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BANNING THE HIJAB IN PRISONS: VIOLATIONS OF INCARCERATED MUSLIM WOMEN’S RIGHT TO FREE EXERCISE OF RELIGION

ALI AMMOURA*

INTRODUCTION

On November 1, 2011, officers at the Orange County Superior Court took Souhair Khatib, a practicing Muslim woman who wore the hijab, the Islamic headscarf, into custody, and to her dismay and humiliation, ordered her to remove her hijab and to remain without it while in custody.1 Khatib explained to the officers that her religion forbade her from removing her hijab in front of male non-relatives. She pleaded with them to allow her to keep it on, but they threatened to physically take it off of her head unless she removed it herself. Emotional and distraught, she reluctantly complied.2 While awaiting her reappearance in court, officers kept Khatib scarfless and locked up in front of male officers and inmates. Degraded and ashamed, she tried to cover her head with her vest but was forced to pull it down when she left her cell.3 She later filed a complaint against the County of Orange for violations of the Religious Land Use and Institutionalized Persons Act (RLUIPA).4 Although the Ninth Circuit reversed the district court’s dismissal of her case and remanded her case for further proceedings,5 Khatib has yet to find justice for the humiliation and degradation that she suffered at the hands of Orange County Superior Court officers.

Unfortunately, Khatib’s case is not unique. Other American Muslim women who wear the hijab face a wide array of discrimination in their

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1. Khatib v. Cnty. of Orange, No. SACV 07-1012 DOC (MLGx), 2008 WL 822562, at *1 (C.D. Cal. 2008), rev’d 639 F.3d 906, 906 (9th Cir. 2011), cert. denied, 132 S. Ct. 115 (2013). Khatib and her husband had appeared in court that day to seek an extension on a prior sentencing of community service, which the court denied.


3. Id.

4. Id.

5. Khatib, 639 F.3d at 906.
daily lives.6 One area in particular, as illustrated by Khatib’s case, involves penal regulations that prohibit incarcerated women from wearing the hijab, whether by a complete ban or by restrictions in certain areas of the facility. Although some courts have recently addressed whether such bans violate the prisoner’s First Amendment right to free exercise of religion or provisions of RLUIPA, none has yet to reach a decision on the merits.7 Admittedly, prisoners are less entitled to their civil rights than the rest of the population because of their criminal adjudications.8 But this does not mean that prisoners’ civil rights should be deprived entirely without compelling reasons, especially when religious discrimination gives rise to such deprivation. Protecting the rights of incarcerated Muslim women is particularly important because, like all persons in the United States, they have the right to practice their religion free from discrimination, whether they are incarcerated or freely walk the streets.

This Note examines whether prison regulations that prohibit incarcerated Muslim women from wearing the hijab violate their right to free exercise of religion. It argues that such individuals can redress their grievances by bringing claims under the First Amendment of the United States Constitution and RLUIPA.9 Specifically, Part I discusses the hijab as a religious exercise, its meaning, and its significance for Muslim women in the United States. Part II briefly explains the evolution of the legal standard of review for prisoner rights claims brought under the Free Exercise Clause and RLUIPA. Part III discusses the recent case of Khatib v. County of Orange, in which the Ninth Circuit considered whether a courthouse holding facility was an “institution” within the meaning of RLUIPA, and the implications that this case will have on other cases involving bans on the hijab in penal institutions. Finally, Part IV analyzes potential claims under the First Amendment

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6. These women have arguably been subject to greater public scrutiny and religious discrimination because of the hijab, more so than Muslim women who wear the niqab (or burqa), the Islamic face-veil, despite the notoriety afforded to the niqab by France’s national ban on wearing the niqab publicly. See Camille Rustic, France Burqa Ban Takes Effect; Two Women Detained, HUFFINGTON POST (Apr. 11, 2001), http://www.huffingtonpost.com/2011/04/11/france-burqa-han-takes-ef_n_847566.html.

7. See Ahâ Abdo, The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf, 5 HASTINGS RACE & POVERTY L.J. 441, 484-89 (2008) (discussing several cases in which Muslim women have litigated bans on the hijab in the context of prison visitors and inmates, all of which have not prevailed). The court in Khatib v. County of Orange also did not reach the merits of the case. See 639 F.3d at 906.


9. Plaintiffs may also bring suit under federal and state Religious Freedom Restoration Acts (RFRA), which have a similar if not identical standard as that of RLUIPA. This Note will primarily explore claims under RLUIPA and the Free Exercise Clause.
itself and RLUIPA, through which incarcerated Muslim women can bring suit against prisons for violating their right to free exercise of religion.

I. THE HIJAB: A CHOICE AND A RELIGIOUS PRACTICE

For many Muslim women, wearing the hijab is fundamental to their understanding and practice of Islamic dress.\textsuperscript{10} The word "hijab" comes from the Arabic word "hajab," meaning to veil, seclude, or screen.\textsuperscript{11} Islam enjoins Muslim men and women to pursue piety and righteousness in their dress and interactions with the opposite sex, by exhibiting modesty, privacy, and public respect.\textsuperscript{12} The practice of wearing the hijab originated from a series of divine revelations in the Quran, the Islamic holy book, which began by commanding men to remain behind a curtain or veil when asking anything of Prophet Muhammad’s wives,\textsuperscript{13} with the onus on the men to establish such a separation. Later, God commanded both men and women to behave with modesty. Men must “lower [t]heir gaze and guard [t]heir modesty, [which] will make [f]or greater purity for them . . .”\textsuperscript{14} and women must “lower [t]heir gaze and guard [t]heir modesty . . . [and] not display their [b]eauty and ornaments except [w]hat (must ordinarily) appear.”\textsuperscript{15} Additionally, God specifically addressed women’s dress by commanding them to cover their bosoms with a veil\textsuperscript{16} and their bodies with a cloak in order to protect themselves and identify themselves as respectable women.\textsuperscript{17} The overwhelming majority of Muslims therefore believe that wearing the hijab is religiously mandated.

Wearing the hijab and dressing according to the specified requirements in the Quran becomes obligatory on a Muslim woman when she reaches the age of puberty.\textsuperscript{18} The dress requirements for Muslim women include covering her entire body, except for her hands, face, and feet, in loose, nontransparent clothing in front of all non-

\textsuperscript{10} There are other types of Islamic headdress, however, including the kufi, a religious cap worn by Muslim men, and the niqab, the face-veil.
\textsuperscript{11} 2 Encyclopedia of Islam and the Muslim World 721 (Richard C. Martin et al. eds., 2003).
\textsuperscript{12} Id.
\textsuperscript{14} Id. at 24:30.
\textsuperscript{15} Id. at 24:31.
\textsuperscript{16} Id.
\textsuperscript{17} Id. at 33:59.
mahram males, or non-marriageable persons, as prescribed under Islamic jurisprudence.19 A woman’s mahram includes her husband, sons, father, grandfathers, brothers, uncles, sons, nephews, father-in-law, and young children.20 Although Muslim women are not required to wear hijab in front of other women,21 there are differing opinions in Islamic jurisprudence as to whether this includes non-Muslim women. Some Muslim women also cover their faces with a niqab, a face veil, because they believe that wearing the niqab is a highly recommended practice, perhaps even obligatory. But it is generally not considered an obligation according to mainstream orthodox Islam.

For many Muslim women in the United States, the decision to wear the hijab is a deeply personal choice. In a recent study researchers surveyed young second-generation Muslim American women and compiled their reasons for wearing the hijab.22 Many of them regarded wearing the hijab as both “a cultural and religious symbol” that encompassed different aspects of their identity.23 Most of the participants “made a conscious decision to wear the hijab,” without influence or pressure from others, some even deciding to wear it later into early adulthood.24 Their choice to wear it often involved notions of modesty, avoiding immorality, and protecting themselves from the opposite sex for reasons of safety and modesty.25 But they also emphasized individual choice and a conscious resolution as central in their decision to wear the hijab and in their understanding of their religious commitment.26 While the participants offered various reasons for wearing the hijab, all of their decisions “invariably involved a sense of religious obligation.”27

Some individuals, however, perceive that the practice of wearing the hijab is a non-choice and that Muslim women who wear it are oppressed and disempowered, thus discounting the individual opinions of the women who wear it.28 These individuals suppose that because Islam mandates wearing the hijab, as many believe, it follows that Mus-

20. Id.
21. Id.
23. Id. at 281.
24. Id.
25. Id.
26. Id. at 284.
27. Id. at 281.
28. Id. at 269-71.
PRISONERS RIGHTS TO RELIGIOUS PRACTICE

lim women do not have a choice in the matter and that Muslim societies may justifiably—within the bounds of Islam—force women to wear it against their will. But such notions are wrong for several reasons. First, this belief fails to recognize the individuality of Muslim women who wear the *hijab* and the fact that many choose freely to wear it. Moreover, declaring that Muslim women should not wear the *hijab*, or that they should not be allowed to wear it, equally disenfranchises them of their freedom to choose how to practice their religion. Second, this belief ignores the many Muslim women in predominantly non-Muslim societies choose to wear the *hijab* without experiencing any societal or cultural pressures to do so, such as the American women in the above-mentioned study.

Additionally, it is a fundamental principle in Islam that in matters of religion there can be no compulsion,29 which means that Islam forbids any individual from forcing others to adopt religious practices. While the orthodox Islamic opinion requires women to wear the *hijab*, a woman still has the choice to adopt the practice as her own. Notably, it is religiously sinful and morally blameworthy for anyone to force a woman to wear the *hijab* against her will. On the other hand, it cannot be fully discounted that there certainly are many social and cultural pressures on women to wear the *hijab*, which often amounts to a blatant compulsion. But as overpowering and oppressive as these pressures can be, Islam nonetheless gives women the individual authority to adopt wearing the *hijab* as her own practice, and it forbids others from compelling her to do so. As evidenced by the statements of the young Muslim American women in the study mentioned above, many Muslims in countries like the United States believe and adhere to the Islamic principle of no compulsion in religion. For the participants of the study and many Muslim women in the United States, wearing the *hijab* is undoubtedly a religious practice, and forcing a woman to remove it against her will will grossly violates her autonomy, dignity, and religious belief.

II. THE EVOLVING LEGAL STANDARD OF PRISONERS’ FREE EXERCISE OF RELIGION CLAIMS

To understand the current status of free exercise claims and the legal options available to prisoners who face religious discrimination, it is necessary to understand how the legal standards for such claims

have evolved.\textsuperscript{30} In \textit{Sherbert v. Verner}, a dispute over unemployment compensation, the United States Supreme Court established strict scrutiny and the “compelling state interest” test as the appropriate legal standard of review for free exercise claims.\textsuperscript{31} Under the compelling state interest test, a government regulation that substantially burdened an individual’s sincerely held religious belief was unconstitutional, unless the regulation furthered a compelling state interest.\textsuperscript{32} Later, the Court applied strict scrutiny to free exercise claims in educational contexts in \textit{Wisconsin v. Yoder}, and declared that only interests of the highest order would overcome substantial burdens on free exercise of religion.\textsuperscript{33}

Although the Supreme Court in \textit{Sherbert} and \textit{Yoder} did not address prisoners’ free exercise claims, the Court expressed the need for an appropriate standard in \textit{Procunier v. Martinez}.\textsuperscript{34} After \textit{Procunier}, a government regulation that placed incidental restrictions on a prisoner’s right to free speech was justified if it “further[ed] an important or substantial governmental interest unrelated to the suppression of expression” and did not burden the prisoner’s rights beyond what was “necessary or essential to the protection of the particular governmental interest.”\textsuperscript{35} While the Court did heighten the level of scrutiny for prisoner rights cases involving free speech, it failed to apply this to all prisoner rights claims.\textsuperscript{36} The Court spent the next thirteen years determining the applicable standard of review for prisoner civil rights claims.\textsuperscript{37} Eventually, the Court created a test that balanced the burden

\begin{itemize}
\item \textsuperscript{31} 374 U.S. 398, 403 (1963) (protecting an individual’s right to receive unemployment benefits that were denied to her for refusing to work on her religious Sabbath).
\item \textsuperscript{32} \textit{Id.} The Court applied the compelling interest test \textit{specifically} to employment discrimination and unemployment benefits and reinforced the principle that a state may not exclude members of a religious group “from receiving the benefits of public welfare legislation.” \textit{Id.} at 410.
\item \textsuperscript{33} 406 U.S. 205, 215 (1972).
\item \textsuperscript{35} \textit{Procunier}, 416 U.S. at 413-14.
\item \textsuperscript{36} See Kao, \textit{supra} note 34, at 5.
\item \textsuperscript{37} \textit{Id.} at 6-7; see Bell v. Wolfish, 441 U.S. 520, 550-51 (1979) (holding that a regulation limiting prisoners’ receipt of books in particular circumstances did not violate the prisoners’ rights because the regulation was a rational response to prison security); Jones v. N.C. Prisoners Union, 433 U.S. 119, 132-33 (1977) (holding that reasonable regulations do not violate First Amendment rights when justified by legitimate penological interests).
\end{itemize}
on prisoners’ rights against the legitimate governmental interest in incarceration while also considering alternative ways for prisoners to exercise their rights.

In Turner v. Safely, the Court expressly rejected a heightened level of scrutiny for prisoner’s free exercise claims, and instead held that “a prison regulation that impinges on inmates’ constitutional rights” is constitutional if it is “reasonably related to legitimate penological interests.” To determine reasonableness under Turner, courts must determine: (1) whether there is a “valid, rational connection between the prison regulation and the legitimate governmental interest”; (2) whether the prisoner has other means of exercising the asserted constitutional right, which is afforded deference to the corrections officials’ expertise; (3) whether accommodating the right will have any impact on the staff, the inmate’s liberty, or the allocation of prison resources; and (4) whether there exists an available alternative that accommodates the prisoner’s rights at de minimis costs and that fulfills valid penological interests.

The Court had the opportunity to apply the Turner four-factor test in O’Lone v. Estate of Shabazz, in which it held that a correctional institution’s regulation of a Muslim prisoner’s attendance at a congregational Friday prayer service did not violate his First Amendment rights. The regulation was reasonably related to the “legitimate penological objectives” of institutional order and security. The Court’s decisions in Turner and Shabazz thus replaced the “highest order standard” with a rational basis test for prisoners’ free exercise claims, which currently stands as the applicable standard for First Amendment free exercise of religion claims.

But the Court did not limit the rational basis test to prisoner rights free exercise claims. In Employment Division v. Smith, it held that state laws that banned the religious use of peyote, a drug used for ceremoni-

38. See Procunier, 417 U.S. at 822 (analyzing the burden on inmates’ rights in terms of legitimate governmental interests, such as deterrence of crime, rehabilitation of prisoners, and internal prison security).

39. See id. at 827-28 (holding that the regulation did not violate the First Amendment because alternative means of communication were open to prison inmates).

40. 482 U.S. 78, 87-89 (1987) (rejecting the idea that prior prisoners’ rights cases applied a heightened strict scrutiny standard).

41. Id. at 89-91.

42. 482 U.S. 343, 349 (1987).

43. Id. at 349-52. Other relevant factors included: the time constraint of the religious service eliminated any alternative means of exercising the right; and the service would threaten prison security by creating “affinity” groups amongst the inmates and deplete resources. Id. at 350-53.
al purposes in the Native American Church, did not violate the First Amendment, and therefore negative employment decisions based upon an employee’s use of peyote were constitutional. Just three years later, in an effort to overturn Smith and restore the compelling interest test to free exercise claims, Congress passed the Religious Freedom Restoration Act (RFRA). Under RFRA, the government could “substantially burden a person’s exercise of free religion only if it demonstrates that application of the burden to the person” furthered a “compelling governmental interest… [by] the least restrictive means.” But soon afterwards, the Court in City of Boerne v. Flores struck down RFRA and held that Congress exceeded its authority under Section 5 by applying RFRA to the states. Nonetheless, RFRA is still constitutional as it applies to the federal government.

In response to the Court’s decision in City of Boerne, at least twelve states passed RFRAs of their own that restored the compelling interest test in freedom of religion cases, many of which mirrored the language in the federal RFRA. Congress also responded to City of Boerne by passing the Religious Land Use and Institutionalized Persons Act (RLUIPA). For cases involving institutionalized persons and matters of land use, RLUIPA rejects the lesser rational basis standard of City of Boerne and re-establishes the heightened compelling interest standard. Under RLUIPA, the government cannot substantially burden a person’s religious exercise in these two categories, unless the burden furthers “a compelling governmental interest” in the “least restrictive means” of burdening the religious exercise. Although

50. See, e.g., FLA. STAT. § 761.03(1) (1998); 775 ILL. COMP. STAT. 35/15 (1993); TEX. CIV. PRAC. & REM. CODE ANN. § 110.001(a) (West 1999).
53. Id. at § 2000cc(a)(1)-(2).
RLUIPA’s constitutionality has been challenged on various grounds in a number of courts, it has yet to be held unconstitutional and remains a viable legal avenue to redress violations of prisoners’ free exercise rights.

III. Khatib v. County of Orange AND REGULATING THE HIJAB IN PRISONS

Prisoners have often brought free exercise claims over prison policies that either forbid or heavily regulate wearing religious headgear. Cases involving the hijab, in particular, are arising with more frequency, and these cases often question the policies of short-term detention facilities, the first stop for arrestees and for those awaiting criminal charges or trial.54 While some courts have dealt with whether prohibiting female inmates from wearing the hijab violates their free exercise rights, none decided the case on its merits.55 However, in March 2011, the Ninth Circuit decided Khatib v. County of Orange, in which it considered whether a courthouse holding facility qualified as an “institution” within the meaning of RLUIPA.56 Although the Ninth Circuit only considered the statutory question, its holding and judgment will likely pave a path for future cases involving penal regulations of religious headgear, including the hijab.

54. In the case of Mabrouk v. Arpaio, deputies of the Maricopa County Sheriff’s Office in Phoenix, Arizona forced Eman Mabrouk, a practicing Muslim woman who wore the hijab, to remove her hijab in the presence of men unknown to her while she was in temporary custody at a county jail. MCSO Implements Muslim Head Scarf Policy in County Jails, AMERICAN CIVIL LIBERTIES Union (Feb. 4, 2010), http://www.aclu.org/prisoners-rights-religion-belief-womens-rights/mcso-implements-muslim-head-scarf-policy-county-jails. Additionally in the case of Medina v. County of San Bernardino, the Los Angeles County Sheriff’s Department arrested Jameelah Medina, a practicing Muslim woman who wore the hijab, for having an invalid train ticket and escorted her to a temporary detention center where they forced her to remove the hijab. Q&A: The Practice of Hijab, AMERICAN CIVIL LIBERTIES Union (Apr. 16, 2008), http://www.aclu.org/womens-rights/q-practice-hijab.

55. See, e.g., Rhouni v. Wisc. Dept. of Corrs., No. 05-C-300-S, 2005 WL 2860282, at *1-2 (W.D. Wis. 2005) (holding that the plaintiff’s claims were barred by sovereign immunity under the Eleventh Amendment); Shabazz v. Nagy, No. Gv. A 01-5396, 2002 WL 32356394, at *1-2 (E.D. Pa. 2002) (A Muslim woman who was arrested on a traffic stop was forced to remove her hijab in front of male officers. The court dismissed her case because “none of the named defendants w[ere] involved in the alleged violation”); Sihlungu v. Hollar, Civ. A. No. 92-0038-R, 1993 WL 28806, at *5 (W.D. Va. 1993) (holding that the plaintiff’s suit against the penal institution, which barred Muslim female visitors from wearing the hijab inside the institution, was moot because the plaintiff’s parole meant that he would no longer be receiving female visitors).

56. Khatib v. Cnty. of Orange, 639 F.3d 898, 900 (9th Cir. 2011).
A. Khatib v. County of Orange: The Meaning of “Institution” under RLUIPA

1. The Facts

On November 1, 2011, officers at the Orange County Superior Court ordered Souhair Khatib, a practicing Muslim woman who wore the hijab, to remove her hijab to her dismay and humiliation, and remain without it while in custody. Khatib and her husband had appeared in court earlier that day to seek an extension on a prior sentencing of community service. The court denied the extension and ordered that Khatib be taken into custody, where she was escorted to the courthouse holding facility. While awaiting her reappearance in court officers kept Khatib scarfless and locked her up in front of male officers and inmates. When she appeared before the court later that day, the court reinstated her probation and granted her extension. Khatib filed a complaint against the County of Orange, the sheriff, and courthouse officers for violations of RLUIPA. The order to expose her head in public, “especially in front of men outside of her immediate family, [was] a serious breach of [her] faith and a deeply humiliating and defiling experience.” But the district court dismissed Khatib’s RLUIPA claim, holding that RLUIPA did not cover the courthouse holding facility as an “institution” within the meaning of the statute. Khatib appealed to the United States Court of Appeals for the Ninth Circuit.

2. The Holding: Courthouse Holding Facilities are “Institutions” under RLUIPA

The issue before the appellate court was whether the courthouse holding facility qualified as an “institution” under RLUIPA. As the
court initially noted, RLUIPA requires ambiguous terms to be construed “in favor of a broad protection of religious exercise, to the maximum extent permitted.” The statute affords protection to individuals who have been “residing in or confined to an institution,” which includes “any facility or institution that is a jail, prison, or other correctional facility [or] a pretrial detention facility.”

The court began its analysis with the plain meaning of the term “pretrial detention facility,” which it defined as “a facility where individuals who are not yet convicted are held pending court proceedings.” It rejected the notion that RLUIPA only afforded protection to inmates at long-term facilities with residential capabilities, because the statute had no temporal qualifications. Even according to Orange County’s own characterization of the facility, the facility was a “secure detention facility located within a court building used for the confinement of persons . . . solely for the purpose of a court appearance” for people who were awaiting court proceedings, including trials. Based on the term’s plain meaning and the defendant’s definition of the facility, the court found that the courthouse facility was a “pretrial detention facility” under RLUIPA because the “facility’s main purpose is to temporarily hold individuals who are awaiting court proceedings.”

The plain meaning of the term “jail” was a “building for the confinement of persons held in lawful custody (as for minor offenses or some future judicial proceeding).” Looking again at Orange County’s characterization of the courthouse facility, the court found that Orange County’s definition “[fell] squarely within the ordinary, common definition of a jail.” Based on the plain meaning of “jail” and Orange Coun-

66. Id. at 900-01 (quoting 42 U.S.C. § 2000cc-3(g)).
67. Id. at 902 (quoting 42 U.S.C. § 2000cc-1(a)).
69. Id. at 901-02.
70. Id. at 903.
71. Id. at 903-04. ("Had Congress intended to cover only long-term, residential facilities, it would not have enacted a provision that includes both confined to and residing in.").
72. Id. at 903.
73. Id. at 904.
74. Id. at 904-05 (quoting WEBSTEK'S THIRD NEW INTERNATIONAL DICTIONARY 1208 (2002); see also BLACK'S LAW DICTIONARY 910 (9th ed. 2009) ("jail is a generic term, used to describe "[a] local government's detention center where persons awaiting trial or those convicted of misdemeanors are confined").
75. Id. at 905.
ty's characterization of the facility, the court determined that the courthouse facility was also a “jail” under RLUIPA.\textsuperscript{76}

The court noted that distinguishing between a pretrial holding facility and a jail under RLUIPA rested upon the function of the facility, not upon the labeling.\textsuperscript{77} “Functionally identical facilities [might be] labeled as a jail in one jurisdiction and a pretrial detention facility in another.”\textsuperscript{78} By focusing on the functionality and not the labeling of institutions, the court ensured RLUIPA’s demand for “broad protection of religious exercise, to the maximum extent permitted.”\textsuperscript{79} It held that the courthouse holding facility met the definition of both a “pretrial detention facility” and of a “jail,” and therefore, RLUIPA protected individuals detained at the courthouse holding facility.\textsuperscript{80} The court reversed the district court’s opinion and remanded the case for further proceedings.\textsuperscript{81}

Judge Gould concurred with the court’s holding, but wrote separately to emphasize an underlying factor in the court’s decision.\textsuperscript{82} “In deciding the issue of coverage, we should not lose sight of the reality that if RLUIPA does not apply, a Muslim woman in custody loses an important statutory protection for her religious preference to wear a hijab, a traditional headscarf—a preference that Congress aimed to protect.”\textsuperscript{83} For remedial statutes such as RLUIPA, courts commonly interpret ambiguities by considering “the old law, the mischief, and the remedy,” and courts should “suppress the mischief and advance the remedy.”\textsuperscript{84} In passing RLUIPA, Congress sought to “safeguard the permissible religious observance of powerless persons incarcerated by the state.”\textsuperscript{85} RLUIPA sought to remedy the kind of mischief that humiliated incarcerated Muslim women by forcing them to remove their hi-

\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id. (quoting 42 U.S.C. § 2000cc-3(g) (emphasis added)).}
\item \textit{Id. at 900-01}. The court also held that the district court erred when it inserted the substantive analysis of RLUIPA into the statutory analysis of determining whether the statute covered the courthouse facility. \textit{Id.} at 905. “Security and administrative concerns that could frustrate a facility’s ability to accommodate religious exercise do not implicate whether that facility is an ‘institution’ under RLUIPA.” \textit{Id.}
\item \textit{Id. at 906}. While an appeal to the Supreme Court would have been yet another hurdle for Khatib to overcome, the Supreme Court denied certiorari to hear the appeal from the County of Orange. \textit{Khatib}, 639 F.3d 898, cert. denied, 132 S. Ct. 115 (2011).
\item \textit{Khatib}, 639 F.3d at 906 (Gould, J., concurring).
\item \textit{Id.}
\item \textit{Id. at 906-07.}
\item \textit{Id. at 907.}
\end{enumerate}
In construing RLUIPA broadly, Judge Gould reasoned that the Ninth Circuit properly effectuated Congress’ protection of religious practices like the hijab. Although the court’s decision centered on the interpretation of the statutory term “institution,” Judge Gould’s concurrence suggests that in deciding as they did, the majority advocated for the right of Khatib and those like her to be free from religious discrimination in penal institutions.

B. The Impact of Khatib v. County of Orange on Future Free Exercise of Religion Claims

By remanding Khatib’s case, the Ninth Circuit allowed Khatib to finally take her case to trial where she could argue that County of Orange officials violated her free exercise rights and her rights under RLUIPA when they forced her to remove her hijab. If her case does in fact go to trial, then it will likely be the first time that a court will have decided the merits on such a case. Although Khatib v. County of Orange will only be binding on future cases arising out of the Ninth Circuit, the court’s holding and statutory construction of RLUIPA, along with the Supreme Court’s denial of certiorari, will be instructive. Other courts hearing cases similar to Khatib’s should likewise interpret RLUIPA broadly and treat temporary holding facilities like police stations and courthouses as “institutions” under RLUIPA.

Khatib v. County of Orange will also likely affect cases where the events that led up to the prisoner’s detention involved policies that prohibited wearing the hijab in the courthouse itself, not in the holding cell. In some cases courthouses have prevented Muslim women from wearing the hijab as visitors to the courthouse, and in others officials have jailed Muslim women who refused to remove their hijab in the courthouse. Although RLUIPA does not protect an individual until he or she is jailed, courthouses should abolish policies that forbid Muslim

86. Id.
87. Id.
88. See, e.g., Rhouni v. Wisc. Dept. of Corrs., No. 05-C-300-S, 2005 WL 2860282, at *1-2 (W.D. Wis. 2005) (Muslim woman had visited her incarcerated ex-husband and prison officials forced her to remove her hijab while inside the prison).
89. In 2010, Lisa Valentine filed a complaint against the City of Douglasville, Georgia. Valentine, a Muslim woman who wore the hijab, had accompanied her nephew to court for a traffic hearing, where she was told to remove her hijab before entering the courthouse. After refusing to remove her hijab, she was held in contempt of court and jailed. ACLU Files Lawsuit on Behalf of Muslim Woman Forced to Remove Head Covering in Georgia Courthouse, AMERICAN CIVIL LIBERTIES UNION (Dec. 14, 2010), http://www.aclu.org/religion-belief-womens-rights/aclu-files-lawsuit-behalf-muslim-woman-forced-remove-head-covering-geo.
women from wearing the *hijab* when they are visitors to the courthouse because such prohibitions deprive Muslim women of their civil rights. They should instead adopt policies that respect Muslim women’s dignity and religious beliefs by not preventing them from wearing a *hijab* while in the courthouse.

IV. LEGAL AVENUES FOR VICTIMS OF PRISON POLICIES THAT BAN HIJAB IN JAILS

Individuals like Khatib who have suffered from prison polices that restrict or prohibit wearing the *hijab* may bring suit against the prison for violations of the First Amendment right to free exercise of religion, RLUIPA, and federal and state RFRAs. While Khatib might simultaneously bring claims under RLUIPA and federal and state RFRAs, RLUIPA and the majority of RFRAs are virtually identical in their language and application of the compelling interest test to protection of religious freedom. Additionally, some states interpret their RFRAs in the same

90. *After Rhouni v. Wisconsin Department of Corrections*, the Wisconsin Department of Corrections agreed to change its visitation policy to allow visitors to wear religious headgear, while still ensuring prison safety and security. *Muslim Woman Sues Prison for Forcing her to Remove Headscarf in Front of Male Guards* and *Prisoners*, AMERICAN CIVIL LIBERTIES UNION (May 25, 2005), http://www.aclu.org/religion-belief/muslim-woman-sues-prison-forcing-her-remove-headscarf-front-male-guards-and-prisoner. In Lisa Valentine’s case, which eventually settled outside of court, the City of Douglasville also adopted a policy that permits visitors to wear religious headgear in the courtroom and to pass through security screening in a private area by an officer of the same gender. ACLU Files Lawsuit, supra note 89.

91. RLUIPA, the federal RFRA, and the majority (if not all) of state RFRAs employ the same compelling interest test. Under RLUIPA, 42U.S.C. 2000cc-1(a):
(a) General rule. No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.
Under the federal RFRA, 42 USC 2000bb-1(a)-(b):
(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) of this section.
(b) Exception: 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 governmental interest
As example of a state RFRA, under the Illinois RFRA, 775 ILL. COMP. STAT. 35/15 (2011):
Government may not substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person
(i) is in furtherance of a compelling governmental interest and
(ii) is the least restrictive means of furthering that compelling governmental interest.
manner as the federal RFRA and RLUIPA. Because RLUIPA currently applies to state actions and specifically targets institutionalized persons, this Note will limit its discussion of meeting the compelling interest standard to an analysis under RLUIPA.

Both the First Amendment and RLUIPA prohibit the government from placing substantial burdens on institutionalized persons’ religious practices. Under RLUIPA, governmental institutions cannot substantially burden an institutionalized person’s religious exercise, unless the burden furthers “a compelling governmental interest” in the “least restrictive means.”

But under the First Amendment itself the government need only meet the lesser burden of showing that the prison regulation is reasonably related to legitimate penological interests. Individuals who succeed in bringing a First Amendment claim under 42 U.S.C. §1983 may be entitled to compensatory and punitive damages, injunctive relief, and/or attorneys fees. Similarly, a successful RLUIPA claim will entitle the claimant to “appropriate relief,” which may include attorneys’ fees and/or injunctive relief. However, the Supreme Court recently held that “appropriate relief” under RLUIPA does not include monetary relief against the states.

The first section of this Part discusses the hijab as a religious exercise, the first inquiry in the Turner and RLUIPA analysis. The second section discusses whether prison regulations of the hijab substantially

92. See Merced v. Kasson, 577 F.3d 578, 588-90 (5th Cir. 2009) (federal interpretation of federal RFRA and RLUIPA was relevant to analyzing Texas Religious Freedom and Restoration Act); State v. Hardesty, 214 P.3d 1004, 1008 (Ariz. 2009) (The federal RFRA was substantially identical to Free Exercise of Religion Act. Although the United States Supreme Court’s interpretation of federal RFRA was not binding regarding the interpretation of state FERA, it provided persuasive authority for interpreting FERA).
96. See Carey v. Piphus, 435 U.S. 247, 248 (1978) (compensatory damages are appropriate where the plaintiff can prove that actual harm occurred).
97. Smith v. Wade, 461 U.S. 30, 56 (1983) (“A jury may be permitted to assess punitive damages in an action under §1983 when the defendant’s conduct is shown to be motivated by evil motive or intent.”).
100. Id. However, authorized attorneys’ fees under 42 U.S.C 1988 may be subject to limitations according to 42 U.S.C. § 1997e(d) (2006).
101. See, e.g., Van Wyhe v. Reisch, 581 F.3d 639, 658 (8th Cir. 2009); Nelson v. Miller, 570 F.3d 868, 882 (7th Cir. 2009); Smith v. Allen, 502 F.3d 1255, 1281 (11th Cir. 2007); Madison v. Virginia, 474 F.3d 118, 130-31 (4th Cir. 2006); Mayewthers v. Newland, 314 F.3d 1062, 1069-70 (9th Cir. 2002).
102. Sossamon v. Texas, 131 S. Ct. 1651, 1658-59 (2011) (holding that individuals could not sue states or state officials in their individual capacity for monetary relief under RLUIPA).
burden a Muslim woman’s religious exercise, the second inquiry in the Turner and RLUIPA analysis. The third section discusses the application of the Turner analysis and whether prison regulations of the hijab are reasonably related to legitimate penological interests. Finally the fourth section discusses the application of RLUIPA’s compelling interest standard to the same regulations.

A. The Hijab as a Religious Exercise

For a prisoner’s right to be protected under the First Amendment and RLUIPA, it must be a religious exercise. Under RLUIPA, a “religious exercise” is “any exercise of religion, whether or not compelled by, or central, to a system of religious belief.”\textsuperscript{103} Under the First Amendment, the Supreme Court has defined a “religious belief” as any sincere belief “based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent.”\textsuperscript{104} Neither RLUIPA nor the First Amendment are concerned with whether a practice is “central” to a person’s religion. Rather for First Amendment claims, courts inquire into whether the person’s beliefs are sincerely held.\textsuperscript{105} Although RLUIPA does not expressly impose a similar sincerity test, it “does not preclude inquiry into the sincerity of a prisoner’s professed religiosity.”\textsuperscript{106} Like the First Amendment, RLUIPA may not be invoked simply to protect any “way of life, however virtuous and admirable . . . if it is based on purely secular considerations.”\textsuperscript{107} Proving the sincerity of an individual’s religiously held belief is not difficult; simply alleging the sincerity of a religious belief is usually enough. However, courts will not presume the sincerity of a plaintiff’s beliefs unless the plaintiff alleges facts sufficient to establish the sincerity.

Proving that the practice of wearing the hijab is religious and sincerely held is likewise not difficult. Islam is a globally recognized and historically established religion, such that alleging a practice to be Islamic will likely be enough to consider a claimant’s practice “religious.” This is especially true for the practice of wearing the hijab, which is found throughout the many cultures and countries where Islam is practiced. Courts need not inquire whether Islam commands Muslim

women to wear the hijab publicly. A person’s religious practice does not need to be religiously compelled under RLUIPA, and must only be sincerely held under the First Amendment. In the District Court opinion of *Khatib v. County of Orange*, Khatib met the sincerity test by alleging that having her head uncovered in the presence of male non-family members “[was] a serious breach of faith and a deeply humiliating and defiling experience.” 108 Given such allegations as Khatib’s, courts should undoubtedly consider an incarcerated Muslim woman’s practice of wearing the hijab as a religious exercise.

B. Substantially Burdening a Woman’s Practice of Wearing the Hijab

A prisoner must also allege that the burden placed on her religious practice is substantial. For First Amendment and RLUIPA claims alike, the standard for determining whether a burden is “substantial” rests on “whether government action either (1) puts pressure on individuals to modify their religious behavior or (2) prevents them from engaging in religious conduct, in a way that is greater than a mere inconvenience.” 109 Although Congress did not define a “substantial burden” in RLUIPA, the legislative history indicates that the term should “be interpreted by reference to existing Supreme Court jurisprudence.” 110

Meeting this standard is not difficult for incarcerated Muslim women who wear the hijab. The court in *Khatib v. County of Orange* found that Khatib sufficiently pled that the officers substantially burdened her rights when they forced her to remove her hijab and did not allow her to replace it either in the holding facility or in the courtroom.111 In *Singh v. Goord*, a case involving a prisoner of the Sikh faith, the court held that because the plaintiff believed that he must wear a religious armband at all times, permitting him to wear it for only thirty minutes per day substantially burdened his rights.112

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Similarly, courts need not inquire any further than a Muslim woman’s sincerely held belief that she must wear the hijab in public at all times. Policies substantially burden a woman’s religious practice when they force a woman to remove her hijab for any period of time in front of non-related males, and courts should treat these policies as such.

C. The First Amendment and the Four-Factor Turner Test

Once the claimant has established that the penal institution substantially burdened her religious practice, the final question for claims brought under the First Amendment is whether the prison regulation is reasonably related to legitimate penological interests asserted by prison officials. To determine reasonableness, courts apply a four-factor balancing test.

1. A Rational Connection Between the Regulation and Legitimate Penological Interests

The first Turner factor centers on whether the regulation in question is rationally connected to legitimate penological interests asserted by the prison officials. Prison officials usually offer prison security as the essential penological interest for cases involving prisoners’ religious practices, which courts consider the most compelling state interest. Courts have also recognized legitimate penological interests in preventing gang activity and rivalry, because head coverings are often utilized for gang or group identification and preventing the concealment of contraband, like shanks and razor blades.

religious services and wear his head covering almost every day. Thus, Plaintiff has not established a ‘substantial burden’ on his ability to practice religion.”).


114. Turner, 482 U.S. at 89-91.

115. Id. at 89.

116. See, e.g., O’Lone v. Estate of Shabazz, 482 U.S. 343, 350-51 (1987) (finding that security reasons were legitimate penological interests that were rationally related to work restrictions).

117. See, e.g., Muhammad v. Lynaugh, 966 F.2d 901, 902 (5th Cir. 1992) (“weapons, such as shanks and razor blades, could easily be secreted inside a Kufi cap… and the inmates use symbolic banners to show… their colors.”); Young v. Lane, 922 F.2d 370, 375 (7th Cir. 1991) (“The Defendants justify their policy… on the basis of security concerns—yarmulkes could be used to conceal contraband and could also be worn for gang identification purposes.”).

118. Muhammad, 966 F.2d at 902; see also, Benaim v. Coughlin, 905 F.2d 571, 579 (2d Cir. 1990) (The court recognized the concealment concern regarding Rastafarian crowns over yarmulkes or kufis, because the large and loose-fitting nature of the crowns provided “a readily available means for concealing and transporting weapons, controlled substances or other contraband.”).
For regulations involving religious headgear, courts have often found the required logical connection with prison security sufficient for the first Turner factor. While no case involving the hijab has shed light on this rational connection, cases involving other religious headgear are illustrative. In Hathcock v. Cohen, a case involving a Muslim male inmate who wore a kufi, the prison headgear policy required the inmate to get approval to wear his kufi. The court found that requiring prior inspection and approval of the kufi were rationally connected to the legitimate penological interest because it ensured that inmates’ clothing did not pose a threat to prison safety and security.

For policies that regulate the hijab, prison officials would likely offer any or all of the above-mentioned security concerns as penological interests. The hijab might pose an identification issue in that simply wearing one could indicate membership in a particular gang. However, this argument fails to consider the possibility that there will be inmates who wear the hijab, but who do not affiliate themselves with any gang. The hijab might also raise an issue of contraband concealment. Depending on the size of the hijab, it may be large and loose fitting around the back of the wearer’s head, which could be used to conceal or transport weapons, controlled substances, or other contraband. Because it would be hard to circumvent the issue of contraband concealment, the first Turner factor would likely favor the government.

2. The Prisoner’s Ability to Exercise Her Faith by Other Means

Under the second Turner factor, the court must determine whether the prisoner has other means of exercising her asserted constitutional right. The central question is not whether the prison policy denies the inmate a particular means of observing her faith, but whether it denies all means of observing her faith. Courts usually favor the penal institution when the inmate has some opportunity to observe her faith, although the prison may in fact be infringing on some aspect of the inmate’s religious practice. In several cases involving

119. 287 F. App’x 793, 799-800 (11th Cir. 2008).
120. Id. at 800.
121. See Benjamin, 905 F.2d at 579 (large and loose-fitting nature of the crowns provide means to conceal contraband).
124. Id.; see also, Sutton v. Stewart, 22 F. Supp. 2d 1097, 1103 (D. Ariz. 1998) (“In both Turner and O’Lone, decided the same term, the Court emphasized that the appropriate inquiry is not
male prisoners who wore religious headgear, namely the *kufi*, prison regulations only allowed a prisoner to wear his *kufi* in areas such as his cell, designated living areas, and during religious services. In these cases the courts found that the prisoners were allowed to engage in some form of religious observation because they could wear their *kufi* in at least some areas of the prison.

Some courts also consider the centrality of the religious practice to the prisoner’s religion. A court might favor the prisoner if the prison regulation infringes on a core religious practice, without which the inmate would not be able to fulfill his religious practice. In *Young v. Lane*, a Jewish prisoner brought an equal protection claim over a prison policy that prohibited Jewish inmates from wearing yarmulkes but allowed others to wear baseball caps. The court observed that Jewish law required men to wear a head covering generally, not necessarily a yarmulke. While this fact did “not remove the religious implications of the uniform headgear policy, it certainly diminish[es] the plaintiffs’ interest.” Conversely, in *Henderson v. Terhune*, a case involving a policy that required a Sikh prisoner to cut his hair, against his religious practice, the court found that keeping long hair was central to the prisoner’s religious observation, such that cutting his hair would render him “defiled and unworthy or unable to participate in the other major practices of his religion.” Ordering him to cut his hair would therefore have “denied [him] all means of religious expression.”

Prison officials could similarly argue that permitting a Muslim female prisoner to wear the *hijab* in designated areas and during prayer permits her some means of exercising her religion. However, whether a particular form of exercise is available to prisoners, but whether prison regulations afford other means for inmates to exercise their rights.

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125. See, e.g., *Hathcock* v. *Cohen*, 287 F. App’x 793, 800 (11th Cir. 2008); *Muhammad v. Lynaugh*, 966 F.2d 901, 902-03 (5th Cir. 1992); *Sutton*, 22 F.Supp.2d at 1103 (“Significantly, however, Plaintiff is permitted to observe Ramadan, Taleem, Eid Al-Adha [since 1995], Eid-Ul-Fitr, and the weekly Jum’ah prayer service. Although there is some dispute concerning Plaintiff’s ability or willingness to attend services on particular dates, the availability of Muslim services is not in dispute.”).

126. See, e.g., *Hathcock*, 287 F. App’x at 800; *Muhammad*, 966 F.2d at 902-03; *Sutton*, 22 F. Supp. 2d at 1103.

127. See *Henderson v. Terhune*, 379 F.3d 709, 714 (9th Cir. 2004).

128. 922 F.2d 370, 375 (7th Cir. 1991).

129. *Id.* at 376-77.

130. *Id.* at 377.

131. 379 F.3d at 714.

132. *Id.*
er, the *hijab* is different from the *kufi* because many Muslim women who wear the *hijab* believe that their religion requires them to wear it at all times while in public and in front of non-relative men, such that failing to wear it would be considered sinful. Additionally, the *hijab* would not pose a problem of “type,” as in *Young*, because it does not necessarily need to be of a specific style or material to comply with the religious requirement, except that it must be non-transparent and cover the hair. For some Muslim women, wearing the *hijab* is so central to their religion, as in *Henderson*, that denying them the ability to wear the *hijab* at *all times*, or at least in front of men, would deny these women all means of religious expression. Therefore, courts should treat the practice as such.

3. The “Ripple Effect” of Accommodating the Prisoner’s Right

Under the third *Turner* factor, the court must consider the “ripple effect,” or the impact that accommodating the prisoner’s right will have on staff, on the inmate’s liberty, and on the allocation of prison resources. Courts will defer to prison officials’ authority if the ripple effect is great. Courts have recognized that permitting inmates to wear religious headgear without restriction could facilitate group or gang identification, and therefore would endanger the safety of other inmates and prison staff. Additionally, permitting some religious groups to wear religious headgear would necessarily require that other religious groups be allowed to wear their own headgear, or otherwise risk showing favoritism to certain groups of prisoners, causing undesirable consequences. These arguments apply equally to the *hijab*, and prisoners may have difficulty overcoming the issue of gang identification without evidence to counter it. However, claimants should introduce evidence of other institutions that permit prisoners to wear the *hijab* in order to demonstrate situations where allowing inmates to wear the *hijab* at all times did not have great ripple effects or snowball into gang-related issues. Courts should not dismiss such examples

133. See *supra* at Part IV, A, B.
135. See *id.* at 90.
137. See *Young*, 922 F.2d at 377.
138. See *infra* at Part IV, D (discussing prison policies that regulate religious headgear, including the *hijab*, while allowing inmates to wear religious headgear throughout the facility).
where regulations of religious headgear has worked, but rather, weigh them heavily against arguments of hypothetical ripple effects.

4. Existing Alternatives that Accommodate the Prisoner’s Rights

Under the fourth and final Turner factor, the court must consider whether an available alternative exists that accommodates the prisoner’s rights at de minimis costs to the institution and that fulfills valid penological interests.139 The prevailing standard for the fourth Turner prong does not amount to a “least restrictive means test,” so “prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint.”140 Rather, the plaintiff bears the burden of demonstrating that a better alternative exists and must illustrate obvious and easy alternatives. The court in Sutton v. Stewart found that no easy alternative existed for a prison regulation that prohibited a prisoner from wearing his kufi in the main yard.141 The court reasoned that “this would require prison staff supervising large numbers of inmates in the prison yard to distinguish between authorized and unauthorized wearers … [which] would be substantially more burdensome than a blanket prohibition.”142

There are at least two alternatives that would accommodate a prisoner’s right to wear the hijab at de minimis costs to the institution and that fulfill valid penological interests. First, the institution could provide uniform headscarves to prisoners along with the prisoners’ standard issued uniform clothing. The cost would be de minimis because the number of Muslim female inmates who wear the hijab would likely be small and because the cost of the headscarves themselves would be de minimis. Alternatively, the prison could allow the prisoners to purchase the headscarves themselves from an approved source, limited to specific styles and colors, which would not cost the prison anything. Although these alternatives do not necessarily prevent gang identification associated with wearing a headscarf, the standard nature of a uniform headscarf may prevent gang affiliation based on the headscarf’s color or style.143 Additionally, the prison could manufacture the headscarves in such a way as to reduce the amount of ex-

139. Turner, 482 U.S. at 90.
140. Id.
141. 22 F. Supp. 2d at 1105.
142. Id.
143. Presumably the problem with headscarves and gang affiliation is that a prisoner associates with a gang either by simply wearing the headscarf or by the headscarf’s color or style.
cess room underneath, and thereby reduce the risk of contraband concealment.144

Second, the institution could provide female prisoners with as much exclusive contact with female guards as possible. This would involve providing female guards for the prison’s female wing and having prisoners searched by female guards, which may already be the case for many prisons. Nearly exclusive female contact would reduce the need to wear a hijab to only requiring wear during religious services and during periods of time when the prisoner is in front of men. Prisons will be able to make these accommodations at de minimis costs while still fulfilling valid penological interests. Courts should therefore consider these viable examples as available accommodations for prisoners who wear the hijab.

5. Conclusion: Regulations of the Hijab under a Turner Analysis

Under Turner’s rational basis test, prisoners litigating a claim for denial of the hijab will likely encounter trouble with the first factor because policies regulating headgear will easily be connected to the legitimate interests of prison safety and security. The third factor may also be problematic because allowing prisoners to wear the hijab may spiral into issues of favoritism or gang association with other inmates. A claimant’s best argument, however, is that under the second Turner factor, wearing the hijab is central to a Muslim woman’s religion, and thus prohibiting her from wearing it at all times, or when she must wear it, such as in front of men, would deny her all means of religious expression. Furthermore, under the fourth Turner factor there exist ready alternatives to accommodate the prisoner’s right at de minimis costs to the institution that fulfill penological interests. Claimants should bolster their argument by providing the court with examples of viable, working prison policies that accommodate the hijab. And courts should not ignore these examples, especially where the comparative prisons are similar in operation and structure.

D. RLUIPA and the Compelling Interest Test

Under RLUIPA, once the plaintiff has established that the prison regulation substantially burdened her religious practice of wearing

144. Some concealment in any headgear may nonetheless still be possible.
the *hijab*, the burden shifts to the defendant to prove that a compelling penological interest necessitates the substantial burden and that the burden is the least restrictive means of achieving that interest. Although strict scrutiny demands that the penal institution’s interest be compelling, many courts have found that the penological interests considered legitimate under the *Turner* standard are also compelling under RLUIPA. The difference in analysis then turns on whether the burden is the least restrictive means of achieving the compelling interest. Courts have found that burdens on a prisoner’s rights are the least restrictive means when the prisoner has an alternative means of practicing her religious exercise, which in the case of religious headgear includes the ability to wear other headgear that fulfills the same religious function. Courts will also assume that the prison policies are the least restrictive means when a prisoner fails to allege any alternative means that would not burden their religious exercise of wearing headgear.

When a prisoner does offer an alternative to the prison policy, the prison bears the burden of proving that “no alternative forms of regulation” would be narrowly tailored enough to meet the government’s compelling interests, or that the alternative policy would be less effective in achieving the interests. If the prison’s compelling “interests could be achieved by narrower ordinances [or policies] that burdened religion to a far lesser degree,” then the government has not used the least restrictive means available.

In *Ali v. Quarterman*, a prisoner claimed a RLUIPA violation over a prison headgear regulation that “allow[ed] inmates to wear religious caps [only] within their cell and during religious services… [H]e responded to the state’s purported security concerns by proposing… that

145. See supra at Part IV, A, B.


147. See Levy, 2010 WL 1373828 at *4 ("Plaintiff has alternative means to exercise his First Amendment rights because he can wear a yarmulke as a head covering.").

148. See Ali v. Quarterman, 434 F. App’x 322, 325 (5th Cir. 2011) (The defendants in Ali did not respond to the plaintiff’s proposed alternatives so the court accepted the prisoner’s allegations as true.).


prison officials could use hand-held metal detectors over his [k]ufi.” 151 The Ali court accepted the prisoner’s allegations as true because the defendants did not respond to the plaintiffs proposed alternatives or offer explanations of why the alternative would not be feasible or as effective. 152 However, in Levy v. Holinka, a case involving a prisoner who desired to wear a turban, the defendants offered facts that showed that turbans could hide contraband or represent gang affiliation, and therefore wearing turbans, if widespread, would jeopardize the safety and security of the institution. 153 The court stated that “[g]iven the difficulty that defendants . . . described in being able to maintain security if the wearing of turbans is widespread . . . banning [turbans] for most religious groups is likely the least restrictive means of meeting the compelling interest.” 154

Prisoners will fair better under RLUIPA than under the First Amendment itself for cases involving the hijab because of the strict scrutiny standard and the least restrictive means requirement under RLUIPA. Prison officials will likely argue, however, that any regulation of the hijab is the least restrictive means of fulfilling the following two interests: preventing both contraband concealment under the hijab and gang affiliation or identification associated with wearing the hijab. To defeat these concerns and demonstrate that prison regulations of the hijab are not the least restrictive means, prisoners may offer the same alternatives proposed under the Turner standard. 155 But they should still “introduce evidence demonstrating that another well-run prison accommodates the religious practice without appreciable damage to the supposed compelling interest.” 156 Although such evidence would not necessarily be controlling, it would be relevant to determining the strength of the need for such a policy. 157 At the very least, such evidence should create a genuine issue of material fact as to

151. Ali, 434 F. App’x at 325.
152. Id; see O’Bryan v. Bureau of Prisons, 349 F.3d 399, 400-01 (7th Cir. 2003) (government must demonstrate, not simply assert, that the burden is the least restrictive means of achieving the compelling interest).
154. Id.
155. See supra at Part IV, A.
156. Gubatz, supra note 109, at 549.
157. See id. at 549, n. 218 (citing Procunier v. Martinez, 416 U.S. 396, 414 n.14 (1974) (reasoning that the fact that Federal Bureau of Prisons generally allowed marriages suggested that there were alternatives to state prison’s prohibition of allowing inmates to marry).
whether the prison’s policy is the least restrictive means of accommodating the religious exercise.158

Several correctional institutions have policies that accommodate religious headgear including the Federal Bureau of Prisons (FBP) and the Kentucky and New York State Department of Corrections (DOC).159

The FBP and the Kentucky DOC permit two types of headgear to be worn in prisons for religious purposes: (1) religious headgear, which may be worn throughout the institution upon the inmate’s request and with the warden’s permission; and (2) ceremonial headgear, which may be worn only during religious ceremony.160 Both the FBP and Kentucky DOC also recognize “religious attire for women,” listing scarves and headwraps (hijabs) as acceptable for female inmates who have identified as Muslim, Jewish, Native American, Rastafarian, and orthodox Christian.161 Scarves and hijabs may be one of two colors, and inmates are authorized three scarves or hijabs, which may be purchased from the commissary or an approved catalog.162 While the New York DOC also allows inmates, including Muslim women, to wear religious headgear, it specifies the dimensions and permissible colors of an approved hijab.163

Although the regulations do not offer an explanation for these restrictions, specifying permissible colors likely eliminates problems of gang identification and reduces the risk of allegations of favoritism to individual groups of inmates. A “standard uniform” article of clothing, as opposed to one of the inmates’ choice, eliminates problems of gang identification. And specifying the dimensions of an approved hijab likely eliminates problems with excess room and contraband concealment. In fact, the FBP policy states that the standard color and style of the religious headgear eliminates the need for inmates to carry permit cards for wearing the headgear, which might oth-

161. Id.
otherwise encourage religious discrimination. Permitting inmates to wear the hijab under the FBP policies also indicates that the size and nature of standard hijabs does not inherently pose a security threat over contraband concealment. Furthermore, the FBP specifically addresses issues of contraband concealment in loose-fitting clothing by not permitting baggy pants or full-length robes to be worn during ceremonial services. As with a First Amendment claim, courts should consider these policies as examples of viable, working prison policies that accommodate the hijab, and as dispositive of a claimant’s RLUIPA claim when the comparative prisons are similar in operation and structure.

CONCLUSION

Prison regulations that prohibit incarcerated Muslim women from wearing the hijab undoubtedly violate prisoners’ rights to free exercise of religion, and courts should acknowledge this violation by protecting their rights under the First Amendment and RLUIPA. Cases like Khatib’s, where police and correctional officers have humiliated Muslim women by forcing them to remove their hijab, are not isolated incidents and will continue to occur until our laws treat Muslim women with the dignity and respect that they are entitled to receive. The examples of correctional institutions that have adopted policies to allow inmates to wear the hijab show that some institutions already comply, albeit some of which only came into compliance after threat of lawsuit under RLUIPA.

After Khatib v. County of Orange, courts should easily find that courthouse-holding facilities are “institutions” under RLUIPA. More importantly, they should move beyond issues of statutory terminology and protect Muslim women’s right to wear the hijab in prisons under RLUIPA, as well as the Free Exercise Clause. Although Khatib still awaits a trial where the court will move beyond the semantics and decide her case on the merits once and for all, she and other Muslim women who have been degraded and humiliated by being forced to remove their hijab have an arsenal in the First Amendment and RLUIPA to redress their grievances and to change the policies, and eventually mentalities, that caused them injustice.

165. Id. at § (14)(B)(4).
166. Their arsenal also includes the federal and state Religious Freedom Restoration Acts.
Whether prisoners can succeed under a rational basis or strict scrutiny test remains to be seen. Under both the First Amendment and RLUIPA, wearing the *hijab* at all times, as some Muslim women believe they must, is indisputably a religious exercise, and any violation or forcible removal of it in front of non-related males will be a substantial burden on their religious exercise. Under *Turner’s* rational basis test, a prisoner’s best argument is that wearing the *hijab* is so central to her religion that prohibiting her from wearing it at all times, or when she *must* wear it in front of men, would deny her all means of religious expression. Moreover, prisons have available alternatives to accommodate the prisoner’s right at de minimis costs to the institution and that fulfill penological interests.

Prisoners will fair better under RLUIPA, however, because the compelling interest standard demands that the prisons narrowly tailor their policies to burden Muslim female prisoners in the least restrictive means possible. While Muslim women who wear the *hijab* generally have no other means of practicing the *hijab* except to cover their hair, prisons have multiple options for which to accommodate their practice that does not require Muslim women to reveal their hair in front of non-related men. In addition to having a disarming tool in RLUIPA’s compelling interest test, claimants should invoke the statute’s spirit. With the passage of RLUIPA, Congress intended RLUIPA to remedy the exact kind of “mischief” perpetrated by prisons across the country that distresses and shames incarcerated Muslim women when prison officials force them to remove their *hijab* in front of non-related men in violation of their religious beliefs.167

167. Khatib v. Cnty. of Orange, 639 F.3d 898, 907 (9th Cir. 2011) [Gould, J., concurring].