RLUIPA and Method-of-Execution Claims After *Glossip*: The Free Exercise Exception to *Glossip*'s Known-and-Available Alternative Requirement

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Introduction

While the U.S. Constitution contemplates the use of capital punishment,[1] the Constitution has nonetheless served as a bulwark against the death penalty. The Fifth and Sixth Amendments have constrained the processes through which a death sentence may be pronounced.[2] The Eighth Amendment has narrowed the class of convicts eligible for execution, outlawing the execution of the intellectually disabled,[3] persons who committed their crimes as juveniles,[4] and those whose crime did not involve the killing of another.[5] The Eighth Amendment's prohibition on "cruel and unusual punishments"[6] also outlaws a method-of-execution that will either cause severe pain or a significant likelihood of it.[7] A method-of-execution

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1. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .").

2. *See* Buck v. Davis, 137 S. Ct. 759 (2017) (holding that the Fifth Circuit applied the wrong standard and that Buck had demonstrated ineffective assistance of counsel); Florida v. Hurst, 136 S. Ct. 616 (2016) (finding that Florida's capital sentencing scheme violated the holding in *Ring*); Ring v. Arizona, 536 U.S. 584 (2002) (holding that the Sixth Amendment requires a jury to find the aggravating factors necessary for imposing the death penalty).

3. Atkins v. Virginia, 536 U.S. 304 (2002).

4. Roper v. Simmons, 543 U.S. 551 (2005).

5. Kennedy v. Louisiana, 554 U.S. 407 (2008).

6. U.S. CONST. amend. VIII.

7. *See* Baze v. Rees, 553 U.S. 35, 50–51 (2008) (requiring a substantial risk of harm and a viable alternative for an Eighth Amendment violation); *see also* Evans v. Saar, 412 F. Supp. 2d 519, 524 (D. Md. 2006) (asking "whether an inmate facing execution has shown that he is subject

claim is one made by a condemned person alleging that the process of their execution violates of the Eighth Amendment.

In 2015, in *Glossip v. Gross*, the Supreme Court established a requirement for plaintiffs making method-of-execution claims: If they allege that the method-of-execution used to carry out their death sentence will cause severe pain, then they must suggest a "known-and-available alternative method-of-execution" in order for their claim to be heard.[8] This requirement has served as a significant impediment to death row litigants as a narrow understanding of 'known-and-available' has effectively foreclosed their ability to comply with this prong of *Glossip*.[9] As a result, the ability to litigate a method-of-execution claim after *Glossip* has withered.

A free exercise exception to the known-and-available alternative requirement is necessary to restore the ability of condemned people to make method-of-execution claims. *Arthur v. Commissioner, Alabama Department of Corrections* illustrates how *Glossip* has hampered the ability of condemned persons to litigate the merits of method-of-execution claims. There, an Alabama death row inmate brought a claim against his correctional institute challenging the constitutionality of the state's new lethal injection protocol.[10] The plaintiff complied with *Glossip* and suggested that instead of lethal injection, the State should use a firing squad or hanging.[11] However, because neither of those methods were statutorily permitted in Alabama, the court rejected Arthur's claim on the grounds that he failed to suggest an available alternative.[12] The Supreme Court denied Arthur's certiorari petition.[13] The Eleventh Circuit's holding in effect "shield[s] [the] state from method-of-execution liability" by allowing the state to statutorily reject

to an unnecessary risk of unconstitutional pain or suffering") (internal quotation marks omitted); Cooey v. Taft, 430 F. Supp. 2d 702, 708 (S.D. Ohio 2006).

8. Glossip v. Gross, 135 S. Ct. 2726, 2738 (2015).

9. *See* McGehee v. Hutchinson, 854 F.3d 488, 493 (8th Cir. 2017), *cert. denied*, 137 S. Ct. 1275 (2017) (where the "possibility that Arkansas could acquire pentobarbital for use in executions is too speculative to justify stays of execution."); Kelley v. Johnson, 496 S.W.3d 346, 359 (2016), *reh'g denied* (July 21, 2016), *cert. denied*, 137 S. Ct. 1067 (2017), *reh'g denied*, 137 S. Ct. 1838 (2017) ("That the drugs are generally available on the open market says nothing about whether ADC, as a department of correction, is able to obtain the drugs for the purpose of carrying out an execution."); *In re* Ohio Execution Protocol, 860 F.3d 881, 891 (6th Cir. 2017), *cert. denied sub nom.* Otte v. Morgan, 137 S. Ct. 2238 (2017) (where the state was unable to procure the lethal injection drug from other state correctional departments pending the grant of a license to import those drugs from the DEA, the court held that the plaintiffs had failed to establish there was an 'available' alternative).

10. Arthur v. Comm'r, Alabama Dep't of Corr., 840 F.3d 1268 (11th Cir. 2016), *cert. denied sub nom.* Arthur v. Dunn, 137 S. Ct. 725 (2017), *reh'g denied*, 137 S. Ct. 1838 (2017).

11. *Arthur*, 840 F.3d at 1319.

12. *Id.*

13. Arthur v. Dunn, 137 S. Ct. 725 (2017).

alternative methods.[14] As such, Arthur had no means of seeking relief for what could possibly be an unconstitutional method-of-execution. If Arthur were excused from the known-and-available alternative, his claim could be addressed on the merits and a court could determine whether or not the method-of-execution at issue there violates the Eighth Amendment. This Note outlines a manner in which Arthur could have his claim fully addressed.

Death row inmates retain constitutional rights while they await execution.[15] Not only do they have Eighth Amendment rights, but they also have the First Amendment right to free exercise of religion—a central focus of the U.S. constitutional project and the nation's founding.[16] When the government compels a citizen to act in a manner that violates their religious conscience, those foundational principles are implicated.[17] The Religious Land Use and Institutionalized Persons Act ("RLUIPA") protects condemned persons, as it does all prisoners, from illegitimate restrictions to their religious liberty.[18] The contention of this Note is that *Glossip*'s "known-and-available alternative" requirement implicates the religious consciences of condemned persons and raises constitutional concerns. This Note will argue that if a condemned person has a religious objection to capital punishment, the requirement to offer a known-and-available alternative method-of-execution under *Glossip* violates their free exercise rights as interpreted under RLUIPA. The requirement should therefore be held as unconstitutional as applied to those inmates.

Part I of this Note will provide further background to *Glossip* and explain the development of judicial scrutiny with regard to free exercise claims made by incarcerated persons. Part II will outline free exercise claims made by incarcerated persons in other contexts. Part II will also address the substantive requirements of RLUIPA and explain why *Glossip*'s known-and-available alternative requirement violates the free exercise rights of condemned persons who have a religious objection to capital punishment.

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14. Arthur v. Comm'r, Alabama Dep't of Corr., 840 F.3d 1268, 1330 (11th Cir. 2016) (Wilson, C.J., dissenting).

15. Prieto v. Clarke, 780 F.3d 245, 247 (4th Cir. 2015) (where the court entertained a death row inmate due process claim).

16. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."); U.S. CONST. art. VI, cl. 3 (". . . no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

17. Thomas Jefferson, Reply to Address to the Society of the Methodist Episcopal Church at New London, Connecticut (Feb. 4, 1809) *in* THE COMPLETE JEFFERSON (S. K. Padover, ed. Duell, Sloan & Pearce, Inc. 1943) (" No provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority.").

18. *See, e.g.*, Hayes v. Bruno, 171 F. Supp. 3d 22, 25 (D. Conn. 2016) (where the court considered a RLUIPA claim made by a death row inmate); *cf.* 42 U.S.C. § 2000cc-1.

The last part of this Note will consider several counter arguments the plaintiff envisioned herein may face and suggests another way to conceptualize the tension between the known-and-available alternative requirement and the Free Exercise Clause.

I. *Glossip* and Religious Practice in Prison

A. The Known-and-Available Alternative Requirement

Glossip was litigated by condemned persons who were concerned that their executions would bear semblance to the grim spectacle that transpired during Clayton Lockett's botched execution.[19] In Lockett's execution, the state used 100 mg of midazolam[20] and employed deficient procedures[21] that resulted in Lockett writhing on the gurney and telling the assembled witnesses that the drugs were not "working."[22] Since that execution, Ohio changed its protocol. Not only did the state increase the dosage of midazolam to 500 mg, but the state also changed its procedures to ensure that the person on the gurney is in fact unconscious and that the intravenous lines were functioning properly.[23] In *Glossip*, the condemned plaintiffs argued that, in light of Lockett's execution, and faced with the uncertainty of a new and untested procedure, the risk of a 'cruel and unusual' execution was constitutionally intolerable.[24]

The Court rejected the inmates' claim on two grounds. First, the plaintiffs failed to establish a likelihood of success on the merits of their claim; there was insufficient evidence that the use of midazolam as the initial drug in the execution protocol entailed a substantial risk of severe pain.[25] Second, the Court rejected the inmates' claim because they had failed to offer

19. Glossip v. Gross, 135 S. Ct. 2726, 2782 (2015).

20. Midazolam is a sedative in the benzodiazepine family of drugs. It is used to induce a state of unconsciousness in the condemned person before lethal doses of other drugs are injected.

21. *Glossip*, 135 S. Ct. at 2734 ("After the team administered the midazolam and a physician determined that Lockett was unconscious, the team next administered the paralytic agent (vecuronium bromide) and most of the potassium chloride. Lockett began to move and speak, at which point the physician lifted the sheet and determined that the IV had "infiltrated, which means that the IV fluid, rather than entering Lockett's blood stream, had leaked into the tissue surrounding the IV access point.") (internal quotations omitted).

22. *Glossip*, 135 S. Ct. at 2782.

23. *Id*. at 2735.

24. *Id*. at 2737.

25. *Id.* at 2738. *See also* Hamm v. Comm'r, Alabama Dep't of Corr., No. 18-10636, 2018 WL 1020051, at *1 (11th Cir. Feb. 22, 2018), *cert. denied sub nom*. Hamm v. Dunn, 138 S. Ct. 828 (2018) (where a death row inmate with lymphoma had his method-of-execution claim denied because he failed to show that the district court erred in finding that the lethal injection procedure would cause a severe likelihood of pain notwithstanding his deteriorated veins).

a known-and-available alternative method-of-execution.[26] On this point, Justice Samuel Alito writing for the majority, stated that a preceding case, *Baze v. Rees*,[27] addressed the "substantive elements of an Eighth Amendment method-of-execution claim" and "made [it] clear that the Eighth Amendment requires a prisoner to *plead and prove* a known and available alternative."[28] In *Baze*, the Court addressed an Eighth Amendment claim challenging Kentucky's lethal-injection protocol, which, like Ohio's method, also employed a three-drug cocktail.[29] There was no majority opinion. However, Justice Alito writing for the majority in *Glossip*, interpreted *Baze* as adding a heightened requirement: In order to protect one's Eighth Amendment rights in a method-of-execution claim, one must also prove that there is another method that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain."[30]

As a consequence of this holding it follows that any condemned person faces, as Justice Sonia Sotomayor put it, "a macabre challenge"[31] if they argue that their execution will violate the Eighth Amendment. Suppose a state elects to use an objectively cruel method-of-execution—for example, burning at the stake.[32] Under *Glossip*, the only way for a condemned person to avoid the pyre would be if they suggested an alternative feasible method-of-execution, even though the state's proposed method is in clear violation of the Eighth Amendment. The condemned person therefore faces the choice of becoming a central participant in planning his or her own execution, by suggesting how it should occur, or of suffering an agonizing death. The question this Note addresses is whether this is an affront to the First Amendment rights of a condemned prisoner who has a religious opposition to the death penalty.

26. *Glossip*,135 S. Ct. at 2739.

27. Baze v. Rees, 553 U.S. 35 (2008).

28. *Glossip*, 135 S. Ct. at 2739 (emphasis added).

29. *Baze*, 553 U.S. at 41–44 (explaining that a 'three-drug cocktail' is a term used to describe an injection protocol where a series of drugs is injected into the executee such that they die).

30. *Id*. at 52.

31. Arthur v. Dunn, 137 S. Ct. 725 (2017).

32. Although this is perhaps an outlandish thought experiment, the contention that the death penalty as applied today could be agonizing applies in modern lethal injection procedures. *See, e.g.*, Arthur v. Dunn, 137 S. Ct. 725, 726 (2017) (citations omitted) ("Execution absent an adequate sedative thus produces a nightmarish death: The condemned prisoner is conscious but entirely paralyzed, unable to move or scream his agony, as he suffers 'what may well be the chemical equivalent of being burned at the stake.'").

B. Judicial Scrutiny for Free Exercise Claims Made by Prisoners

Like all prisoners, death row inmates lack the full panoply of rights that free persons enjoy. However, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution."[33] Incarcerated persons retain First Amendment rights circumscribed by their status as a prisoner and by the legitimate penological objectives of the prison.[34] In other words, restrictions on speech or religion, for instance, are legitimate in prison so long as the purpose of those restrictions is to further a legitimate government interest related to the prison administration. But, because inmates have the right to due process,[35] "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."[36] It is, after all, the role of courts to serve as a check on the excesses of executive authority. Prison officials are agents of the executive branch. Hence, when prison officials overstep their authority and infringe upon protected constitutional rights, courts are empowered to enjoin the prison officials from doing so.

Amongst the most foundational constitutional rights are those surrounding religious practice.[37] However, religious exercise can pose significant difficulties to prison administration. Prisons are ill-suited to determine what constitutes religious practice. Further, that prisons may have to make exemptions and grant privileges based on religious belief conflicts with the leveling tendencies of the prison environment.[38] With nearly "50% of inmates attending religious service an average of six times per month"[39]

33. Turner v. Safley, 482 U.S. 78, 84 (1987).

34. Pell v. Procunier, 417 U.S. 817, 822 (1974).

35. Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

36. Procunier v. Martinez, 416 U.S. 396, 405–06 (1974).

37. *See, e.g.*, JAMES MADISON, A MEMORIAL AND REMONSTRANCE (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 400 (R. Rutland & W. Rachal eds. 1973) ("The religion then of every man must be left to the conviction and conscience of every man."); Thomas Jefferson, Reply to Address to the Society of the Methodist Episcopal Church at New London, Connecticut (Feb. 4, 1809) *in* THE COMPLETE JEFFERSON (S. K. Padover, ed. Duell, Sloan & Pearce, Inc. 1943) ("No provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority.").

38. *See* Noha Moustafa, *The Right to Free Exercise of Religion in Prisons: How Courts Should Determine Sincerity of Religious Belief Under RLUIPA*, 20 MICH. J. RACE & L. 213, 225 (2014) ("Prison facilities are concerned about the cost of providing kosher meals, unfairly advantaging practitioners of certain religions, fostering feelings of jealousy between inmates, or overburdening personnel.").

39. Thomas P. O'Connor & Michael Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation, in Religion, the Community, and the Rehabilitation of Criminal Offenders*, 35 J. OF OFFENDER REHABILITATION 11, 12 (2002). *See also* Thomas P. O'Connor et al., *Home for Good in Oregon: A Community, Faith and State Reentry Partnership to Increase*

opportunities to restrict religious freedom in prison are replete. Courts are faced with the problem of judging the veracity of religious conviction, and of evaluating the justification and importance of a prison regulation. The separation of powers between branches of government and the lack of justiciable standards have restrained judges from becoming overseers of prisons.

1. Judicial Development of the Standard of Review

Historically, courts were reticent to be the harbinger of religious exercise within the penitentiary system. In 1952, the Fifth Circuit expressed the limited role of the judiciary in the prison setting, stating: "it is not the function of the Courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined."[40] In the 1960s and 1970s, however, courts became more receptive to free exercise claims of inmates largely in response to Black Muslims and other minority religions whose religious practices were not already assumed by the penal system. In 1964, the Second Circuit concluded that "insofar as possible within the limits of prison discipline" prisoners should be allowed to practice their religion in prison.[41] Then in 1972, the Court in *Cruz v. Beto* demonstrated an increasing sensitivity to religious exercise within prisons, holding that a prison had a duty to provide Muslim prisoners with a "reasonable opportunity of pursuing [their] faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts."[42] Although several circuits conflicted over what level of judicial scrutiny to apply to free exercise claims made by prisoners, courts generally applied some form of heightened scrutiny.[43]

Any conciliation between the civil rights of incarcerated persons and the discretion of their jailers ended shortly thereafter as the Court became deferential to the exercise of executive discretion, applying commensurate levels of judicial scrutiny. This was because the Court became aware of the

Restorative Justice, CORRECTIONS TODAY 73 (Oct. 2004) (census of Oregon state prisoners showed that fifty-two percent of them are involved in religious activities).

40. Adams v. Ellis, 197 F.2d 483, 485 (5th Cir. 1952); *see also* Kelly v. Dowd, 140 F.2d 81, 83 (7th Cir. 1944) (holding that because prisoner was incarcerated in a state prison, the reasonableness of the refusal to provide religious materials was a subject for the state courts).

41. Sostre v. McGinnis, 334 F.2d 906, 912 (2d Cir. 1964).

42. Cruz v. Beto, 405 U.S. 319, 322 (1972).

43. *Cf.* Barnett v. Rodgers, 410 F.2d 995, 1000 (D.C. Cir. 1969) (finding that the burden on prisoner religious exercise is justified only if the state shows a compelling state interest and no alternatives that would not infringe upon First Amendment rights) *with* Wali v. Coughlin, 754 F.2d 1015, 1033 (2d Cir. 1985) (finding where prisoner religious exercise was not presumptively dangerous, prison officials were required to show "that a particular restriction is necessary to further an important governmental interest, and that the limitations on freedoms occasioned by the restriction are no greater than necessary to effectuate the governmental objective involved").

complexities of prison administration, the expertise required to solve them, and the separation of powers issue to be avoided.[44] Hence, in *Turner v. Safley*, the Court held that "[w]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[45] Then in *O'Lone v. Estate of Shabazz*, the Court applied this principle, rational basis review,[46] to an inmate's free exercise claim, upholding a prison regulation that prevented a group of Muslim inmates from attending the Jummah, a Friday afternoon congregational prayer.[47] In *Estate of Shabazz*, the inmate-plaintiffs had a work assignment outside of the prison walls that prevented them from attending prayer. The prison justified the curtailment of their religious liberty by citing the length of time it would take to reenter the prison and the fact that would be excused from completing their full eight-hour workday.[48] The Court found that those governmental interests were rationally related to the government objective and outweighed the burden on the inmates' free exercise rights.[49]

The reasonableness of a prison regulation is determined by several factors outlined in *Turner*: whether the connection between the regulation and the government goal is not "so remote as to render the policy arbitrary or irrational;"[50] the existence of alternative means of exercising the circumscribed right;[51] the impact of accommodating the right on other inmates, guards, and prison resources generally;[52] and whether there is an alternative regulation that "fully accommodates the prisoner's rights at de minimis cost to valid penological interests."[53] This judicial framework—the rational basis standard—rendered free exercise claims weak absent invidious discrimination. *Estate of Shabazz* foreshadowed the Court's general movement away from protecting religious exercise incidentally burdened by state action.[54]

44. Procunier v. Martinez, 416 U.S. 396, 405 (1974).

45. Turner v. Safley, 482 U.S. 78, 89 (1987).

46. Bd. of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356, 367 (2001). Broadly speaking, 'rational basis' is a method of judicial review for determining whether a law is constitutional by ensuring that it is rationally related to a legitimate government interest.

47. O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

48. *Estate of Shabazz*, 482 U.S. at 350–53.

49. *Id*. at 350–53.

50. *Turner*, 482 U.S. at 89–90.

51. *Id*. at 90.

52. *Id*.

53. *Estate of Shabazz*, 482 U.S. at 91.

54. *See infra* Part III(A).

Shortly thereafter, the Court announced in *Employment Div., Dept. of Human Resources v. Smith* that laws of general applicability that incidentally burden free exercise of religion are constitutional so long as they are rationally related to legitimate government interests.[55] Prior to *Smith*, the Court mostly applied strict scrutiny to laws that substantially burdened free exercise,[56] meaning the burden on religious exercise would have to satisfy the "compelling interest test."[57] Although *Smith* was not a case about prisoners' rights, its effect was that, thereafter, the free exercise claims of both incarcerated and free people received rational basis review when alleging government interference with the free exercise of religion. In general, the decision diminished the protections afforded to religious adherents in the U.S.

2. RLUIPA Mandates Strict Scrutiny

Congress responded to *Smith* by enacting the Religious Freedom Restoration Act ("RFRA"). The purpose of RFRA was to "restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*," so that heightened scrutiny would apply to all government acts that "substantially burdened" religious exercise, even if the burden arose from a neutral law of general applicability.[58] The legislation also specifically intended to restore strict scrutiny to religious claims made by inmates in light of the Court's decision in *Estate of Shabazz*.[59] Any fanfare surrounding RFRA was unwarranted—not only was the law found to be unconstitutional

55. Emp't Div., Dep't. of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990) (where American Indian was withheld a social security entitlement because he had been fired for ingesting peyote in violation of a law of general applicability that that incidentally burden free exercise, in this case a prohibition on drugs).

56. *See* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Thomas v. Review Bd. of Indep. Employment Sec. Div., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). *But see* Goldman v. Weinberger, 475 U.S. 503 (1986) (applying rational basis).

57. *Smith*, 494 U.S. at 902 (O'Connor, J., concurring) (The compelling interest test is a method of judicial review for determining the constitutionality of a statute or regulation that restricts the practice of a fundamental right or distinguishes between people due to a suspect classification. For the statute to be constitutional, there must be a compelling governmental interest that can be furthered only by the law in question.).

58. 42 U.S.C. §§ 2000bb(b), 2000bb-1.

59. *See* S. REP. NO. 103-111 (1993) (expressing intent to restore "protection afforded to prisoners to observe their religions[,] which was weakened by the decision in *O'Lone v. Estate of Shabazz*").

as applied to states in *City of Boerne v. Flores*,[60] but also, only ten percent of religious liberty claims made by inmates were found to be meritorious.[61]

Thereafter, Congress held a series of hearings to correct the constitutional deficiencies of RFRA identified in *City of Boerne*. The Religious Land Use and Institutionalized Persons Act ("RLUIPA") was the result of this process. *City of Boerne* prevented Congress from mandating strict scrutiny under its Fourteenth Amendment Enforcement Clause powers.[62] As a result, RLUIPA was enacted under Congress' Spending and Commerce Clause powers. Congress identified two "areas of law where the congressional record of religious discrimination and discretionary burden was the strongest:" laws governing institutionalized persons (i.e., prisoners and persons in mental institutions) and land use laws.[63] Congress was motivated to protect the free exercise rights of inmates for several reasons—the growing concern that those rights were being arbitrarily infringed upon,[64] the strong evidence to suggest that spiritual practice promoted rehabilitation and reduced recidivism,[65] the observation that federal protection would be the best vehicle to address the dearth of state legislation protecting religious liberty,[66] and the need to address the barriers imposed by states on prison

60. City of Boerne v. Flores, 521 U.S. 507, 532 (1997) (where the Court held that Congress exceeded its authority under section 5 of the Fourteenth Amendment in defining the substance of the rights protected by the Fourteenth Amendment).

61. Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 607–17 (1998) (collecting federal and state court prisoner RFRA cases and demonstrating that prisoners lost ninety out of ninety-nine RFRA claims for which there were reported decisions).

62. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

63. Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 943–44 (2001).

64. *See, e.g.*, Statements of Sen. Hatch and Kennedy, Statements on Introduced Bills and Joint Resolutions (July 13, 2000); *The Need for Federal Protection of Religious Freedom and Boerne v. Flores, II: Oversight Hearing Before the H. Comm. on the Judiciary, Subcomm. on the Constitution*, 105th Cong. 37–45 (1998) (statement of Isaac M. Jarsoslawicz, Director of Legal Affairs, Aleph Institute) [hereinafter Testimony of Jarsoslawicz]; *The Need for Federal Protection of Religious Freedom After Boerne v. Flores: Hearing Before the House Comm. on the Judiciary, Subcomm. on the Constitution*, 105th Congress 54–66 (1998) (statement of Rev. Donald W. Brooks, Director of Prison Ministry, Roman Catholic Archdiocese of Oklahoma City and the Roman Catholic Diocese of Tulsa) [hereinafter Testimony of Brooks].

65. *See* Mark C. Young et al., *Long-Term Recidivism Among Federal Inmates Trained as Volunteer Prison Ministers*, 22 J. OFFENDER REHAB. 97, 104, 110–11 (1995) (recidivism rate lower for prisoners participating in intensive prison ministry as compared to prisoners in the general population); Melvina T. Sumter, *Religiousness and Post-Release Community Adjustment*, GRADUATE RESEARCH FELLOWSHIP EXECUTIVE SUMMARY 10 (Sept. 25, 2000), http://www.ncjrs.org/pdffiles1/nij/grants/184509.pdf.

66. *See, e.g.*, Testimony of Jarsoslawicz, *supra* note 64; *Protecting Religious Liberty After Boerne v. Flores: Hearing Before the House Comm. on the Judiciary, S. Comm. on the Constitution,*

ministry.[67] Even opponents of RLUIPA conceded that religious practice within prison had net benefits on the administration of prisons.[68] Hence, Congress enacted RLUIPA, mandating that free exercise claims made by inmates receive strict scrutiny.

The relevant portion of the RLUIPA is reproduced here:

> (a) GENERAL RULE- No government[69] shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
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> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (b) SCOPE OF APPLICATION- This section applies in any case in which—
>
> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
>
> (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.[70]

105th Cong. 3–11 (1997) (statement of Charles W. Colson, President, Prison Fellowship Ministries).

67. Testimony of Brooks, *supra* note 64.

68. *See Hearing Before the Senate Comm. on the Judiciary: Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure*, 106th Cong. 73, 175 (1999) (statement of Glenn S. Goord, Commissioner New York State Department of Correctional Services) ("[E]very correction administrator in the country recognizes the vital role played by most religious practices and beliefs in furthering inmate rehabilitation, in maintaining a sense of hope and purpose among individual inmates and in enhancing overall institutional safety and well-being. Most inmates who sincerely practice their religious beliefs do not pose institutional problems. Rather, as a rule of thumb, they promote institutional stability.").

69. 42 U.S.C. § 2000cc-5(4) (RLUIPA defines the term "government" as follows:)

> (i) a State, county, municipality, or other governmental entity created under the authority of a State;
>
> (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and
>
> (iii) any other person acting under color of State law; and . . . for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

70. 42 U.S.C. § 2000cc-1 (2000).

II. Using RLUIPA to Challenge *Glossip's* Known-and-Available Alternative Requirement

This Note addresses a claim made by a hypothetical inmate who has a religious objection to capital punishment and who contends that the substantive pleading requirement in *Glossip* forces him or her to compromise their Free Exercise rights. Because of RLUIPA, the known-and-available alternative requirement is unconstitutional as applied to death row inmates who have a religious opposition to capital punishment.

A. Pre-RLUIPA Free Exercise Litigation Concerning Capital Punishment

Before the passage of RLUIPA, in *Campbell v. Wood* the Ninth Circuit was asked whether a Washington state statute allowing a condemned prisoner to choose between two methods-of-execution would violate the Free Exercise Clause.[71] The statute at issue had a presumption for hanging, but also allowed the inmate to elect lethal injection.[72] In *Campbell*, the inmate alleged that his religious beliefs prevented him from making such a choice.[73]

The court agreed "with Campbell that a statute providing for a choice between two methods of execution, one constitutional and the other unconstitutional, might place an impermissible burden on the free exercise of the asserted beliefs."[74] However, Campbell's claim failed for two reasons. First, by statute, he was not required to make a choice between methods of execution. He could remain silent, make no selection, and succumb to the de facto method.[75] In this sense, he was not forced to make a choice that would offend his religious beliefs. Second, because the court found that hanging was not an unconstitutional method-of-execution, the statute did "not compel Campbell to compromise one constitutional right to avoid the infringement of another."[76] In other words, because there was no apparent Eighth Amendment violation, Campbell was not forced to express a preference for a method-of-execution—a choice that would cause him to

71. *See* Campbell v. Wood, 18 F.3d 662, 687 (9th Cir. 1994).

72. WASH. REV. CODE ANN. § 10.95.180 (West) ("The punishment of death shall be supervised by the superintendent of the penitentiary and shall be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until the defendant is dead, or, at the election of the defendant, by hanging by the neck until the defendant is dead.").

73. *Campbell*, 18 F.3d at 686.

74. *Id.* at 687 (citing to Frazee v. Illinois Dep't of Employ. Security, 489 U.S. 829, 832 (1989)); *see also* Hunt v. Nuth, 57 F.3d 1327, 1337 (5th Cir. 1995) (rejecting the claim that a choice between methods-of-execution was cruel and unusual).

75. *Campbell*, 18 F.3d at 687.

76. *Id.*

compromise his religious beliefs—just in order to ensure that his Eighth Amendment rights would remain intact.

In contrast, the known-and-available alternative directly implicates a condemned person's free exercise rights because they are forced to participate in an activity that challenges a central tenet of their faith as a condition for exercising their Eighth Amendment right.

B. RLUIPA's Functionality

The level of judicial scrutiny a constitutional claim receives is amongst the most important factors in determining the constitutionality of government action. After *Glossip*, it is arguable that a method-of-execution claim receives something slightly lower than rational basis review.[77] Traditional rational basis places a burden on the plaintiff to show that the rule burdening them is not rationally related to a legitimate government objective. *Glossip* creates an additional burden on the plaintiff not just to satisfy rational basis but also to assist the government in finding a way to carry out the function sought. That is the essence of the known-and-available alternative requirement. By advancing the claim under RLUIPA, the condemned person may side-step compliance with *Glossip*'s onerous requirement by collaterally attacking it.

RLUIPA requires a prisoner to prove three things: (1) that government officials have imposed a "substantial burden" on his "religious exercise" (a merits requirement);[78] (2) that the "substantial burden" was either (a) imposed in a program or activity that receives federal funds or (b) affects interstate commerce (a jurisdictional requirement);[79] and (3) that all available administrative remedies have been exhausted, in compliance with the Prison Litigation Reform Act ("PLRA").[80]

Once the prisoner has successfully presented a prima facie claim, the burden shifts to the government to prove that the decision or course of action, which substantially burdened the prisoner's religious liberty, can withstand strict scrutiny.[81] In other words, the government must prove that the burden on the religious exercise is the least burdensome way to achieve a compelling government interest. If the government fails to satisfy strict scrutiny, then

77. Steven Schwinn, *Symposium: The Wonderland Rules for Method-of-Execution Claims*, SCOTUS BLOG (June 30, 2015) http://www.scotusblog.com/2015/06/symposium-the-wonderland-rules-for-method-of-execution-claims/.

78. 42 U.S.C. § 2000cc-1.

79. 42 U.S.C. § 2000cc-1.

80. 42 U.S.C. § 2000cc-2(e).

81. 42 U.S.C. § 2000cc-2(b).

RLUIPA specifies that the prisoner is entitled to "any appropriate relief" and attorney fees.[82]

RLUIPA's jurisdictional requirement can be satisfied by showing that: (1) the substantial burden [on the prisoner's religious exercise] is imposed in a program or activity that receives Federal financial assistance [Spending Clause jurisdiction]; or (2) the substantial burden [on the prisoner's religious exercise] affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes [Commerce Clause jurisdiction].[83]

To establish jurisdiction under the Spending Clause hook, the prisoner must prove that the department of corrections that houses them receives funding from the federal government. The federal government transfers millions of dollars to state correctional facilities.[84] Therefore, Spending Clause jurisdiction does not present significant difficulties. A claimant may also establish Commerce Clause jurisdiction by showing some instrumentality related to the execution process, or even to the prison itself, was transferred in interstate commerce.[85]

The plaintiff must also demonstrate compliance with the PLRA, which requires "[e]xhaustion of administrative remedies as required by [the PLRA], [as] a condition precedent to suit."[86] Courts lack discretion to decide claims on the merits if this requirement has not been met. In many states, the department of corrections promulgates lethal injection protocols. Prisoners have the ability to challenge those protocols through the available

82. 42 U.S.C. § 2000cc-2(a).

83. 42 U.S.C. § 2000cc-1(b).

84. *See* Alexia Cooper, *Justice Assistance Grant (JAG) Program 2013*, DEP'T OF JUST. (Oct. 2012), https://www.bjs.gov/content/pub/pdf/jagp13.pdf (detailing that the federal government gave out $278.4 million dollars to state governments from crime related expenditures, including correctional facilities); *see* Charles v. Verhagen, 348 F.3d 601, 605 (7th Cir. 2003) (where a state prisoner established jurisdiction in a state where the department of corrections received approximately 14.5 million federal dollars in fiscal year 2001, which comprised roughly 1.6% of their budget, and where the infringement on the inmates free exercise was unrelated to the federal funding).

85. *See* United States v. Lopez, 514 U.S. 549, 558–59 (1995) (where the Supreme Court described three categories of activity that fall within Congress's power under the Commerce Clause. First, "Congress may regulate the use of the channels of interstate commerce." Second, "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." Third, "Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.") (citation omitted).

86. Dixon v. Page, 291 F.3d 485, 488 (7th Cir. 2002).

administrative channels open to them.[87] An inmate seeking redress under RLUIPA would have to comply with this requirement. It should be noted that an administrative challenge to the known-and-available alternative requirement is distinct from most other administrative challenges because the requirement is not a regulation, but a constitutional provision.

In order to make a prima facie case of a RLUIPA violation, an inmate must show that there is a 'substantial burden' on their religious exercise. The first question is: What is a "substantial burden?" The *Sherbert* Court articulated the definition of substantial burden as forcing one to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other."[88] Another court put it thus:

> a 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.[89]

'Religious exercise' is defined in RLUIPA. Religious exercise "includes *any* exercise of religion, whether or not compelled by, or central to, a system of religious belief."[90] The use of the word 'any' is important as it displaces the harsh interpretation of the *Turner*/*Estate of Shabazz* test, which would ask whether there were other available means to exercise religion in lieu of the allegedly burdened form of religious exercise. Hence, RLUIPA's abandonment of the 'other means available' inquiry expands the scope and extent of religious liberty within prisons. The question for a court

87. *See, e.g.*, Walton v. Johnson, No. CIVA 2:06CV258, 2006 WL 2076717 (E.D. Va. July 21, 2006).

88. Sherbert v. Verner, 374 U.S. 398, 404 (1963).

89. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004) (The Midrash court summarized Supreme Court precedent on "substantial burden" in order to give meaning to Section 2(a) of RLUIPA, which in language almost identical to RLUIPA's prisoner provisions in Section 3, 42 U.S.C. § 2000cc(a)(3)(2004), forbids a government from "impos[ing] or implement[ing] a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person . . . unless . . . imposition of the burden . . . is in furtherance of a compelling government interest and is the least restrictive means of furthering that compelling interest."); 42 U.S.C. § 20000cc(a)(1)(2004); *see also* Coronel v. Paul, 316 F. Supp. 2d 868, 880 (D. Ariz. 2004) (holding that "state action substantially burdens the exercise of religion within the meaning of the [prisoner provisions of] RLUIPA when it prevents a religious adherent from engaging in conduct both important to the adherent and motivated by sincere religious belief").

90. 42 U.S.C. § 2000cc-5(7)(A) (emphasis added.)

is whether the known-and-available alternative requirement is a substantial burden on the religious exercise of the plaintiff.

C. The Role of Religious Opposition to the Death Penalty

As an initial matter, in order to claim a substantial burden on religious exercise, the plaintiff hypothesized here must be opposed to capital punishment on the basis of religion. Yet, it is not a foregone conclusion that religious belief requires opposition to capital punishment. Opponents and proponents of the death penalty both cite to religious texts as justification for their positions.[91] In the Judeo-Christian tradition, religious supporters of capital punishment rely principally on the Old Testament, which envisions execution as the punishment for a number of crimes[92] and which endorses the principle of *lex talionis*, "an eye for an eye."[93] The New Testament may also be cited as supporting capital punishment.[94] Christian theologians such as Thomas Aquinas are further authority for the proposition that God ordains capital punishment.[95]

91. NINA RIVKIND ET AL., CASES AND MATERIALS ON THE DEATH PENALTY 10 (4th ed. 2016).

92. *See* S. Levine, *Capital Punishment in Jewish Law and Its Application to the American Legal System: A Conceptual Overview*, 29 ST. MARY'S L.J. 1037, 1042 (1998) (citing Moses Maimonides) (It has been estimated that there are at least thirty-six capital crimes in the Old Testament, in addition to murder, including adultery, working on the Sabbath, and being an unruly child).

93. *Leviticus* 24:20; *Exodus* 21:24 ("Whoever takes the life of any human being shall be put to death.").

94. *See generally Romans* 13:1-7 ("[4] For the one in authority is God's servant for your good. But if you do wrong, be afraid, for rulers do not bear the sword for no reason. They are God's servants, agents of wrath to bring punishment on the wrongdoer. [5] Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also as a matter of conscience.").

95. St. Thomas Aquinas, *Summa Theologica II*, *IN F. DE VITORIA, REFLECTION ON HOMICIDE & COMMENTARY ON SUMMA THEOLOGIAE* II^{a}-II^{ae} *q. 64*, 240–41 (John P. Doyle trans., 1997).

Thomas Aquinas wrote:

> Now every individual person is compared to the whole community, as part to the whole. There if a man is dangerous and infectious to the [others], on account of some sin, it is praiseworthy and advantageous that he be killed in order to safeguard the common good, since a little leaven corrupted the whole lump.
>
> By sinning everyman departs from the order of reason, and consequently falls away from the dignity of his manhood, in so far as he is naturally free, and exists for himself and he falls into the slavish state of the beasts to be disposed of according as he is useful to others . . . . Hence, although it be evil in itself to kill a man so long as he preserve his dignity, yet it may be good to kill a man who has sinned, even as it is to kill a beast.

Yet, by and large the Western theological tradition has repudiated the death penalty. Jesus Christ rejected *lex talionis*,[96] and at one point intervened to prevent the execution of an adulteress.[97] Today, most major religious groups in the United States have taken a position against the death penalty.[98] Pope Francis expressed that the Catholic Church's opposition to the death penalty, calling it "inadmissible, no matter how serious the crime committed."[99] Jewish leaders across denominations expressed similar opposition.[100] Although there is not a clear line between death penalty abolition and religious exercise, it is possible to have religiously motivated opposition to the death penalty.

Whether the religious exercise at issue is central to the believer's faith or derivative from it is irrelevant. RLUIPA is meant to be "construed in favor of a broad protection of religious exercise."[101] Under RLUIPA, "[t]he term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[102] The central question is whether the belief is sincerely held, "the adherent [must] have an honest belief that the practice is important to his free exercise of religion."[103] Courts do not inquire into whether a certain expression of faith is required or mandated by a religion for fear of violating the Establishment Clause for assessing the validity of a professed belief.[104]

96. *Matthew* 5:38-42 ("You have heard that it was said, An eye for an eye and a tooth for a tooth.' But I say to you, Do not resist the one who is evil. But if anyone slaps you on the right cheek, turn to him the other also. And if anyone would sue you and take your tunic, let him have your cloak as well. And if anyone forces you to go one mile, go with him two miles. Give to the one who begs from you, and do not refuse the one who would borrow from you.").

97. *John* 8:4-11.

98. *Religion and the Death Penalty*, DEATH PENALTY INFORMATION CENTER (Jan. 2, 2018) https://deathpenaltyinfo.org/article.php%3Fdid%3D2249.

99. *Pope Francis: The Death Penalty Is Inadmissible*, NAT'L CATHOLIC REPORTER (Mar. 20, 2015), https://www.ncronline.org/blogs/ncr-today/pope-francis-death-penalty-inadmissible.

100. Rabbi Dr. Shmuly Yanklowitz, *Jewish Leaders Take A Stand Against the Death Penalty*, JEWISH J. (Feb. 17, 2016), http://jewishjournal.com/culture/arts/182601/jewish-leaders-take-a-stand-against-the-death-penalty/.

101. 42 U.S.C. § 2000cc-3(g).

102. 42 U.S.C § 2000cc-5(7)(A).

103. Sossamon v. Lone Star State of Tex., 560 F.3d 316, 332 (5th Cir. 2009), *aff'd sub nom.* Sossamon v. Texas, 131 S. Ct. 1651 (2011).

104. Gillette v. United States, 401 U.S. 437, 449–50 (1971) (citing U.S. CONST. amend. I) ("And as a general matter it is surely true that the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization.").

In any case, free exercise is the right to choose a religious belief and follow its practices so long as they are otherwise lawful.[105] Any suggestion that a condemned person who claims a religious objection to capital punishment is misinterpreting scripture should be disregarded. While the belief must be one that is religious in nature,[106] it does not follow that the belief must be one that is uniformly adopted by the religion in question for the belief to be one that merits constitutional protection.[107] Instead, "the relevant question is not what others regard as an important religious practice, but what the plaintiff believes."[108] Furthermore, the belief does not need to be one that is compelled by the religion in question.[109] Nonetheless, courts and prisons conduct an inquiry into the sincerity of the asserted beliefs.[110] Putting that concern aside, the question addressed here is whether adherence to the known-and-available alternative requirement substantially burdens a condemned person's free exercise rights, assuming the belief is sincerely held.

D. *Glossip's* Requirement is a Substantial Burden

The known-and-available alternative requirement is a substantial burden on the religious exercise of a condemned person. This is because by offering a viable alternative method-of-execution—one that does not pose a substantial risk of harm to oneself—one becomes a central participant in helping the state carry out executions. The known-and-available alternative pleading requirement substantially burdens their free exercise rights for several reasons.

First, as an initial matter, the mere act of choosing between methods of execution is constitutionally suspect. The Ninth Circuit has suggested that a choice between two methods would violate that inmate's free exercise rights

105. Emp't Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 877–78 (1990); *but see*, *e.g.*, Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014) (finding that, where a corporation was exempted from paying for certain forms of health insurance coverage as they had a religious objection to the services, this imposed no extra costs on employees because the insurance companies will provide contraceptive coverage anyways rather than have to pay the cost of an ensuing pregnancy).

106. Thomas v. Review Bd. of Indep. Emp't Sec'y Div., 450 U.S. 707, 713 (1981).

107. Frazee v. Illinois Dep't of Emp't Sec'y, 489 U.S. 829, 833 (1989).

108. Rouser v. White, 944 F. Supp. 1447, 1454 (E.D. Cal. 1996); *see also* Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").

109. *See* 42 U.S.C. § 2000cc-5(7) (2004) ("'[R]eligious exercise' includes any exercise of religion, whether or not compelled by . . . a system of religious belief.").

110. Moustafa, *supra* note 38, at 225–26.

because it would impermissibly burden his asserted beliefs by forcing him to participate in his own execution.[111]

Second, forcing a condemned prisoner to suggest an alternative method-of-execution buoys the system of capital punishment. Not only will the plaintiff be facilitating one execution, namely their own, but the alternative method could be used in potentially every other administration of capital punishment that occurs thereafter. This is so because *Glossip* requires the plaintiff to prove that the proposed method-of-execution poses a substantial risk of harm and set forth the feasibility of an alternative. Hence, *Glossip* requires the condemned person to contribute to the success of future executions. By doing so, *Glossip* substantially burdens the religious conscience of the condemned person hypothesized here.

Third, because the requirement puts "substantial pressure on an adherent to modify [their] behavior to and violate [their] beliefs," it violates their free exercise rights.[112] The requirement places pressure on the plaintiff because it is a precondition for litigating the claim in the first place. Hence, the plaintiff will need to modify their behavior by assisting the government develop constitutional methods of execution, and in doing so they violate a tenet of their belief system.

The drafters of RLUIPA foresaw that relief under its impose costs on the government.[113] The prisoner is both arguing that the government should find a way to carry out a death sentence that does not violate the Eighth Amendment and is objecting to the fact that they themselves must fulfill a task for which the government is ostensibly responsible. This is not a situation in which a person is exempting himself or herself from a tax burden so that others may pick up the tab.[114] The cost associated with accommodating the plaintiff's religious exercise was taken into account by Congress as a necessary expenditure to assure Constitutional protections are realized.

E. The Means Do Not Justify the Ends

Once claimants have demonstrated that the penal institution has substantially burdened their religious exercise, the burden shifts to the prison to show that it is in furtherance of a compelling government interest and is

111. Campbell v. Wood, 18 F.3d 662, 687 (9th Cir. 1994).

112. Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141 (1987) (citing *Thomas*, 450 U.S. at 717–18.).

113. 42 U.S.C.A. § 2000cc-3 (West 2004) (" . . . this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise").

114. *See generally* Jimmy Swaggert Ministries v. Bd. of Edu., 493 U.S. 378 (1990) (holding that the imposition of sales taxes does not contravene the First Amendment); United States v. Lee, 455 U.S. 252 (1982) (holding that the imposition of Social Security taxes is not unconstitutional in the face of objections based on religious grounds).

the least restrictive manner of achieving that interest.[115] Because of the strict scrutiny analysis under RLUIPA, in order for the government to satisfy its burden, it must show that the known-and-available alternative requirement is the least burdensome way of achieving an important government objective.

A possible government interest in the known-and-available alternative is the state's interest in the administration of justice—the government has a "significant interest in meting out a sentence of death in a timely fashion."[116] Further, the efficient administration of capital punishment theoretically gives it the deterrent value that is inherent in any form of punishment.[117] There is an additional government interest in vindicating the life of the victim.[118] Lastly, the government has an interest in deterring further litigation aimed at unnecessarily delaying future executions. The question then becomes: Do those interests justify the infringement on the inmate's First Amendment rights, and is the known-and-available alternative requirement the 'least burdensome' way of achieving the purported aim?

Forcing the inmate to develop a method-of-execution that is constitutionally tolerable is not the least burdensome way for the government to achieve the government interest sought. The government could, for instance, engineer a whole new method-of-execution that does not risk a significant likelihood of unnecessary pain on the condemned person. Alternatively, it could hire and train medical staff or even develop drugs itself for the execution, decreasing the risks of botched executions. It could also increase transparency and/or rewrite protocols. The burden on the government to make these changes is not great and, given the magnitude of the government action at issue, is entirely appropriate.

Without considering the burden on religious exercise in particular, it is generally difficult for an inmate to formulate a known-and-available alternative method-of-execution. As an initial matter, the acuity and emotional stability required to plan one's own execution is overwhelming.

115. Because it is the prisoner's burden to prove a substantial burden on religious exercise, judgment is appropriate in favor of the defendants where a prisoner fails to produce any competent evidence (even if it is only declarative testimony explaining why it is that the prison policy burdens his or her religious exercise) to demonstrate a substantial burden. *See* Piscitello v. Berge, 2003 WL 23095741, at *5 (W.D. Wis. Apr. 17, 2003) (granting summary judgment to prison officials where plaintiff offered only a "one sentence" argument in his brief that RLUIPA was violated and did not introduce any evidence to show how the prison's policy had substantially burdened his religious exercise).

116. Nelson v. Campbell, 541 U.S. 637, 644 (2004).

117. Baze v. Rees, 553 U.S. 35, 89–90 (2008) (Scalia, J., concurring) (citing to the "significant body of recent evidence that capital punishment may well have a deterrent effect, possibly a quite powerful one.")

118. *Id.*; *see also* Hill v. McDonough, 547 U.S. 573, 584 (2006) ("Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.").

The burden on a method-of-execution plaintiff is even more exacting when you consider the perspective from which they have to make the claim. Prisoners are ill-equipped to determine a constitutional method-of-execution; even the government uses a fair amount of guesswork in designing methods of execution.[119] Now, almost all states that have the death penalty use lethal injection as their method.[120] Assuming that people on death row have little expertise in the science behind lethal injections, requiring them to come up with another available method would require staggering efforts on their part or on the part of their counsel.[121]

The secrecy surrounding the procurement of lethal injection drugs and the methods used increases the difficulty.[122] Given the dearth of available drugs, the burden placed on inmates is even higher.[123] Further, there is the possibility that plaintiffs find themselves in the same situation as the plaintiff in *Arthur*—where the state's only statutorily proscribed method-of-execution was deemed the only 'available' method-of-execution—making it constructively impossible for the plaintiff to adhere to the known-and-available alternative requirement.[124] In this light, requiring condemned inmates to plead a known-and-available alternative is unreasonable and burdensome—not the "least burdensome" way of achieving the government objective.

The burden on the plaintiff is compounded once the First Amendment implications are taken into account. Assuming the condemned person has a religious objection, the requirement compels them to think and act in a manner that would violate their freedom of conscience. In order to comply with *Glossip,* they will necessarily have to express an idea. If that thought is one which conflicts with their religious conscience, then the requirement that the inmate think that way, as a precondition to the exercise of their

119. The litigation in *Glossip* concerned a new lethal injection protocol for which the plaintiffs would be the test subjects.

120. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. 3 (Feb. 2, 2018), https://deathpenaltyinfo.org/documents/FactSheet.pdf.

121. *See* Arthur v. Comm'r, Alabama Dep't of Corr., 840 F.3d 1268, 1317–18 (11th Cir. 2016), *cert. denied sub nom.* Arthur v. Dunn, 137 S. Ct. 725 (2017), *reh'g denied*, 137 S. Ct. 1838 (2017) (making clear that only other lethal injection protocols would be considered as "alternative")).

122. *See, e.g.*, Arthur v. Thomas, 674 F.3d 1257, 1263 (11th Cir. 2012) (per curiam) (noting "the veil of secrecy that surrounds Alabama's execution protocol"); Terrell v. Bryson, 807 F.3d 1276, 1281 (11th Cir. 2015) (Martin, J., concurring) (discussing Georgia's lethal injection "secrecy rules").

123. Beth Schwartzapfel, *Controlled Substances*, MARSHALL PROJECT (June 29, 2015), https://www.themarshallproject.org/2015/03/06/controlled-substances.

124. *Methods of Execution*, DEATH PENALTY INFO. CTR., (Feb. 2, 2017), https://deathpenalty info.org/methods-execution (notwithstanding the circumstance in *Arthur*, nineteen States have only one statutorily proscribed method of execution).

Eighth Amendment right, forces them into an uncomfortable choice: either violate their religious beliefs or forego their right to be executed in a manner that does not inflict pain and suffering. If it is your belief that capital punishment is 'inadmissible, no matter how serious the crime committed' then the known-and-available alternative forces you to acquiesce and be complicit to a practice that you may find abhorrent based on your religion. This is especially troubling because at "the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."[125] As a 'substantive element' of a method-of-execution claim, *Glossip* ignores this First Amendment principle by compelling condemned persons in the circumstance envisioned here to express an idea that they think is undeserving of consideration.

There is an argument that the government interest at stake here is narrower than what was suggested above. Rather, the government interest in known-and-available alternative requirement is the state's interest in not bearing the burden of finding a constitutionally tolerable method-of-execution—even when the existing procedure bears a significant likelihood of pain. In such a light, the litigant envisioned here will find themselves on firmer footing as the balance of interests weigh heavily in their favor given the special place religious exercise in prisons has under RLUIPA.

III. Comments, Counter-Arguments, and Responses

One may contend that this argument erects a straw-man, creating a free exercise violation where there is none. The condemned person could simply forgo the challenge and their religious conscience would be unscathed. In other words, because the government is not preventing the inmate from exercising their religion, there is not a free exercise problem. The inmate can still practice their religion while in custody; nothing about *Glossip* impedes their ability to do so.

The response to this argument is that the requirement to name an alternative method-of-execution would therefore exclude religious opponents of capital punishment from challenging their method-of-execution. The Court has in other circumstances adopted rules aimed at preventing situations in which people are forced to choose between two rights.[126] Here, the choice the hypothesized plaintiff has is either to violate

125. Turner Broad. Sys. v. FCC, 512 U.S. 622, 641 (1994).

126. Doyle v. Ohio, 426 US 610, 618–19 (1976) (holding that the prosecution cannot use a defendant's post arrest invocation of *Miranda* rights in order to impeach the defendant, because, although "Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be

their religious principles or to forego their Eighth Amendment rights. This choice, which the Ninth Circuit saw as constitutionally suspicious,[127] presents a free exercise problem because the government action prevents the plaintiff from adhering to the precepts of their religion.

Another argument against the plaintiff's claim is that complying with the known-and-available alternative requirement is not necessarily an endorsement of capital punishment such that it violates the plaintiff's religious beliefs. In other words, the religious conscience of the inmate is undisturbed by the fact that he or she must find another method-of-execution. However, as noted previously, the plaintiff's alternative would be used not only in his or her own execution, but it could also be used in any other subsequent execution. In that sense, one would be propping a system that institutionalizes a behavior the religious observer finds repugnant. He or she is providing another means for a practice to which the believer objects. In *Burwell v. Hobby Lobby*, the Court found that a corporation's religious principles are substantially burdened by paying into a health insurance scheme that allows subscribers to choose to seek contraceptive care.[128] In that case, there was a link between the free exercise rights of the corporation, which established a health insurance scheme, and the contraceptive care that their employees elected to have, which was reimbursed by their insurance. Like in *Hobby Lobby*, the known-and-available alternative substantially burdens the free exercise of the plaintiff because it helps further a practice that the plaintiff's religion forbids. The condemned person becomes complicit in the administration of capital punishment. In *Hobby Lobby*, the Court found a substantial burden on the corporation's religious beliefs when the health insurance, in their view, was "facilitating abortions."[129] The plaintiff imagined here has an analogous burden imposed on them.

A. A Supreme Court Ruling is Subject to RLUIPA

Another counter argument is that RLUIPA only applies to regulations or practices that are either legislatively enacted or stem from executive power, and that because the known-and-available alternative requirement

fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."); *see also* Griffin v. California, 380 U.S. 609, 613 (1965) (holding that a prosecutor is not permitted, either expressly or by direct implication, to comment in the presence of the jury on a defendant's exercise of the right against self-incrimination).

127. Campbell v. Wood, 18 F.3d 662, 687 (9th Cir. 1994) ("We agree with Campbell that a statute providing for a choice between two methods of execution, one constitutional and the other unconstitutional, might place an impermissible burden on the free exercise of the asserted beliefs.").

128. Burwell v. Hobby Lobby, 134 S. Ct. 2751, 2775 (2014).

129. *Hobby Lobby*, 134 S. Ct. at 2759.

stems from a judicial act, RLUIPA does not apply. Furthermore, it could be argued that RLUIPA only addresses state action, not federal government action[130] since RLUIPA applies to government action but defines the word 'government' as "(i) a State, county, municipality, or other governmental entity created under the authority of a State; (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and (iii) any other person acting under color of State law."[131] That argument is that the law does not extend to its judgment, because the known-and-available alternative requirement flows from a U.S. Supreme Court ruling, which is not enumerated as a 'government' under RLUPA. This argument, however, does not hold water.

There are several aspects of *Glossip*'s requirement that make the claim advanced here justiciable under RLUIPA. First, the hypothesized claim begins with the existence of a state statutory and regulatory scheme that runs the risk of violating the Eighth Amendment. The condemned prisoner is (in most cases[132]) in a state correctional institution, pursuant to a sentence governed by state law, and the protocols for the execution of that sentence promulgated by a state agency. A method-of-execution claim is not an attack on *Glossip per se*, rather, it is an allegation that the statutorily proscribed method-of-execution violates the Eighth Amendment. As was explained above, *Glossip* has two parts. The first is that the plaintiff must show that due to the state statutory scheme, there is a substantial likelihood of harm. *Glossip*'s second requirement is the known-and-available alternative requirement. Adherence to these elements of an Eighth Amendment claim is intimately linked to both the lethal injection protocols promulgated by the *state* correctional authority and the *state* legislation providing for methods-of-execution.[133] The state, as opposed to the Supreme Court, becomes the relevant locus of government action in instances where the death penalty statutes only envision one method-of-execution. In those circumstances, courts have held that there are no other known-and-available alternatives because the statutory scheme only allows for one—in essence foreclosing the ability to have the method-of-execution claim heard.[134] In this light, even

130. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1077 (9th Cir. 2008).

131. 42 U.S.C.A. § 2000cc-5(4)(A).

132. *See, e.g.*, *Death Row Prisoners by State*, DEATH PENALTY INFO. CTR., (July 1, 2017), https://deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year (showing that there are 2756 condemned prisoners in state prisons and 61 in federal prison).

133. In most states that have the death penalty, the legislature proscribes the method-of-execution in general terms. The legislature then delegates authority to the correctional agency, which enacts rules governing the minutiae of the execution.

134. Arthur v. Comm'r, Alabama Dep't of Corr., 840 F.3d 1268, 1301 (11th Cir. 2016), *cert. denied sub nom.* Arthur v. Dunn, 137 S. Ct. 725 (2017), *reh'g denied*, 137 S. Ct. 1838 (2017).

taking a narrow understanding of the word 'government,' the claim deals centrally with the actions of the state government. Hence, this claim is justiciable under RLUIPA's definition of 'government.'

Alternatively, the Religious Freedom and Restoration Act ("RFRA") applies to federal action. If adherence to *Glossip* is strictly a federal matter, then the prisoner could take advantage of the nearly identical statutory scheme under RFRA.[135] The statute covers both state and federal prisoners.[136] RFRA applies to every branch of the federal government.[137] *Glossip* is a case from the U.S. Supreme Court, part of the judicial branch of the federal government. Therefore, state prisoner on death row could take advantage of the RFRA to make the claim envisioned here if a court were to hold that a challenge to *Glossip* is nonjusticiable under RLUIPA.

B. Hybrid Rights as an Alternative Theory

If a court rejects the argument that RLUIPA applies to the claim proposed here, then the claim would be subject to rational basis analysis under *Smith*.[138] This is so because the known-and-available alternative requirement is a law of general application, that in this instance incidentally burdens free exercise. In *Smith*, Justice Antonin Scalia wrote that strict scrutiny was applied previously only in situations where the Free Exercise Clause was implicated along with other constitutional protections.[139] Thereafter, the only instances in which free exercise claims are afforded heightened scrutiny are for laws that are not neutral or generally applicable, which involve a system of individualized exemptions or assessments, or which run afoul of "hybrid rights." Otherwise, the claim receives rational basis scrutiny.

The concept of hybrid rights is another avenue through which the plaintiff imagined here could challenge the known-and-available alternative as violating the Free Exercise Clause. What makes the hybrid rights theory difficult for the plaintiff imagined here, is that the hybrid right hypothesized has never been recognized.

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135. *See* 42 U.S.C.A. § 2000bb-1.

136. Hicks v. Garner, 69 F.3d 22, 23 (5th Cir. 1995) (RFRA claim made by a state prisoner); Brown–El v. Harris, 26 F.3d 68, 69 (8th Cir.1994); Werner v. McCotter, 49 F.3d 1476 (10th Cir.1995), *cert. denied*, 515 U.S. 1166 (these holdings are based on the fact that Congress debated and rejected an amendment that would have excluded prisons from the RFRA); *see also* S. REP. NO. 111, 103d Cong., 1st Sess. §§ V(d) and XI (1993); H.R. REP. NO. 88, 103d Cong., 1st Sess. (1993) U.S. Code Cong. & Admin. News 1993 pp. 1892, 1898, 1906.

137. 42 U.S.C. § 2000bb-2.

138. Emp't Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).

139. *Id.* at 881 (*Yoder* involved the right to educate your children as you see fit. *Sherbert*, *Hobbie*, and *Thomas* dealt with unemployment insurance, so formed a class apart).

Glossip arguably generates a hybrid right by implicating both the First and Eighth Amendments by creating a zero-sum choice for the condemned plaintiff imagined here. Justice Scalia, in *Smith*, outlined the hybrid rights doctrine as follows: "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."[140] Justice Scalia noted five constitutional rights that could combine with a free exercise claim in order to form a hybrid claim: freedom of speech, freedom of the press, the right of parents to direct the education of their children, freedom from compelled expression, and freedom of association.[141]

Lower courts have used three approaches towards deciding whether there are other, unenumerated hybrid rights.[142] The first approach, adopted by the Second, Third, and Sixth Circuits ignores the doctrine altogether and treats Justice Scalia's language in *Smith* regarding hybrid rights as dicta.[143] This is so because it would be too easy to construe a claim as implicating more than one right, and hence, the doctrine of hybrid rights would in effect swallow the rule set forth in *Smith.*[144] The First and the D.C. Circuits use the independent-claims approach.[145] Under this approach, a hybrid rights claim is valid only in circumstances where the companion claim can win on its own without a free exercise claim. The problem with this approach is that it takes the teeth out of the theory of hybrid rights: If the additional constitutional challenge must independently win to invoke a hybrid rights claim, then there is no need for a hybrid rights analysis in the first place.[146] The Ninth and

140. *Smith*, 494 U.S. at 881.

141. *Id*. at 882.

142. Ryan S. Rummage, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 EMORY L.J. 1175, 1189 (2015).

143. *Id*. at 1190; Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 166–67 (2d Cir. 2001) (concluding that Smith's "language relating to hybrid claims is dicta and not binding on this court."); Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231, 244 (3d Cir. 2008) (stating that "[u]ntil the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta."); Kissinger v. Bd. of Trs. of the Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993) (calling the hybrid rights theory "completely illogical").

144. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring) (agreeing that the hybrid rights language of *Smith* is purely dicta, and ultimately "untenable").

145. Brown v. Hot, Sexy & Safer Prod., Inc., 68 F.3d 525, 539 (1st Cir. 1995) (where the court rejected a hybrid rights claim because the free exercise claim was "not conjoined with an independently protected constitutional protection"); Henderson v. Kennedy, 253 F.3d 12 (D.C. Cir. 2001) (applied in Mahoney v. Dist. of Columbia, 662 F. Supp. 2d 74, 95 n.12 (D.D.C. 2009).

146. *Church of the Lukumi Babalu Aye*, 508 U.S. at 567 (Souter, J., concurring); *see also*, *The Best of a Bad Lot: Compromise and Hybrid Right Exemptions*, 123 HARV. L. REV. 1494, 1502

Tenth Circuits use a third "colorable claims" approach.[147] It holds that a valid hybrid rights claim is one which includes a free exercise claim accompanied by another claim that has a probable, or colorable, chance of success on its own.[148] Hybrid rights claims usually are "only seeking an exemption from the law, not a finding that the law is unconstitutional."[149] That is, in essence, what the challenger envisioned in this note is seeking. There have been several instances in which lower courts have recognized new hybrid rights.[150]

A condemned person has two rights that are implicated by the ruling in *Glossip*. First, they have an Eighth Amendment right to a method-of-execution that will not cause severe pain or a significant likelihood of it.[151] Second, even as prisoners, they have a Free Exercise right to practice their religion. *Glossip* implicates both of these rights because it is the vehicle through which the method-of-execution claim must be litigated and because the known-and-available alternative requirement forces the litigant to

(2010) (describing this approach as the "weakest attempt" to give meaning to the hybrid rights language in *Smith*).

147. Rummage, *supra* note 142, at 1195.

148. *See, e.g.*, Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the Oregon Employment Division v. Smith "Hybrid Rights Exception"*, 108 PENN ST. L. REV. 573, 600 (2003) ("The colorable claim standard, properly applied, appears to most closely approximate the design of *Smith*."); Timothy J. Santoli, *A Decade After Employment Division v. Smith: Examining How Courts Are Still Grappling with the Hybrid-Rights Exception to the Free Exercise Clause of the First Amendment*, 34 SUFFOLK U. L. REV. 649, 670 (2001) ("Thus, the 'colorable claim' theory to the hybrid-rights exception is best suited to weigh the companion claim."); John L. Tuttle, *Adding Color: An Argument for the Colorable Showing Approach to Hybrid Rights Claims Under Employment Division v. Smith*, 3 AVE MARIA L. REV. 741, 742 (2005) ("This article contends the colorable showing approach to the hybrid rights exception of *Smith* is the most appropriate approach adopted by the lower courts.").

149. Rummage, *supra* note 142, at 1206.

150. *See, e.g.*, Ala. & Coushatta Tribes of Tex. v. Trs. of the Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319 (E.D. Tex. 1993) (where the court found the plaintiffs had successfully alleged a hybrid free exercise and free speech claim in relation to a school's mandatory hair dressing policy); Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961 (N.D. Ill. 2003) (where the court applied strict scrutiny under the hybrid rights doctrine to a claim made by a church against a city's zoning ordinance that prevented the use of the property for worship or prayer, claiming that the law violated its rights to free exercise and free speech); Hicks *ex rel.* Hicks v. Halifax Cty. Bd. of Edu., 93 F. Supp. 2d 649 (E.D.N.C. 1999) (where the court used the hybrid rights framework, combining free exercise rights and the right of parents' to direct the upbringing of their children, to apply heightened scrutiny to a student's legal guardian and great-grandmother challenging a school board's mandatory uniform policy on religious grounds).

151. *See* Baze v. Rees, 553 U.S. 35, 50–51 (2008) (requiring a substantial risk of harm and a viable alternative for an Eighth Amendment violation); *see also* Evans v. Saar, 412 F. Supp. 2d 519, 524 (D. Md. 2006) (asking "whether an inmate facing execution has shown that he is subject to an unnecessary risk of unconstitutional pain or suffering") (internal quotation marks omitted); Cooey v. Taft, 430 F. Supp. 2d 702, 708 (S.D. Ohio 2006).

compromise their religious beliefs. By showing that both these rights are implicated, the litigant has presented a hybrid right.

Once a plaintiff presents a hybrid rights claim, the court guides their strict scrutiny analysis through three questions.[152] First, is the claimant being compelled to act?[153] Second, would granting an exemption injure others? Third, would granting an exemption violate the Establishment Clause? Here, the claimant is being compelled to act because the requirement is a 'substantive element' of the method-of-execution claim. An exemption would cause no injury to others because the cost associated with finding another method-of-execution would not be transferred to other people. Further, creating an exemption does not create an Establishment Clause issue; the government maintains the position that is antithetical to the religious viewpoint for which one is seeking an exemption. Lastly, within the hybrid rights framework, the dominant question is not whether an exemption establishes a religion; rather, the question is whether the burden imposed by the government is the least restrictive means of achieving a compelling governmental purpose. As argued above, that is not the case in this circumstance.

C. How to Approach the Judicial Remedy

If a court were to hold that the known-and-available alternative violates the plaintiff's free exercise rights, that court would need to create a remedy. In other words, if a court were to find a particular method-of-execution to be unconstitutional and then excuse the inmate from complying with the known-and-available alternative requirement even though it was the only currently available means to carry out an otherwise lawful sentence, the court would in effect create a permanent stay on the execution for that person. Yet, the Court's decisions in this area have been animated in part by the recognition that because capital punishment is constitutional, "[i]t necessarily follows that there must be a [constitutional] means of carrying it out."[154]

For further guidance on judicial remedies in method-of-execution claims, we may look at the manner in which lower courts addressed the issue

152. Rummage, *supra* note 142, at 1212.

153. Rummage, *supra* note 142, at 1213 ("The vast majority of successful pre-*Smith* free exercise claimants dealt with this exact issue: the law forced the claimant to act in violation of religious beliefs. In *West Virginia State Board of Ed. v. Barnette*, the claimant's child was required to salute the flag in violation of the family's religion. In *Sherbert v. Verner*, the claimant was required to work on Saturday in violation of her religious beliefs. In *Wisconsin v. Yoder*, the claimant's child was required to attend school past the eighth grade in violation of the family's sincere religious beliefs. In each of these three cases, the government compelled the claimant to act against religious beliefs, and the government lost each time.").

154. Glossip v. Gross, 135 S. Ct. 2726, 2732–33 (2018) (citing to *Baze*, 553 U.S. at 47.).

before *Glossip*. In *Morales v. Hickman*, the court decided that uncertainty coupled with the risk that California's lethal injection protocol carried an undue risk of pain, merited an equitable remedy.[155] Judge Jeremy Fogel sought to find a remedy that would "place a substantially lesser burden on the State's strong interest in proceeding" with the execution, eventually suggesting that medical professionals ought to be present for the lethal injection procedure to be constitutional.[156] Other jurisdictions have devised similar remedies.[157] Judge Fogel later commented that the challenge presented an opportunity for leadership on the part of the executive branch to the extent that it was up to that branch of government to find a constitutional method-of-execution.[158]

Any court, in addressing this issue, is confronted by the judicial lack of expertise in methods-of-execution, the risk of overstepping the boundaries of their branch of government, and becoming embroiled in the matters of state government.[159] By establishing a remedy, a court runs the risk of exercising either an executive or legislative function. The decision in *Baze* (the case underlying *Glossip*) was influenced by *Bell v. Wolfish*, where the Court reversed a structural injunction in a prison conditions case, reiterating the principle that there is a "wide range of 'judgment calls' that meet constitutional and statutory requirements [which] are confided to officials outside the Judicial Branch of Government."[160] Furthermore, courts are particularly reluctant to become embroiled in "ongoing scientific controversies beyond their expertise."[161] However, the question presented by this Note is narrow and litigants ought to focus the court's decision making on the discrete matter before them—whether the known-and-available alternative withstands a challenge under RLUIPA.

The condemned person envisioned is asking for two things: first, in light of their arguments, that the court hold that a particular method-of-execution is unconstitutional; and second, that they be exempted from complying with the known-and-available alternative requirement. This

155. Morales v. Hickman, 415 F. Supp. 2d 1037, 1046 (N.D. Cal. 2006) [hereinafter *Morales II*].

156. *Morales II*, 415 F. Supp. 2d at 1047 (here, the medical professionals that were supposed to be present for the execution balked when they learned of the nature of the task they were asked to do, giving rise to *Morales II*).

157. *See* Brown v. Beck, No. 06-3018, 2006 WL 3914717, at *8 (E.D.N.C. Apr. 7, 2006) (permitting execution to proceed "on the condition that there are present and accessible to Plaintiff throughout the execution personnel with sufficient medical training to ensure Plaintiff is in all respects unconscious prior to and at the time of the administration" of the lethal drugs).

158. *Morales II*, 465 F. Supp. 2d at 975 (discussing *Morales I*).

159. Baze v. Rees, 553 U.S. 35, 50 (2008).

160. *Id.* at 51 (quoting Bell v. Wolfish, 441 U.S. 520, 562 (1979)).

161. *Id.*

would essentially put the court back into the position that it was trying to avoid when it forced the plaintiff to answer the method-of-execution question. But even if that analysis is correct, if this claim were to win, it would merely shift the burden of finding a constitutional method-of-execution back onto the party who bears the burden of carrying it out. Strict scrutiny analysis is meant to achieve just that.

Conclusion

By first outlining the interplay of judicial scrutiny and the free exercise clause, then explaining the mechanics of RLUIPA and addressing several counter-arguments, this Note argued that *Glossip*'s known-and-available alternative requirement violates the free exercise rights of a condemned inmate who has a religious opposition to the death penalty. This conclusion is valuable for several reasons.

First, by recognizing the importance of religious practice even for a condemned person, holding that the known-and-available alternative requirement is unconstitutional recognizes the dignity of that person and allows the death sentence to go forward without compromising the government's legitimacy and need to comply with constitutional mandates. Second, this holding would reaffirm the First Amendment principle that nobody should be compelled by the government to act in a manner that is contrary to their religious beliefs. Third, considering capital punishment is the most serious governmental action on a citizen, this finding shifts the responsibility of executing people in a manner that is consistent with the Eighth Amendment back onto the government. And lastly, in light of *Arthur*, this free-exercise exception to *Glossip* may be the only manner in which a method-of-execution claim could be addressed on the merits.