Know Your Rights:
Freedom of Religion

The free exercise of religion principally derives protection from some combination of three federal legal sources: (1) the Free Exercise Clause of the First Amendment to the U.S. Constitution; (2) the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq*.; and (3) the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq*. While the Supreme Court has substantially restricted the rights of prisoners when interpreting the First Amendment, Congress has made it easier for prisoners to win cases regarding religious freedom by passing RFRA and RLUIPA.

THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

When is Religious Exercise Constitutionally Protected?

Generally, beliefs that are "religious" and "sincerely held" are protected by the Free Exercise Clause of the First Amendment to the United States Constitution.

Courts often disagree about what qualifies as a religion or a religious belief. So-called "mainstream" belief systems, such as Christianity, Islam and Judaism, are universally understood to be religions. Less well-known or nontraditional faiths, however, have had less success being recognized as religions. While Rastafari, Native American religions, and various Eastern religions have generally been protected, belief systems such as the Church of the New Song, Satanism, the Aryan Nations, and the Five Percenters have often gone unprotected. The Supreme Court has never defined the term "religion." However, in deciding whether something is a religion, lower courts have asked whether the belief system addresses "fundamental and ultimate questions," is "comprehensive in nature," and presents "certain formal and external signs." *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981); *see also Dettmer v. Landon*, 799 F.2d 929, 931-32 (4th Cir. 1986). If you want a nontraditional belief system to be recognized as a religion, it may help if you can show how your beliefs are similar to other, better-known religions: Does your religion have many members? Any leaders? A holy book? Other artifacts or symbols? Does it believe in a God or gods? Does it believe that life has a purpose? Does it have a story about the origin of people?

In addition to proving that something is a religion, you must also convince prison administrators or a court that your beliefs are sincerely held. In other words, you must really believe it. In deciding whether a belief is sincere, courts sometimes look to how long a person has believed something and how consistently he or she has followed those beliefs. *See Sourbeer v. Robinson*, 791 F.2d 1094, 1102 (3d Cir. 1986); *Vaughn v. Garrison*, 534 F. Supp. 90, 92 (E.D.N.C. 1981). Just because you have not believed something your entire life, or because you have violated your beliefs in the past, does not automatically mean that a court will find that you are insincere. *See Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988); *Weir v. Nix*, 890 F. Supp. 769, 775-76 (S.D. Iowa 1995). However, if you recently converted or if you have repeatedly acted in a manner inconsistent with your beliefs, you will probably have a hard time convincing a court that you are sincere.

<u>When are Prison Restrictions on the Exercise of Religion Constitutionally Permitted?</u>

You have an absolute right to believe anything you want. You do not, however, always have a constitutional right to do things (or not do things) just because of your religious beliefs.

The constitutional right of free exercise does not excuse anyone, including prisoners, from complying with a "neutral" rule (one not intended to restrict religion) of "general applicability" (one that applies to everyone in the same way) simply because it requires them to act in a manner inconsistent with their religious beliefs. *See Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). A rule that applies only to a religious group is not generally applicable. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 543 (1993).

In prison cases, courts permit restrictions on religious exercise as long as such restrictions are "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). This standard is not very protective of prisoners' First Amendment rights. In *O'Lone v. Estate of Shabazz*, the Supreme Court upheld two regulations that effectively prohibited Muslim prisoners from attending Friday afternoon congregational services. 482 U.S. 342 (1987). The Court reasoned that although some prisoners were completely unable to attend services, the restrictions were reasonable because prisoners could practice other aspects of their faith. *Id.* at 351-52.

RFRA & RLUIPA: EXPANDED STATUTORY PROTECTIONS FOR RELIGIOUS ACTIVITIES

Congress has passed two statutes providing heightened protection for religious exercise in prison.. The Religious Freedom Restoration Act (RFRA) applies to federal and District of Columbia prisoners. *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003) (federal prisoners); *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001) (same); *Jama v. U.S.I.N.S.*, 343 F. Supp. 2d 338, 370 (D.N.J. 2004) (immigration detainees); *Gartrell v. Ashcroft*, 191 F. Supp. 2d 23 (D.D.C. 2002) (District of Columbia prisoners). The Religious Land Use and Institutionalized Persons Act (RLUIPA) applies to state or local institutions that receive money from the federal government; this includes most local and every single State prison system. *See Cutter v. Wilkinson*, 544 U.S. 709, 716 n.4 (2005).

Both RFRA and RLUIPA balance a prisoner's right to exercise his or her religion against the government's interests. The general balancing test is that the government may not impose a substantial burden on the religious exercise of prisoners unless that burden (1) is in furtherance of a *compelling governmental interest*; and (2) is the *least restrictive means* of furthering that interest. RLUIPA additionally defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

This test is *more protective* than the *Turner* standard that applies to Free Exercise claims under the First Amendment. Therefore, if a religious practice was protected under the Free Exercise Clause, it will probably be protected under RFRA or RLUIPA. And even if a practice was not protected under the Free Exercise Clause, it may sill be protected under RFRA or RLUIPA. The cases below discuss the application of the First Amendment to various aspects of religious exercise. Cases brought under RFRA and RLUIPA can be expected to yield similar or more favorable results.

Religious foods

Prisoners have enjoyed a fair amount of success with claims protecting religious dietary practices. *Ford v. McGinnis*, 352 F.3d 582, 597 (2d Cir. 2003) ("[A] prisoner has a right to a diet consistent with his or her religious scruples."); *Lomholt v. Holder*, 287 F.3d 683 (8th Cir. 2002) (prisoner's allegation that he was punished for religious fasting stated a First Amendment claim).

Courts have often found that prisoners have a right to avoid eating foods that are forbidden by their religious beliefs. *See Moorish Science Temple of Amer., Inc. v. Smith*, 693 F.2d 987, 990 (2d Cir. 1982). Where reasonable accommodations by the prison can be made to provide religious meals, courts have ordered such diets be made available to prisoners. *See Ashelman v. Wawrzaszek*, 111 F.3d 674, 678 (9th Cir. 1997). Courts have also required accommodations for special religious observances related to meals. *See Makin v. Colorado Dep't of Corrections*, 183 F.3d 1205, 1211-14 (10th Cir. 1999) (failure to accommodate Muslim fasting requirements during Ramadan infringed on First Amendment rights); *Levitan v. Ashcroft*, 281 F.3d 1313, 1322 (D.C. Cir. 2002) (reversing summary judgment for defendants in Catholic prisoners' challenge to denial of communion wine). Some courts have rejected efforts by prison officials to charge prisoners for religious diets. *See Beerheide v. Suthers*, 286 F.3d 1179, 1192 (10th Cir. 2002) (no rational relationship between penological concerns and proposed co-payment for kosher diet).

Prisoners requesting highly individualized diets, however, have rarely been successful. *See DeHart v. Horn*, 390 F.3d 262, 269-72 (3d Cir. 2004).

Religious services

Notwithstanding the Supreme Court's decision in *Estate of Shabazz*, courts have generally protected prisoners from interference with their ability to attend religious services or engage in prayer. *Mayweathers v. Newland*, 258 F.3d 930, 938 (9th Cir. 2001) (upholding injunction against disciplining Muslim prisoners for missing work to attend Friday services); *Omar v. Casterline*, 288 F. Supp. 2d 775, 781 (W.D. La. 2003) (refusal to tell Muslim prisoner the date or time of day to allow him to pray and fast states First Amendment claim); *Youngbear v. Thalacker*, 174 F. Supp. 2d 902, 912-15 (N.D. Iowa 2001) (one year delay in providing sweat lodge for Native American religious activities violates First Amendment).

Sabbath

Courts have also found that restrictions requiring prisoners to violate the Sabbath or other religious duties violate the First Amendment. *McEachin v. McGuinnis*, 357 F.3d 197, 204-05 (2d Cir. 2004) (intentionally giving Muslim prisoner an order during prayer may violate First Amendment); *Hayes v. Long*, 72 F.3d 70 (8th Cir. 1995) (requiring Muslim prisoner to handle pork violated First Amendment); *Murphy v. Carroll*, 202 F. Supp. 2d 421, 423-25 (D. Md. 2002) (prison officials' designation of Saturday as cell-cleaning day violated Free Exercise rights of Orthodox Jewish prisoner).

Religious objects

Courts have often concluded that prison officials may generally ban religious

objects if they can make a plausible claim that the objects could pose security problems. *See Spies v. Voinovich*, 173 F.3d 398, 406 (6th Cir. 1999); *Mark v. Nix*, 983 F.2d 138, 139 (8th Cir. 1993). However, prison officials must present evidence that such restrictions responded to valid security concerns. *Boles v. Neet*, 486 F.3d 1177, 1182-83 (10th Cir. 2007). Also, prison officials may not ban some religious objects and not others without any justification. *See Sasnett v. Litscher*, 197 F.3d 290, 292 (7th Cir. 1999) (Free Exercise Clause violated where prison regulation banned the wearing of Protestant crosses but allowed Catholic rosaries without any reasonable justification for distinction). Courts have also concluded that prison officials are not required to provide religious objects as long as prisoners are free to purchase or obtain the objects themselves. *See Frank v. Terrell*, 858 F.2d 1090, 1091 (5th Cir. 1988).

Religious literature

Courts have concluded that although officials may limit the amount of reading material that a prisoner keeps in his or her cell, officials may not bar religious literature when other literature is permitted and prisoners generally have a right to read the primary text of their faith tradition. *See*, *e.g.*, *Sutton v. Rasheed*, 323 F.3d 236, 250-58 (3d Cir. 2003); *Jesus Christ Prison Ministry v. California Dep't of Corrections*, 456 F. Supp. 2d 1188, 1201-02 (E.D. Cal. 2006) (policy barring prisoners from receiving religious books from organizations not on approved vendor list is unconstitutional).

Personal grooming

Prisoners have rarely been successful in challenging grooming and dress regulations. Courts have generally upheld restrictions on haircuts. *See Hines v. South Carolina Dep't of Corrections*, 148 F.3d 353, 356 (4th Cir. 1998); *Sours v. Long*, 978 F.2d 1086, 1087 (8th Cir. 1992). This has also been true with regard to headgear and other religious attire. *See Muhammad v. Lynaugh*, 966 F.2d 901, 902-03 (5th Cir. 1992); *Sutton v. Stewart*, 22 F. Supp. 2d 1097, 1106 (D. Ariz. 1998).

A prison rule about grooming may, however, be vulnerable to attack if it is not enforced equally against all religions. *See Sasnett v. Litscher*, 197 F.3d 290, 292 (7th Cir. 1999); *Swift v. Lewis*, 901 F.2d 730, 731-32 (9th Cir. 1990) (where prison permitted long hair and beards for some religions but not others, it must present evidence justifying this unequal treatment); *Wilson v. Moore*, 270 F. Supp. 2d 1328, 1353 (N.D. Fla. 2003).