definition should be replaced. In its place, courts or legislatures should adopt a broader definition of substantial burden used by the Eighth and Tenth Circuits. This definition allows courts to evaluate the severity of the burden and find that a plaintiff's burden was substantial even where he was not forced to do something forbidden or prevented from doing something obligatory to his faith. In turn, more suits against the government would be successful, and thus citizens would be better able to freely exercise their religion. Once these two challenges are solved, RFRAs will ultimately become what they were meant to be—an effective method of protecting private interests in free exercise against government intrusion.

After this Note was already written, the Seventh Circuit issued a ruling in *Nelson*, the case in which an Illinois inmate was denied a unique diet free of meat on Fridays and during Lent.[121] The court notes that the substantial burden tests applicable under RLUIPA and Illinois's RFRA are "essentially identical" before analyzing Nelson's claim under both.[122] The court found that Nelson's religion was burdened in two ways. First, the

121. Nelson v. Miller, 570 F.3d 868 (7th Cir. 2009).
122. *Id.* at 877–78.

court wrote, "Nelson's practice of his religion was substantially burdened by [the prison's] procedural requirements for obtaining a religious diet," in large part because it would have been "effectively impracticable" for Nelson to show that Catholicism required him to abstain from meat to the degree he desired.[123] Second, the court held that the prison's denial of Nelson's dietary requests amounted to a substantial burden because it essentially required Nelson to "forego adequate nutrition."[124] Because neither the trial court nor the parties before the appellate court reached the least restrictive means test, the Seventh Circuit remanded on that issue. This ruling is significant because it echoes one of the points this Note attempts to make—that religion is deeply personal and that citizens should be able to make choices about their religion that, while not required by the hierarchy of an organized sect, reflect their views on how to act in order to attain their spiritual goals. Catholicism did not require Nelson to abstain from meat every Friday and during Lent; his own readings of St. Benedict and Cistercian monks compelled him so. The Seventh Circuit's decision should be applauded for allowing citizens to go beyond the very minimum levels of religious practice.

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123. *Id.* at 879.
124. *Id.* at 880.