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Yellowbear v. Lampert— Putting Teeth into the Religious Land Use and Institutionalized Person Act of 2000

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NOTE

YELLOWBEAR V. LAMPERT— PUTTING TEETH INTO THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSON ACT OF 2000

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The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) provides prisoners with a means to challenge prison policies that impede their right to freely exercise their religion. Although the RLUIPA provides a means by which to challenge restrictive prison policies, prisoners seeking to establish a claim under the RLUIPA often face an uphill battle. The difficulties a prisoner faces when bringing a RLUIPA claim compound when that prisoner belongs to a religion that is not widely practiced in the United States.[1] This note analyzes the implications that *Yellowbear v. Lampert* has on the manner in which Native American prisoners' rights will be viewed and adjudicated going forward.[2]

Andrew J. Yellowbear is a member of the Northern Arapaho tribe. He is also a prisoner of the Wyoming Department of Corrections. While serving his sentence, Yellowbear finds solace in the traditional religion of his ancestors. Central to Yellowbear's religious beliefs is the sweat lodge ceremony.[3] Through the use of a sweat lodge, Yellowbear seeks to purify his mind, spirit, and body in the same manner that his ancestors have since time immemorial.[4] Yellowbear, however, was denied his right to exercise this aspect of his religion by the Wyoming Corrections Department.[5] This deprivation prompted him to file a claim against the Corrections

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1. Yellowbear v. Lampert, 741 F.3d 48, 54 (10th Cir. 2014).
2. 741 F.3d 48.
3. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, CPD T5360.01, INMATE RELIGIOUS BELIEFS AND PRACTICES at Native American, 1 (Mar. 27, 2002), http://www.acfsa.org/documents/dietsReligious/FederalGuidelinesInmateReligiousBeliefsandPractices032702.pdf [hereinafter INMATE RELIGIOUS BELIEFS AND PRACTICES] ("Sweat lodge ceremonies are generally conducted on a weekly basis in a correctional setting. If the Native American population is rather large, two separate sweat lodge ceremonies may be conducted on a weekly basis to accommodate all participants.").
4. *Yellowbear*, 741 F.3d at 56.
5. *Id.* at 52.

Department under the RLUIPA, seeking to gain limited access to a sweat lodge that already exists within the prison walls.[6]

This note takes the position that *Yellowbear v. Lampert* has favorable implications for Native American prisoners who wish to bring a claim under the RLUIPA. These favorable implications consist primarily of making courts assess the burdens under the RLUIPA that the government and the claimant must meet, at the same level of generality. Part I will examine the portions of the RLUIPA that pertain to institutionalized persons, with a focus on the burdens that a claimant must meet to establish a prima facie claim, and the burdens that the government must overcome to defeat that claim. Part II will contain a statement of the case. Part III will briefly summarize the decision of the case. Finally, Part IV will provide an analysis of the arguments utilized by the court in reaching its decision. Part IV will also emphasize the positive implications that *Yellowbear* represents for Native American religious practitioners bringing a claim under the RLUIPA.

I. Religious Land Use and Institutionalized Persons Act of 2000

The Religious Land Use and Institutionalized Persons Act of 2000[7] is a landmark piece of legislation as evidenced by its far reaching support. By passing the RLUIPA, Congress provides citizens with the means to challenge governmental policies that substantially burden their right to freely exercise their religion, as well as the means to challenge governmental actions that affect the use of land that is religiously significant to a particular group.[8] As such, the RLUIPA is based on the Free Exercise Clause of the First Amendment to the U.S. Constitution.[9] The RLUIPA was passed by a unanimous Congress.[10] Such bipartisan support is very rare, and evidences the importance that the RLUIPA embodies. Both political parties agreed that it is vitally important to protect our religious freedom to the utmost extent. Further evidence that the RLUIPA constitutes a significant statute is the fact that it was upheld in a unanimous Supreme Court ruling in *Cutter v. Wilkinson*, a case challenging the RLUIPA under the Establishment Clause.[11]

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6. *Id.*
7. 42 U.S.C. §§ 2000cc to 2000cc-5 (2012).
8. *See generally id.*
9. U.S. CONST. amend. I.
10. Yellowbear v. Lampert, 741 F.3d 48, 53 (10th Cir. 2014).
11. Cutter v. Wilkinson, 544 U.S. 709, 725 (2005).

This note will focus on the portions of the RLUIPA pertaining to the religious freedom of institutionalized persons.[12] According to the relevant portion of the RLUIPA:

> 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.[13]

This portion of the RLUIPA is best understood in terms of the burdens that a claimant must meet in order to establish a claim, and the burdens that the government must overcome in order to defeat that claim.

A. The Claimant's Burdens Under the RLUIPA

As Judge Gorsuch (now Justice Gorsuch) noted in *Yellowbear*, the RLUIPA is a statute "capable of mowing down inconsistent laws, but to win its application takes no small effort."[14] The burdens that a claimant must meet under the RLUIPA are twofold. First, a claimant must establish that the prison policy being challenged burdens a religious exercise.[15] Second, the claimant must establish that the prison policy constitutes a substantial burden on that religious exercise.[16]

Regarding the first burden, the RLUIPA does not protect against every governmental action that intrudes upon a prisoner's acts of "philosophical conviction" or "personal conscience."[17] Rather, it protects only actions motivated by religious beliefs. Important to the question of what constitutes a religious exercise, is the concept of sincerity.

The sincerity component of the "religiosity" requirement of the RLUIPA is quite often dispositive of the overall success of the claim. The sincerity

12. 42 U.S.C. § 2000cc-1.
13. *Id.*
14. *Yellowbear*, 741 F.3d at 53.
15. *Id.*
16. 42 U.S.C. § 2000cc-1(a).
17. *Id.*

requirement is intended to weed out those claimants who wish to receive some special treatment under the guise of religious beliefs. The determination of what is a sincere religious belief, however, is limited by the non-religious role of the court with the acknowledgment that judicial officers are not well trained in deciding what is a sincere religious belief verses one that is insincere.[18]

The difficulty in determining what is a sincere religious belief is compounded when the court is asked to rule on the sincerity of a belief that is part of a religious tradition that is not widely understood—for example, Native American religious traditions.[19] To reduce the problems inherent in determining sincerity, the court essentially asks whether the claimant is attempting to perpetrate fraud on the court.[20] This determination is similar to the credibility assessments that courts frequently make.

Upon a showing of sincerity, a claimant under the RLUIPA must also show that the governmental policy in question burdens the exercise of their religious beliefs.[21] As the Supreme Court noted in *Employment Division, Department of Human Resources of Oregon v. Smith*, "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, [and/or] abstaining from certain foods or certain modes of transportation."[22] Thus, the claimant must show that the governmental policy challenged goes beyond merely infringing upon their beliefs to the point of infringing upon the exercise of their religion.

A claimant under the RLUIPA does not need to show that the religious exercise being infringed is a "central," a "fundamental," or a "compelled" tenant of that religion.[23] When passing the RLUIPA, Congress seemingly determined that it would run the risks of too many mistakes to require the

18. *Id.* at 54.

19. *Id.*

20. *Id.* ("When inquiring into a claimant's *sincerity*, then, our task is instead a more modest one, limited to asking whether the claimant is (in essence) seeking to perpetrate a fraud on the court—whether he actually holds the beliefs he claims to hold—a comparatively familiar task for secular courts that are regularly called on to make credibility assessments—and an important task, too, for ensuring the integrity of any judicial proceeding.").

21. 42 U.S.C. § 2000cc-1 (2012).

22. Emp't Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 877 (1990), *overturned due to statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-4 (2012).

23. *Yellowbear*, 741 F.3d at 54.

courts to parse what is a central tenant of a religious tradition.[24] Thus, even if the religious exercise in question is not considered by all adherents of a religion as "central," a religious claimant may still sustain a case under the RLUIPA.[25]

As stated, the second burden that a claimant must meet is that the prison policy in question substantially burdens that religious exercise.[26] The analysis of whether a prison policy substantially burdens a religious exercise is distinct from the religious exercise analysis itself. Under this requirement, a claimant must plead enough facts to allow a reasonable trier of fact to conclude the truth of these claims in order to sustain a prima facie case under the RLUIPA. It is important to note that this is not an inquiry into the merit or importance of the claimant's beliefs. Rather, "the inquiry focuses only on the coercive impact of the government's actions."[27]

The Tenth Circuit has noted that a state's policy rises to the level of being substantial when:

> [T]he government (1) requires the plaintiff to participate in an activity prohibited by a sincerely held religious belief, (2) prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief, or (3) places considerable pressure on the plaintiff to violate a sincerely held religious belief—for example, by presenting an illusory or Hobson's choice where the only realistically possible course of action available to the plaintiff trenches on sincere religious exercise.[28]

It is worth noting that for a burden to be substantial, it does not need to be a complete or total denial of that religious exercise. Upon a showing of these two burdens, a claimant has established a prima facie claim under the RLUIPA.

B. The Government's Burdens Under the RLUIPA

Once a claimant has established a prima facie case under the RLUIPA, the government must also meet two burdens in order to overcome that claim. First, the prison policy being challenged must be "in furtherance of a

24. *See generally* 42 U.S.C. § 2000cc-5(7)(A).
25. *Yellowbear*, 741 F.3d at 55.
26. 42 U.S.C. § 2000cc-1(a).
27. *Yellowbear*, 741 F.3d at 55.
28. *Id.* (citing Abdulhaseeb v. Calbone, 600 F.3d 1301, 1315 (10th Cir. 2010)).

compelling governmental interest."[29] Second, the prison policy must be "the least restrictive means of furthering that compelling interest."[30]

The Supreme Court has thus far declined to give a bright line definition of what constitutes a compelling interest in the context of a RLUIPA claim. The interests asserted by prison officials are almost always staff and inmate safety and security, as well as the avoidance of costs.[31] These two interests are related in that a prison generally must spend more money in order to increase the level of security within the prison. Typically, courts will find prison security to be a compelling interest, and there also seems to be a trend toward accepting the avoidance of cost as a compelling interest.[32]

At the outset of the compelling interest analysis, it is important to note that while the language of the RLUIPA is identical to a traditional formulation of the strict scrutiny level of review, this portion of the RLUIPA takes on a somewhat different character given that such claims arise in the unique context of a prison.[33] In the leading Supreme Court case for the portions of the RLUIPA pertaining to prisons, the Court heavily emphasized that "context matters."[34] The interests that guide governmental decision making in the context of a prison are much different than those interests that guide such decision making in society as a whole. For example, security for both the inmates and the prison staff are of vital importance in the context of a prison. A prison must also operate on a limited budget. Further, balancing the need for safety and the need to operate with limited resources in a prison requires experience and expertise that the general population lacks, judges included. Given these unique circumstances, courts typically provide more deference to prison officials'

29. 42 U.S.C. § 2000cc-1.

30. *Id.*

31. *See* Cutter v. Wilkinson, 544 U.S. 709, 723 (2005); Aaron K. Block, Note, *When Money Is Tight, Is Strict Scrutiny Loose?: Cost Sensitivity as a Compelling Governmental Interest Under the Religious Land Use and Institutionalized Persons Act of 2000*, 14 TEX. J. C.L. & C.R. 237, 245 (2009) ("In the prison context, both Congress and the courts consider inmate and staff safety and institutional security to be the most compelling governmental interests.").

32. Block, *supra* note 31, at 245-46.

33. Holt v. Hobbs, 135 S. Ct. 853, 864 (2015) ("Prison officials are experts in running prisons and evaluating the likely effects of altering prison rules, and courts should respect that expertise.").

34. *Cutter*, 544 U.S. at 723 (quoting Grutter v. Bollinger, 539 U.S. 306, 327 (2003)).

asserted compelling interests than they would in a traditional strict scrutiny analysis.[35]

Upon a showing of a compelling interest, the government must demonstrate that the policy is "the least restrictive means of furthering that compelling interest."[36] The Supreme Court has recognized that within the context of a prison, more deference must be given to prison officials' experience and expertise.[37] The legislative history of the RLUIPA also demonstrates that the sponsors of the bill were very concerned with providing prison officials with enough leeway to make the difficult decisions surrounding prison security and the allocation of resources.[38] Even though the language of the RLUIPA appears identical to traditional strict scrutiny, the burdens that the government must meet are much less severe than they would be under the traditional strict scrutiny test. While the "least restrictive means" prong of the RLUIPA test is less severe than traditional strict scrutiny analysis, the government still must show that it has refuted alternative policies suggested by the claimant.[39] This requires prison officials to consider alternatives suggested by the claimant, to specifically refute them, and show why they are inadequate.[40] If the government can meet these burdens, then the claimant's RLUIPA claim will be defeated.

II. Statement of the Case

A. Facts

Yellowbear is serving a sentence that will likely span for the remainder of his life.[41] During his confinement, he has turned to his religious beliefs

35. *Holt*, 135 S. Ct. at 864; *Cutter*, 544 U.S. at 722 ("We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests.").

36. *Cutter*, 544 U.S. at 714-15 (quoting City of Boerne v. Flores, 521 U.S. 507, 515-16 (1997)); 42 U.S.C. § 2000cc (2000).

37. *Id.* at 717.

38. S. REP. 103-111, at 10 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1900 ("Accordingly, the committee expects that the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.").

39. Yellowbear v. Lampert, 741 F.3d 48, 62-63 (10th Cir. 2014) (citing United States v. Wilgus, 638 F.3d 1274, 1289 (10th Cir. 2011)).

40. *Id.*

41. *Id.* at 51.

for comfort. Yellowbear practices the traditional Native American religion of the Northern Arapaho tribe. As part of this religious tradition, Yellowbear requires access to a sweat lodge.[42] In the Wyoming prison in which Yellowbear is incarcerated, there already exists a working sweat lodge that is frequently made available to Native American inmates. Prison officials, however, denied Yellowbear access to the sweat lodge because he is housed in the special protection unit of the prison.[43]

Yellowbear is housed in the special protection unit through no fault of his own, but rather due to threats made against him by other inmates.[44] Yellowbear brought a RLUIPA claim against prison officials seeking some degree of access to the sweat lodge. The sweat lodge within the prison is located in the general population area. The prison officials claim that the cost of moving Yellowbear from the protective unit, where he is housed, to general population would be unduly burdensome because it would require a lock-down of certain portions of the prison.[45]

The district court that initially heard this case decided that the prison policy did not violate the RLUIPA, and entered summary judgment in favor of the prison.[46] Yellowbear then appealed this decision to the Tenth Circuit Court of Appeals. Because the district court granted summary judgment, Yellowbear only needed to plead enough facts to show that a reasonable trier of fact could find in his favor.

B. Issue

The issue in this case can be stated in at least two ways, either from the perspective of the claimant, or the government. First, from the perspective of the claimant: whether Yellowbear has met the burdens required of a claimant under the RLUIPA to a sufficient degree to allow a reasonable trier of fact to infer the truth of the claim? Second, from the perspective of the government: whether the state has responded to Yellowbear's claims to such a degree that no reasonable trier of fact could infer the truth of those claims?

42. INMATE RELIGIOUS BELIEFS AND PRACTICES, *supra* note 3, at Native American, 1.
43. *Yellowbear*, 741 F.3d at 53.
44. *Id.*
45. *Id.* at 53, 58-59.
46. *Id.* at 53.

III. Decision in the Case

The Tenth Circuit held that factual issues precluded the court from entering summary judgment in favor of the government.[47] In other words, the court ruled that Yellowbear succeeded in establishing a prima facie claim under the RLUIPA, and as such, the case was remanded to the district court so that it could proceed to trial.[48] The Tenth Circuit also ruled that the government did not establish the facts necessary to defeat Yellowbear's RLUIPA claim at the summary judgment stage.[49] Thus, the court's ruling was favorable to Yellowbear.

IV. Analysis

As the Tenth Circuit in *Yellowbear* notes, the most important aspect of this case, and cases like it, lies in the manner in which courts typically weigh the substantial burden on a claimant's exercise of religion against the prison officials' asserted compelling interests.[50] Section A will discuss the court's analysis in *Yellowbear* of the problems associated with assessing each parties' burdens under the RLUIPA with differing levels of generality. Section B will discuss the implications of *Yellowbear* for future Native American RLUIPA claimants, which primarily consists of requiring courts to assess each parties' burdens under the RLUIPA with the same level of generality.

A. The Tenth Circuit's Analysis of Each Parties' Burdens Under the RLUIPA

In *Yellowbear*, the Tenth Circuit argues that one of the main problems for RLUIPA claims is that courts often assess the burdens that the claimant must meet and those that the government must meet with "different levels of generality."[51] The court assesses the burdens that must be met for the claimant in a very fact-intensive and specific manner, whereas the burdens that must be met by the government are often analyzed in a very abstract manner.[52]

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47. *Id.* at 64.
48. *Id.*
49. *Id.*
50. *See id.* at 57.
51. *Id.* (citation omitted).
52. *See id.*

1. The Tenth Circuit's Analysis of the Claimant's Burdens Under the RLUIPA

As discussed in Part I, in order for an inmate to establish a claim under the RLUIPA, they must show that a (1) religious exercise is (2) substantially burdened by a prison policy.[53] In other words, an inmate must plead enough facts to demonstrate that a governmental policy places a substantial burden on a sincerely held religious exercise. The Tenth Circuit has clearly stated that a burden on a religious exercise rises to the level of being substantial when an inmate is prohibited from "participating in an activity motivated by a sincerely held religious belief."[54]

In this case, the Tenth Circuit has little difficulty in finding that Yellowbear met the burdens required of claimants under the RLUIPA. In part, this is because this case is essentially a summary judgment case, in which the facts must be construed in a light most favorable to Yellowbear. Yet, even given this procedural posture, the court was readily accepting of Yellowbear's argument that the prison officials' decision to withhold access to the pre-existing sweat lodge constituted a substantial burden to a sincerely held religious exercise. At this point in the litigation, the government did not dispute that the use of a sweat lodge was an important aspect of many Native American religions.[55] To bolster this fact, the Tenth Circuit provides a number of sources that establish the centrality of the sweat lodge ceremony within many Native American religions.[56] The court concludes that Yellowbear succeeded in pleading enough facts to allow a reasonable trier of fact to conclude that the use of a sweat lodge is a sincere religious exercise.

The Tenth Circuit also wastes little time in deciding that a reasonable trier of fact could conclude that Yellowbear's complete denial of access to a sweat lodge rises to the level of a substantial burden on that religious exercise.[57] As the court puts it, the parties in this case contended on the level of absolutes: Yellowbear desired some access to a sweat lodge, and

53. 42 U.S.C. § 2000cc-1 (2012).

54. *Yellowbear*, 741 F.3d at 55.

55. *Id.* at 56.

56. INMATE RELIGIOUS BELIEFS AND PRACTICES, *supra* note 3, at Native American, 1; *see* JOSEPH BRUCHAC, THE NATIVE AMERICAN SWEAT LODGE: HISTORY AND LEGENDS (1993); ARLENE HIRSCHFELDER & PAULETTE MOLIN, THE ENCYCLOPEDIA OF NATIVE AMERICAN RELIGIONS 287–88 (1992); Louis M. Holscher, *Sweat Lodges and Headbands: An Introduction to the Rights of Native American Prisoners*, 18 NEW ENG. J. ON CRIM & CIV. CONFINEMENT 33 (1992).

57. *Yellowbear*, 741 F.3d at 56.

the prison officials denied him any access to a sweat lodge.[58] The court easily concludes that by completely withholding, or prohibiting, Yellowbear's access to a sweat lodge, the government has placed a substantial burden on that religious exercise.[59] Thus having decided that Yellowbear had demonstrated these two burdens, thereby establishing a prima facie RLUIPA claim, the court turned to analyzing the burdens that must be demonstrated by the government in order to prevail at summary judgment.

2. The Tenth Circuit's Analysis of the Government's Burdens Under the RLUIPA

Even if a claimant has met the requisite burdens to establish a prima facie RLUIPA claim, the government may still prevail if it can show that the challenged policy is the least restrictive means of furthering a compelling governmental interest.[60] In contrast to the court's reception of the claimant's burdens, the Tenth Circuit is hesitant to find that the government has met the burdens necessary to defeat Yellowbear's RLUIPA claim at summary judgment.[61]

The compelling interests asserted by the government in this case are security and the avoidance of costs.[62] This is unsurprising given that these are the most commonly asserted governmental interests in RLUIPA litigation. The Tenth Circuit proceeds to unpack these more generally asserted interests, and finds three potentially compelling interests. First, the government asserts that the use of sweat lodges is inherently dangerous, because it involves the use of hot coals.[63] Second, the government asserts that allowing Yellowbear access to the preexisting sweat lodge would be unduly financially burdensome since it would require a lock-down of portions of the prison in order to move him to the location of the sweat lodge.[64] Third, the government asserts that if it were to grant Yellowbear's request it would be flooded with similar requests from other inmates.[65] The court addresses each of these potential compelling interests, but finds each of them lacking.

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58. *Id.*
59. *Id.*
60. 42 U.S.C. § 2000cc-1 (2012).
61. *Yellowbear*, 741 F.3d at 57.
62. *Id.* at 57-59.
63. *Id.* at 57-58.
64. *Id.* at 58-59.
65. *Id.* at 62.

The government begins by asserting that the prison officials have a compelling interest in denying Yellowbear access to the sweat lodge because sweat lodges in general are inherently dangerous, given that they require the use of hot coals.[66] In an attempt to support this argument, the government cites cases from other circuit courts that were decided against inmates seeking access to sweat lodges on the basis of their inherent danger.[67] In those cases, the courts were willing to accept, almost unconditionally, that security always constitutes a compelling interest in the context of the RLUIPA.[68] The Tenth Circuit was unreceptive to this argument because, rather than plead specific facts to establish that a sweat lodge would be dangerous in the context of this particular case, the government attempted to rely upon general abstractions concerning the inherent dangers of allowing inmates access to a sweat lodge.[69] The Tenth Circuit points out that such an argument is undercut by the fact that the prison in question already has an operating sweat lodge on the premises. The court poses the question that if the use of a sweat lodge within a prison is inherently dangerous to the point that it constitutes a compelling interest sufficient to deny an inmate access to it, then how can the prison officials justify the pre-existence of such a sweat lodge?[70] The Tenth Circuit disapprovingly refers to this potential compelling interest as a "post-hoc rationalization" that is unsupported factually.[71] Having decided that the broad statement that sweat lodges are inherently dangerous does not constitute a compelling interest, the court moves on to the next potential compelling interest.

The government argues that it has a compelling interest in denying Yellowbear access to the sweat lodge because allowing access would require a lock-down of certain portions of the prison.[72] Prison officials claim that a lock-down would be necessary in order to ensure that Yellowbear does not come into contact with other inmates who may harm him, and that such a lock-down would be unduly financially burdensome.[73]

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66. *Id.* at 57-58.

67. Fowler v. Crawford, 534 F.3d 931 (8th Cir. 2008); Allen v. Toombs, 827 F.2d 563 (9th Cir. 1987).

68. *Fowler*, 534 F.3d at 939 ("A prison's interest in order and security is always compelling.").

69. *Yellowbear*, 741 F.3d at 58.

70. *Id.*

71. *Id.*

72. *Id.* at 58-59.

73. *Id.*

Once again, the court takes exception to this argument because the government relies entirely on broad and general statements concerning cost, and at no point pleads any facts to suggest that the cost of such a lock-down would be too high.[74] The Tenth Circuit drives home the point that RLUIPA claims are context specific, and as such, for prison officials to prevail at summary judgment, they must plead enough to show that in this particular context the asserted interest is compelling.[75] Even given the substantial deference that is due to prison officials in RLUIPA cases, the Tenth Circuit states that "the deference this court must extend to the experience and expertise of prison administrators does not extend so far that prison officials may declare a compelling governmental interest by fiat."[76] As the court notes, to provide prison officials with this much deference would take RLUIPA adjudication out of the realm of strict scrutiny and replace it with no scrutiny at all.[77] Due to the complete lack of context specificity in the government's argument, the court does not find cost to be a compelling interest.

In its last attempt to show a compelling interest, the government argues that if it accommodates Yellowbear's request, then it will be flooded by similar requests from other inmates.[78] The Tenth Circuit once again takes exception to the government's reliance on such broad assertions. Specifically, the court criticizes the government for not providing any information to support the idea that there is a large number of specially housed inmates awaiting such an opportunity to seek a religious accommodation.[79] The Tenth Circuit quotes the Supreme Court's statement of disapproval of such slippery slope arguments, saying that such arguments "echo[] the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions."[80] The court reiterates the point that the RLUIPA is specific to

74. *Id.* at 59 ("[T]he prison does not even attempt to quantify the costs it faces, let alone try to explain how these costs impinge on prison budgets or administration. Instead, the prison simply asserts, flatly and without more, that the marginal costs are 'unduly burdensome.'").

75. *Id.* at 58.

76. *Id.* at 59.

77. *Id.* at 59-60.

78. *Id.* at 62 ("As the prison puts it, Mr. Yellowbear's request 'would be just the tip of the iceberg.' And avoiding a slippery slope down to submerged troubles just out of present view, the prison suggests, amounts to a compelling interest all its own.").

79. *Id.*

80. *Id.* (quoting Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006)).

the context of a particular claimant. Therefore, in order for the government to prevail it must come forward with specific facts to support its asserted compelling interests. Given that the government in this case did nothing more than make a broad and unspecified slippery slope argument, the court did not find a compelling interest in the government's claims.[81]

B. Implications of Yellowbear for Future RLUIPA Claims Brought by Native Americans

This case has positive benefits for Native American prisoners who might wish to bring claims under the RLUIPA in the future. These benefits primarily consist of requiring courts to assess the burdens of each party at the same level of generality. Following *Yellowbear*, district courts within the Tenth Circuit will be required to assess the government's asserted compelling interests against the burden on a particular claimant's religious exercise at the same level of generality. This is particularly important for RLUIPA claimants who practice a religion that is not widely understood in the United States, like Native American religions.

The importance of requiring prison officials to back-up their asserted compelling interests with specific facts should not be understated. Particularly, given the fact that in the prison context of the RLUIPA, prison officials are provided much more deference than would normally be afforded to them under a strict scrutiny analysis. Requiring courts to analyze each of the parties' burdens at the same level of generality is a positive step toward achieving the original purpose of the RLUIPA: to provide protection to inmates' religious liberties by limiting prison officials' ability to curtail those freedoms. After the Supreme Court's statements concerning the heightened deference due to prison officials in *Cutter v. Wilkinson*, many district and circuit courts began to allow prison officials to broadly assert compelling interests, such as security and cost, without providing a scintilla of concrete justification for their restrictive policies.[82]

As interpreted by many lower courts, these statements concerning deference to prison officials had the effect of taking the teeth out of the strict scrutiny language in the RLUIPA. Given the Supreme Court's sanction to provide prison officials a broader degree of deference under the RLUIPA than a typical strict scrutiny analysis, it is more important than

81. *Id.*

82. Cutter v. Wilkinson, 544 U.S. 709, 722 (2005); *see, e.g.*, Fowler v. Crawford, 534 F.3d 931 (8th Cir. 2008); Allen v. Toombs, 827 F.2d 563 (9th Cir. 1987).

ever that lower courts strike the delicate balance between following the letter of the RLUIPA and still allowing prison officials the flexibility they need to keep prisons secure and within their budgetary limitations. In *Yellowbear*, Judge Gorsuch on behalf of the Tenth Circuit does a masterful job of striking that balance. The court in *Yellowbear* follows the Supreme Court's mandate to provide more deference to the experience and expertise of prison officials, while still abiding by the plain text of the RLUIPA. Specifically, the Tenth Circuit repeatedly emphasizes that courts must assess prison officials' asserted compelling interest in the context of the particular claimant.[83] The deference required by the Supreme Court is not so broad as to require courts to grant summary judgment to RLUIPA defendants any time they claim a change in policy would result in less security and more cost. Instead, a court may only grant summary judgment to a RLUIPA defendant when they plead specific and detailed facts to support their asserted compelling interests. Thus, in *Yellowbear*, the Tenth Circuit provides due deference to the experience of prison officials while at the same time living up to the purpose of the RLUIPA.

The implications of *Yellowbear* are evident in the recent Supreme Court case *Holt v. Hobbs*. While the only direct reference to *Yellowbear* in that case is found in Justices Ginsburg and Sotomayor's concurring opinion, the influence of *Yellowbear* can be seen in the Supreme Court's repeated admonitions that lower courts must analyze prison official's asserted compelling interests in a highly context specific manner.[84]

V. Conclusion

Yellowbear v. Lampert is a favorable decision for Native American prisoners seeking to file a claim under the RLUIPA. The benefits of this decision rest primarily upon requiring courts to analyze the respective burdens of the claimant and the government at the same level of generality. There are certainly interesting questions pertaining to the RLUIPA left unanswered in *Yellowbear*. For example, what would be the outcome if the prison officials allowed Yellowbear access to a sweat lodge once a year when his religion requires him to use a sweat lodge monthly? Would the burden of Yellowbear's religion be less substantial, and the prison officials' interests more compelling? The Tenth Circuit anticipated these questions but did not rule on them because the parties in this case contended on the level of absolutes: some access to a sweat lodge, or no access to a sweat

83. *Yellowbear*, 741 F.3d at 57.

84. *See* Holt v. Hobbs, 135 S. Ct. 853, 867-68 (2015).

lodge.[85] In the future, however, such questions will certainly arise, and will likely be analyzed similarly to the questions raised in this case.

85. *Yellowbear*, 741 F.3d at 56.