WHEN DOES A PRISONER HAVE THE RIGHT TO A SPECIAL DIET?

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Under the Eighth Amendment, a prison must provide an inmate with a diet that contains adequate nutrition. (*French v. Owens*, 777 F.2d 1250, 1255 (7th Cir.1985), *cert. denied*, 479 U.S. 817 (1986) (quoting *Ramos v. Lamm*, 639 F.2d 559, 570-71 (10th Cir.1980), *cert. denied*, 450 U.S. 1041 (1981).) But assuming a diet's nutritional adequacy, it is less clear under what circumstances a prison must accommodate an inmate's dietary restrictions. This outline posits an answer to that question.

I. First Amendment

The First Amendment to the U.S. Constitution prohibits Congress from enacting laws "respecting an establishment of religion[] or prohibiting the free exercise thereof." (U.S. Const., Amdt. 1.) It is now well-settled that the Amendment applies to any government action, not merely laws of Congress. (*Glassroth v. Moore*, 335 F.3d 1282, 1294 (11th Cir. 2003) (citing cases).)

A. Two relevant clauses of the First Amendment

Free exercise clause: inmates retain protections afforded by the First Amendment, including its directive that no law shall prohibit the free exercise of religion. (*O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989).)

Establishment clause: a government policy or practice violates the Establishment Clause if (1) it has no secular purpose, (2) its primary effect advances or inhibits religion, or (3) it fosters an excessive entanglement with religion. (*Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).)

B. Essential elements of a First Amendment case

1. Sincere religious belief (*Koger v. Bryan*, 523 F.3d 789, 797-98 (7th Cir. 2008); *Vision Church v. Village of Long Grove*, 468 F.3d 975, 996-97 (7th Cir. 2006))

To receive protection from the First Amendment, a prisoner must show that his or her request for a special diet is rooted in a sincerely held religious belief, not "purely secular" concerns. (*Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 713-14 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972).)

For example: animal suffering. (*Vinning-El v. Evans*, 657 F.3d 591, 594 (7th Cir. 2011).)

Yet atheism may, in the specialized sense of applying First Amendment protections, be considered a religion. (*Kaufman v. McCaughtry*, 419 F.3d 678, 681-82 (7th Cir. 2005).)

Moreover, the First Amendment protects genuine religious dietary practices even if they are not a central tenet of the prisoner's religion or doctrinally required. (*Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005); *Employment Division v. Smith*, 494 U.S. 872, 886-87 (1990); *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 699 (1989).)

Clergy opinion has generally been deemed insufficient to override a prisoner's sincerely held religious belief. (*Ford v. McGinnis*, 352 F.3d 582, 593-94 (2d Cir. 2003); *Vinning-El v. Evans*, 657 F.3d 591, 593 (7th Cir. 2011).) It is also inappropriate for a prison official to argue with a prisoner regarding the objective truth of his or her religious belief. (*Nelson v. Miller*, 570 F.3d 868, 881 (7th Cir. 2009).) But the more a prisoner's professed belief differs from the orthodox beliefs of his or her faith, the less likely his or her belief is to be sincerely held, at least according to one circuit. (*Vinning-El v. Evans*, 657 F.3d 591, 594 (7th Cir. 2011).)

2. Religious exercise substantially burdened (*Koger v. Bryan*, 523 F.3d 789, 797-98 (7th Cir. 2008); *Vision Church v. Village of Long Grove*, 468 F.3d 975, 996-97 (7th Cir. 2006))

Definition of a substantial burden: a prisoner's religious dietary practice is substantially burdened when the prison forces him or her to choose between religious practice and adequate nutrition. (*Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1317 (10th Cir. 2010); *Nelson v. Miller*, 570 F.3d 868, 879 (7th Cir. 2009); *Love v. Reed*, 216 F.3d 682, 689-90 (8th Cir. 2000); *McElyea v. Babbitt*, 833 F.2d 196, 198 (9th Cir. 1987).)

3. Burden is not reasonably related to a legitimate penological interest (*O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349-51 (1987); *Turner v. Safley*, 482 U.S. 78, 89 (1987))

Four factors relevant to this determination: (1) whether a rational connection exists between the regulation and a neutral, legitimate government interest; (2) whether alternative means exist for inmates to exercise the constitutional right at issue; (3) what impact the accommodation of the right would have on inmates, prison personnel, and allocation of prison resources; and (4) whether obvious, easy alternatives exist. (*Turner v. Safley*, 482 U.S. 78, 79 (1987).)

The second factor refers to alternative means of exercising one's religious

beliefs generally, not specific to diet. (*DeHart v. Horn*, 227 F.3d 47, 53-54 (3d Cir. 2000).)

With regard to the fourth factor, if an inmate can identify a specific alternative that fully accommodates his or her rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard. (*Turner v. Safley*, 482 U.S. 78, 90-91 (1987).)

Legitimate penological concerns include a prison's interest in an efficient food system and avoiding inmate jealousy. (*DeHart v. Horn*, 227 F.3d 47, 53 (3d Cir. 2000).) But the rule should be no greater than necessary to protect those interests; that is, it cannot be an exaggerated response. (*Turner v. Safley*, 482 U.S. 78, 87 (1987); *Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974); *Pell v. Procunier*, 417 U.S. 817, 822-23 (1974).)

Evidence of the rules in other prisons is not, by itself, sufficient to cast doubt on a prison's explanation. (*Mays v. Springborn*, 575 F.3d 643, 647 (7th Cir. 2009); *Fowler v. Crawford*, 534 F.3d 931, 942 (8th Cir. 2008); *Spratt v. Rhode Island Dept. of Corr.*, 482 F.3d 33, 42 (1st Cir. 2007).) This is in contrast to the cases under the Religious Land Use and Institutionalized Persons Act.

II. Religious Land Use and Institutionalized Persons Act (42 U.S.C. section 2000cc-1)

Enacted on September 22, 2000, the Religious Land Use and Institutionalized Persons Act (RLUIPA) imposes duties on prison officials that exceed those imposed by the First Amendment. (*Cutter v. Wilkinson*, 544 U.S. 709, 714-16 (2005).)

RLUIPA applies to any inmate religious exercise case in which "the substantial burden is imposed in a program or activity that receives Federal financial assistance" or "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several states, or with Indian tribes." (42 U.S.C. section 2000cc-1.)

A. Essential elements of a RLUIPA case

1. Sincere religious belief (*Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005))

A prisoner's religious beliefs need not be based on a mainstream faith, but should deal with issues of ultimate concern, occupying a place parallel to that filled by God in traditionally religious people. (*Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829, 834 (1989); *Kaufman v. McCaughtry*, 419 F.3d 678, 681 (7th Cir. 2005).)

RLUIPA bars inquiry into whether a particular belief or practice is central to a prisoner's religion. (42 U.S.C. section 2000cc-5(7).) Instead, the belief or practice need only be *based on* a prisoner's religion. (*See*, *e.g.*, *Dawson v. Burnett*, 631 F.Supp.2d 878 (W.D. Mich. 2009).)

But RLUIPA may not be invoked to protect a way of life based on purely secular considerations. (*Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).)

For example: bodily health. (*Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008).)

2. Religious exercise substantially burdened (42 U.S.C. section 2000cc-2(b); *Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008))

Definition of religious exercise: any exercise of religion, whether or not compelled by or central to a system of religious belief. (42 U.S.C. section 2000cc-5(7)(A).)

Definition of substantial burden: RLUIPA does not define this phrase, but it is interpreted with reference to Supreme Court free exercise jurisprudence. (*Nelson v. Miller*, 570 F.3d 868, 877 (7th Cir. 2009).)

According to the Seventh Circuit, a failure to receive a diet that complies with a prisoner's religious beliefs may constitute a substantial burden on religious exercise under RLUIPA. (*Koger v. Bryan*, 523 F.3d 789, 798 (7th Cir. 2008).)

Unlike in cases arising under the Free Exercise Clause of the First Amendment, a burden resulting from a rule of general applicability is sufficient. (*Cutter v. Wilkinson*, 544 U.S. 709, 732 (2005); *Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008).)

3. Restriction does not further a compelling governmental interest by the least restrictive means (42 U.S.C. section 2000cc-2(b); *Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005))

Inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the RLUIPA's requirements. (146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy on RLUIPA).)

a. Compelling governmental interest

RLUIPA specifically contemplates that the law "may require a government to incur expenses in its own operations to avoid imposing a substantial burden" (42 U.S.C. section 2000cc-3(c)), so the fact that a special diet may be more costly is not alone a

compelling governmental interest. (*Willis v. Commissioner, Indiana Dept. of Correction*, 753 F.Supp.2d 768, 778 (S.D. Indiana 2010).)

The governmental interest should be considered in light of the prisoner's request and circumstances at the detention facility. (*Koger v. Bryan*, 523 F.3d 789, 800 (7th Cir. 2008).)

b. Least restrictive means

For a state to demonstrate that its practice is the least restrictive means, it must show that it actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice. (*Jova v. Smith*, 582 F.3d 410, 416 (2d Cir. 2009); *Shakur v. Schriro*, 514 F.3d 878, 890 (9th Cir. 2008).)

"[T]he failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means." (*Warsoldier v. Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005); *see also Washington v. Klem*, 497 F.3d 272, 285 (3d Cir. 2007).)