Unit 6
Religious Freedom Mock Trial (*Singh v. Booth*)

Unit Questions

How has Congress interpreted the First Amendment's freedom of religion clause? Can we impose limits on religious freedom? If so, when and how can we do so?

Overview

In this unit, you will participate in a mock trial that explores the rights and restrictions on individuals attempting to practice their own religion. Students will first familiarize themselves with the Religious Freedom and Restoration Act ("RFRA"), which was intended to further protect First Amendment rights. You will then read and analyze case documents adapted from a real federal court case, *Singh v. Carter*, which involved a conflict between a soldier's desire to exercise his religious practices and the U.S. Army's interest in protecting its soldiers through uniform and safety requirements.

After learning about the relevant law and facts, you will participate in a mock trial that will allow you to use their knowledge to persuade judges to find either that the soldier's religious practice is protected by RFRA, or that the Army has an overriding safety concern that forbids the soldier from exercising his religion. The mock trial allows you to assume roles as members of the plaintiff's team, members of the defendant's team, neutral judges, or impartial courtroom participants. Each of you will have a substantive role in deciding or observing a dispute that remains pertinent today. You will engage in the authentic tasks of examining and weighing evidence, and using facts and evidence to formulate and present claims.

Unit Objectives and Standards

By the end of this unit, you will be able to:

- Explain issues related to religious freedom in the United States, including disagreements regarding the extent of religious freedom in various contexts.
- Analyze and weigh evidence in the case of *Singh v. Booth*.
- Use evidence to formulate and deliver an argument in the case of *Singh v. Booth.*
- Evaluate the trial process as well as the decision in *Singh v. Booth* to determine the degree to which justice was served in the case.

Unit Assessment

- You will participate in a mock trial.

Handout 1

Historical Context of Religious Freedom in the United States

The right to religious freedom is a foundational American principle. It was the reason both French Huguenots and English Protestant pilgrims came to the American continent in the seventeenth century: to freely practice their faiths in ways which were banned in Europe.

Thus, in the newly independent United States of America, the framers of the Bill of Rights ensured in the very first clause of the very first amendment to the Constitution that the federal government would not establish any national religion, nor prohibit any person's free exercise of their religion.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .
>
> *First Amendment*

In interpreting the First Amendment, the Supreme Court has issued several rulings that have developed what it means for persons to freely exercise their religion. In *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993), the Court held a state statute banning animal sacrifice was unconstitutional because it targeted the religious practice of the Santeria religion, but did not prohibit other practices that killed animals, like hunting and farming.

However, the Court also made clear that the Free Exercise Clause did not generally require the government to grant religious exemptions to laws that were neutral and applied equally to everyone. In *Employment Division v. Smith* (1990), the Court held that a state statute denying unemployment benefits to persons fired from a job for illegally smoking peyote was constitutional, concluding that the Free Exercise clause of the First Amendment did not excuse one's responsibility to follow laws that are generally applicable to everyone.

In response to *Smith*, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA) to provide greater protection for religious exercise under the First Amendment and rejected the Court's unwillingness to strike down generally applicable laws. The statute provides that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . [if] it is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1 (2015). The Supreme Court later stopped the application of RFRA to the states because it exceeded Congress's limited powers (see City of Boerne v. Flores, 1997). But RFRA continues to apply to actions of the federal government.

Recent Supreme Court cases such as Holt v. Hobbs (2015) make clear that RFRA provides greater protection for religious exercise than the First Amendment. What will happen when these broad protections come into conflict with other important government interests, including the enforcement of other laws and regulations that promote health and safety?

Handout 2

Religious Freedom in the News

Article 1: A Church of Cannabis Tests Limits of Religious Law in Indiana

INDIANAPOLIS — On the altar, behind a row of flickering candles, the silhouette outline of a marijuana leaf shined in lights. Colored balloons occasionally bounced through the air as the minister of music led a band in a pew-shaking rendition of "Mary Jane," the funk tribute to the drug. And Bill Levin, who was introduced as "the Grand Poobah" of this new church, finished the gathering with a simple message: "Light up, folks!"

As legislation that proponents call a religious freedom law took effect in Indiana on Wednesday, Mr. Levin's First Church of Cannabis held its first service in a quiet neighborhood on this city's Eastside. Mr. Levin dreamed up the church as a way to test the state's new, much-debated law: If the law protects religious practices, he figured, how could it not also permit marijuana use-which remains illegal here-as part of a broader spiritual philosophy?

Earlier this year, Indiana's Republican-held legislature approved a Religious Freedom Restoration Act aimed at preventing government from infringing on religious practices. Facing the threat of boycotts and fierce objections from business leaders, state officials swiftly added a provision explicitly blocking the measure from trumping local ordinances that bar discrimination over sexual orientation.

Mr. Levin had few kind words for the lawmakers who wrote the state's law in the first place. He called them "clowns" who "polluted and embarrassed" his state. But if Indiana was going to have such a law, he said, why not test its limits and press for his longheld goal, permission to use cannabis? Some legal experts said Mr. Levin may have trouble proving that the use of marijuana is truly tied to religious expression. But Mr. Levin seemed untroubled. "This is an honest-to-God religion," he said. "Other religions have sins and guilt. We're going to have a really big love-in."

Monica Davey, *A Church of Cannabis Tests Limits of Religious Law in Indiana*, N.Y.Times (July 1, 2015) http://www.nytimes.com/2015/07/02/us/a-church-of-cannabis-tests-limits-of-religious-law-in-indiana.html?_r=0

Article 2: Muslim Officer Sues New York Police Dept. Over No Beard Policy

NEW YORK - In the debate over beards in business settings, the New York Police Department officially stands opposed, with limited exceptions for officers seeking a medical or religious accommodation.
The department's no-beard policy, as it is known, is at the center of a federal class-action lawsuit filed on Wednesday on behalf of a Muslim police officer who says he was suspended during the fasting month of Ramadan for refusing to shave his one-inch beard. The lawsuit, brought by Masood Syed, 32, aims to force the Police Department to change a policy that his lawyers say infringes on the rights of more than 100 officers seeking to exercise their religious freedoms without fear of discrimination or retaliation.

The Police Department has said that the rule is necessary for the safety of its officers. Lawrence Byrne, the department's deputy commissioner for legal matters, said the policy helped prevent officers from being overcome in physical confrontations and met federal guidelines for the gas masks that officers would use in a chemical or biological attack.

Officer Syed, of Queens, is a Pakistani-American who wears a beard in obeisance to his Sunni Islamic faith. He joined the department as a transit patrol officer in 2006, and was granted an exception to the no-beards policy, according to his complaint.
The exception allows police officers, like those with skin conditions worsened by shaving or whose faiths require facial hair, to grow the hair up to one millimeter in length. But there are officers who wear their beards longer, including some assigned to undercover roles.

Syed was not reproached until August 2015, when he ran into Captain James F. Kobel, the second-in-command of the department's Equal Employment Opportunity office, at work. Captain Kobel told him he was not in compliance with the department's no-beard policy. What followed, Officer Syed said, was a series of meetings with officials, who repeatedly instructed him to shave his beard. He refused, and in December he sent a letter requesting a "reasonable accommodation" for himself and other officers who wear beards longer than the current exception in observance of their faith.

On June 20, while his request was still pending, Officer Syed received a letter from Captain Kobel ordering him to shave by the end of the next day or face suspension, according to the complaint. When he did not comply on June 21, according to the complaint, he was ordered to turn over his gun and shield and was escorted from the building as his colleagues looked on.

Ashley Southall, *Muslim Officer Sues New York Police Dept. Over No Beard Policy*, N.Y. TIMES (July 22, 2016) http://www.nytimes.com/2016/06/23/nyregion/muslim-officer-sues-new-york-police-dept-over-no-beard-policy.html

Article 3: FLDS Trying to Rewrite Food Stamp Rules in Name of Religion, Prosecutors Say

SALT LAKE CITY — Government prosecutors say Fundamentalist LDS Church members' concerns about losing their eternal salvation because they can't donate welfare benefits to the church doesn't amount to a violation of their religious rights. The sect wants to "rewrite the rules" for the Supplemental Nutrition Assistance Program or SNAP in the name of religion, according to a filing in federal court Wednesday.

"Religious freedom does not compel the extensive modification of a government program—which is not designed to help or hurt religion, but to provide a modicum of nutrition to the poorest citizens," assistant U.S. attorney Amanda Berndt wrote.

FLDS Church members accused of food stamp fraud argue donating food obtained through SNAP to their church is no different than bringing goods to a PTA bake sale or potluck dinner. They contend the Religious Freedom Restoration Act allows them to share benefits as part of their communal living.

Eleven FLDS members have pleaded not guilty to fraud and money laundering charges in connection with the program. Prosecutors say they knowingly broke the law by not only donating food to the church's storehouse but diverting funds to front companies to pay for a tractor, truck and other items. "They further want to rewrite the rules to allow the FLDS bishop—rather than the United States Congress—to determine who benefits from the food purchased with SNAP funds," Berndt wrote.

Prosecutors say the program is designed to provide low-income families with money to purchase food in order to alleviate hunger and malnutrition. If recipients are allowed to buy food and donate it wholesale, there is no guarantee it would be used for that purpose.

Kathryn Nester, an attorney for defendant Lyle Jeffs, argued in a court filing filed Wednesday that the government's interpretation of SNAP benefit regulations demands that Jeffs go against his sincerely held religious beliefs or remain true to the word of God and suffer in federal prison.

Nester contends SNAP rules do not prohibit consecrating food and the government has no authority to determine what happens to the food after it leaves a store. Furthermore, she said the program does not ban buying item such as cookies, soda pop and ice cream that arguably neither provide a nutritious diet nor alleviate hunger and malnutrition.

Jeffs, the highest-ranking leader indicted in the case, has been on the run for four months since he slipped out of a GPS ankle monitor and escaped home confinement in the Salt Lake City area. The FBI is offering a $50,000 reward for his capture.

Dennis Romboy, "*FLDS Trying to Rewrite Food Stamp Rules in Name of Religion, Prosecutors Say*," Deseret News Utah (Nov. 2, 2016), http://www.deseretnews.com/article/865666270/FLDS-trying-to-rewrite-food-stamp-rules-in-name-of-religion-prosecutors-say.html?pg=all

Handout 3

Analyzing the Case Documents

1) Who is the plaintiff? _____

Who is the defendant? _____

2) What is the plaintiff's claim?

3) What relief does the plaintiff seek (what does the plaintiff ask the court to do)?

4) How does the defendant respond?

5) What restrictions did the Army place on the plaintiff regarding his beard and Turban?

Handout 4

Analyzing the RFRA Test

The Law

I. The First Amendment of the U.S. Constitution: "Congress shall make no law **respecting an establishment of religion, or prohibiting the free exercise thereof**, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

II. The Religious Freedom Restoration Act (RFRA):
Congress passed the Religious Freedom Restoration Act (RFRA) to apply protections to individuals practicing their religions.

> **(a) In general**
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
> **(b) Exception**
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
> > (1) is in furtherance of a compelling governmental interest; and
> > (2) is the least restrictive means of furthering that compelling governmental interest.
>
> **(c) Judicial relief**
> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. [. . .]

Applying the Law in *Holt v. Hobbs*

Facts: The Supreme Court in *Holt v. Hobbs* used the same test to analyze whether a prohibition on the growing of a beard in an Arkansas prison violated a Muslim inmate's right to freedom of religion under the Religious Land Use and Institutionalized Persons Act (RLUIPA), which operates in the same way as RFRA, except in the prison context.
Petitioner Gregory Holt was an inmate of the Arkansas Department of Corrections and was also a devout Muslim. He wished to grow a 1/2-inch beard in accordance with his religious beliefs. But the Arkansas Department of Corrections had a grooming policy which prohibited inmates from growing beards. The policy made no exceptions for inmates who object on religious grounds, but contained an exemption for prisoners with medical needs; those prisoners with a diagnosed skin problem could wear facial hair up to 1/4-inch long. The District Court ruled in favor of the Director of the Department of Corrections, and the Court of Appeals affirmed. The Supreme Court granted certiorari and accepted the petitioner's request to hear the case.

The Test: The Court analyzed whether prohibiting the petitioner from growing a beard was unlawful by looking to the RFRA test. The Court must determine the following:

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1) Does the government policy "substantially burden" the individual's freedom to exercise his religion?
    a) If the Court answers "no," then the individual's freedom to exercise his religion is *not* violated.
    b) If the Court answers "yes," then the individual's freedom to exercise his religion might be violated, and the Court must proceed to answer whether:
2) The government has a compelling governmental interest; and
3) The government's policy is the least restrictive means to further that compelling government interest.

Applying these factors, the Supreme Court held that the government's policy (1) "substantially burdened" Mr. Holt's freedom to exercise his religion. While the Court also recognized that (2) the government had a compelling governmental interest to restrict the growing of beards, (3) it also determined that the government's policy was *not* the least restrictive means to further that compelling interest.

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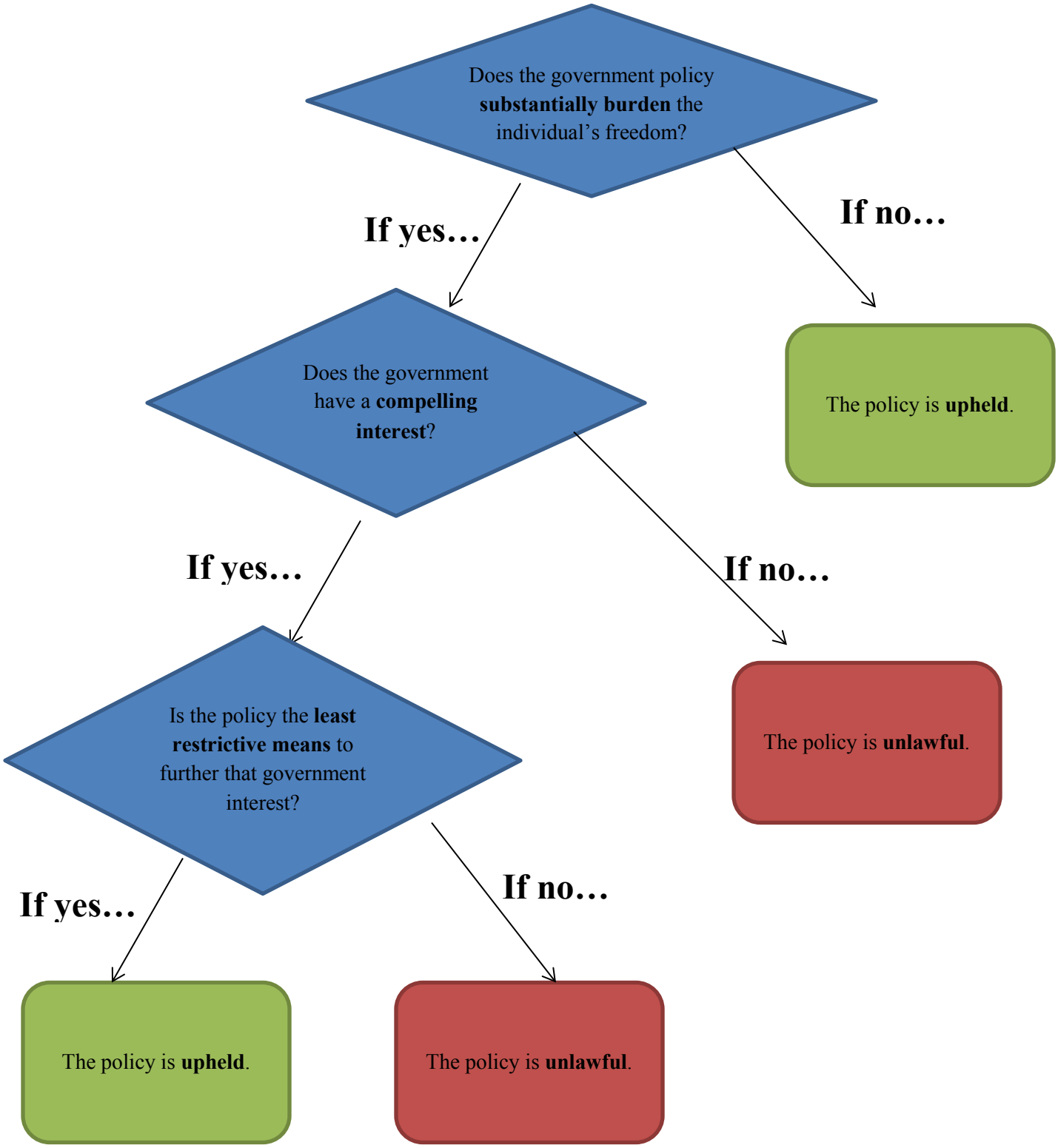
How Courts Apply the RFRA Test



Handout 5

Applying the RFRA test

Step 1: Below is a summary of the court's analysis of the RFRA/RLUIPA test in *Holt v. Hobbs* using excerpts from the case. Annotate the following passages, focusing on how the court analyzes each prong test. What reasoning does the Court use to make its decisions?

Holt v. Hobbs, 135 S. Ct. 853 (2015)

Justice ALITO delivered the opinion of the Court.

Under RLUIPA, [plaintiff] bore the initial burden of proving that the Department's grooming policy substantially burdened the exercise of religion. [Plaintiff] easily satisfied that obligation. The Department's grooming policy requires [plaintiff] to shave his beard and thus to engage in conduct that seriously violates [his] religious beliefs. If he [does not], he will face serious disciplinary action. Because the grooming policy puts [plaintiff] to this choice, it substantially burdens his religious exercise.

The Department first claims that the no-beard policy prevents prisoners from hiding contraband. The Department worries that prisoners may use their beards to conceal all manner of prohibited items, including razors, needles, drugs, and cellular phone subscriber identity module (SIM) cards. Secondly, the Department contends that its grooming policy is necessary to further an additional compelling interest, *i.e.*, preventing prisoners from disguising their identities. The Department tells us that the no-beard policy allows security officers to identify prisoners quickly and accurately.

First, we agree that the Department has a compelling interest in staunching the flow of contraband into and within its facilities . . . . [But] its contraband argument [fails] because the Department cannot show that forbidding very short beards is the least restrictive means of preventing the concealment of contraband. The Department failed to establish that it could not satisfy its security concerns by simply searching petitioner's beard. The Department . . . presumably examines the 1/4-inch beards of inmates with [skin] conditions. It has offered no sound reason why hair, clothing, and 1/4-inch beards can be searched but 1/2-inch beards cannot.

Secondly, we agree that prisons have a compelling interest in the quick and reliable identification of prisoners, and we acknowledge that shaving a beard might have at least some effect on the ability of guards or others to make a quick identification. The Department could largely solve this problem by requiring that all inmates be photographed without beards when first admitted to the facility, and if necessary, periodically thereafter. An inmate like [plaintiff] could be allowed to grow a short beard and could be photographed again when the beard reached the 1/2-inch limit. Prison guards would then have a bearded and clean-shaven photo to use in making identifications. In fact, the Department (like many other States) already has a policy of photographing a prisoner both when he enters an institution and when his "appearance changes at any time during [his] incarceration."

Handout 6

The Eagle Feather Case

Read the following case excerpt, focusing on the court's analysis of whether the defendant's assertions constitute a compelling government interest and are the least restrictive means of serving that interest. Pay close attention to the reasoning for each prong of the RFRA test. In your small groups, complete the "Eagle Feather" section of *Handout 8*.

McAllen Grace Brethren Church v. Salazar, 764 F.3d 465 (5th Cir. 2014)

[Soto, a member of a Native American tribe, practiced a religion that uses eagle feathers in its worship. Soto filed an action on behalf of himself and other church members in federal district court against the Department of the Interior (Department) for confiscating eagle feathers under the Eagle Protection Act. Soto claimed that this confiscation violated his tribal group's First Amendment rights and RFRA protection of religious expression.]
HAYES, Circuit Judge, delivered the opinion of the court:

The Department does not contest the plaintiff's assertion that the Eagle Protection Act substantially burdens their religious beliefs. Soto is involved in a ministry that uses eagle feathers in its worship practice, and his sincerity in practicing this religion is not in question. Furthermore, the eagle feather is sacred to the religious practices of many American Indians. Therefore, any scheme that limits the access of Soto, as a sincere adherent to an American Indian religion, to possession of eagle feathers has a substantial effect on the exercise of his religious beliefs.

We agree with [federal courts of appeals] that protecting bald eagles qualifies as a compelling interest because of its status as our national symbol, regardless of whether the eagle still qualifies as an endangered species. Furthermore, the Supreme Court has suggested that protecting migratory birds in general might qualify as a compelling interest.

Recent Supreme Court cases have reaffirmed that the burden on the government in demonstrating the least restrictive means test is a heavy burden. The Department must provide actual evidence, not just conjecture, demonstrating that the regulatory framework in question is, in fact, the least restrictive means. The Department presents two arguments for why excluding sincere adherents of American Indian religions such as Soto who are not members of federally recognized tribes from receiving permits advances the government's interest in preserving the eagle population: (1) allowing broader possession would undermine law enforcement's efforts to combat the illegal trade of eagle feathers and parts; and (2) broader permitting would create law enforcement problems because law enforcement does not have a means of verifying an individual's American Indian heritage.

The Department's argument lacks sufficient evidence to prove that the ban in its current form is the "least restrictive means." First, the evidence in the record simply does not support the assertion that expanding the permitting process would cause an increase in poaching. This is mere speculation on the part of the agents who provided testimony, and the Supreme Court has stated that mere speculation is not sufficient to satisfy a least restrictive means test. Second, the

evidence in the record indicates that agents currently have to rely on anecdotal information and interviews with American Indians who possess feathers to determine the legal status of the feathers in question. This would not change if the permitting system was expanded, and therefore, the Department has failed to present specific evidence that the Plaintiffs' religious practice would jeopardize the preservation of the eagles.

Furthermore, the Department has not provided sufficient evidence to conclude that there are no other means of enforcement that would achieve the same goals. For example, the Department could require that individuals prove they obtained the feather legally, by producing a valid permit. The Plaintiffs have also suggested that they be allowed to collect feathers that have molted both in the wild and in zoos. The Department has not shown that this is not a viable alternative, and, importantly, it is its burden to do so.

We do not agree, therefore, with the district court that, on this record at this stage, the Department has met its burden in demonstrating that a possession ban on all but a select few American Indians is the least restrictive means of achieving any compelling interests. We reverse the district court's grant of summary judgment in favor of the Department and remand for proceedings consistent with this opinion.

JONES, Circuit Judge, concurring:

I concur in the carefully written panel opinion with one point of clarification. Soto is without dispute an Indian and a member and regular participant in the Lipan Apache Tribe, which, although not federally recognized, has long historical roots in Texas. The panel opinion discusses—and is also limited by—Soto's RFRA claim based on his and his tribe's status. No more should be read into the RFRA protection intended by this decision.

Both the conservation of eagles and the way of life of federally recognized Indian tribes are of signal national importance, as indicated by decades of federal law and regulations. If the government sustains its position that the supply of eagle feathers is limited and that increasing access by non-recognized tribe members, or even by non-Indians, to eagle feathers for sacred purposes will endanger the eagles and the federally recognized tribes, this case becomes very close. Broadening the universe of "believers" who seek eagle feathers might then seriously endanger the religious practices of real Native Americans. Soto's status does not eliminate the potential problems, which will be explored at trial, but cabins this case to Native American co-religionists

Handout 7

The Prison Diet Case

Independently, read the following excerpt, focusing on the court's analysis of whether the defendant's assertions constitute a compelling government interest and are the least restrictive means of serving that interest. Complete the "Prison Diet" section of Handout 8.

Terrell v. Montalbano, No. 7:07-CV-00518, 2008 WL 4679540 (W.D.Va., Oct. 21, 2008)

[Terrell was an inmate at the Virginia Department of Corrections (VDOC) whose application for a special kosher diet was delayed by the prison director for six months because the director wanted to evaluate the sincerity of Terrell's religious beliefs. Terrell argues that this delay violated RLUIPA by forcing him to eat the regular prison fare, which violated his religious beliefs.]

KISER, Senior District Judge, delivered the opinion of the court:

The issue is whether [prison director] Montalbano's decision to defer Terrell's application imposed a substantial burden on Terrell's religious exercise. Terrell claims that he has "no alternative available to practice his sincere religious dietary beliefs outside the Common Fare Program." The meat and no-meat menus are not prepared according to kosher guidelines. VDOC's decision to defer Terrell's Diet application meant that Terrell could not eat the kosher meals required by his sincerely held religious belief. Therefore, I find that the deferral imposed a substantial burden on Terrell's ability to practice his religious dietary beliefs.

Because Terrell has demonstrated that the six-month deferral imposed a substantial burden on his religious exercise, the burden shifts to Montalbano to show that the deferral policy "is the least restrictive means of furthering a compelling governmental interest." Montalbano does not adequately demonstrate on the present record that the deferral policy is the least restrictive means of furthering a compelling governmental interest. She simply asserts that "[u]nless prisoners are entitled willy-nilly to be admitted to the Common Fare Program, the protocol employed in this section has to be viewed as reasonable. There obviously is a valid rational connection between the protocol and the government's interest in regulating which inmates are entitled to participate in the Common Fare Program." Despite this bald assertion, Montalbano did not present any evidence of the Common Fare Program's current costs versus other menus, the deferral policy's impact on VDOC's budget, or the impact on prison security.

Montalbano failed to justify a compelling government interest. She did not present any evidence in the instant matter of the Common Fare Program food, supplies, preparation, or serving costs. She did not present any evidence of the prison's ability to afford any extra expense of Common Fare meals without first inquiring into the sincerity of an applicant's religious beliefs. She did not present any evidence indicating that she relied upon any such concerns in deferring Terrell's application. Given the lack of evidence to support Montalbano's justification for imposing a six-month deferral period, I cannot conclude at this stage that the asserted interest is compelling as a matter of law.

Handout 8

Reading Responses

For each of the two case excerpts you read, analyze the court's use of the RFRA test by completing the chart below. For each prong of the test, answer whether the court determined "yes" or "no" and provide examples of the court's reasoning. Consider: what reasoning, if any, would have persuaded the court to reach the *opposite* conclusions?

The Eagle Feather Case	**The Prison Diet Case**
Substantial burden?	Substantial burden?
Compelling interest?	Compelling interest?
Least Restrictive Means?	Least Restrictive Means?

Handout 9

The Litigation Process

In both state and federal court, a body of rules, known as court procedure, outlines the process of civil litigation from beginning to end.

Part I: Pretrial

This part describes the major steps in the litigation process that occur before the trial starts. As you walk through each step, consider what court procedures ensure that the process is fair.

The Complaint

The plaintiff begins a lawsuit by filing a complaint in a trial court. The complaint is a formal document accusing the defendant of violating the law. It provides the defendant with notice, and outlines the plaintiff's case against the defendant. Specifically, the complaint:

- identifies the plaintiff and defendant
- describes the facts that show the defendant harmed the plaintiff
- explains what law those facts violate
- requests a remedy—usually court order to the defendant to pay money damages or to start or stop doing something

The Answer

After the plaintiff formally files the complaint against the defendant, the defendant must respond to each allegation. Reponses can deal with facts, law, or both. With respect to the facts, the defendant will typically respond by admitting some of the plaintiff's allegations, denying some of them, and stating that he or she lacks knowledge about some of them. The defendant might also argue that there are additional facts that change the situation. This is done in a document called an *answer*.

Discovery

If the case is not dismissed, then the parties begin a process called *discovery*. This is how attorneys on each side gather evidence from the other side. There are several types of discovery. Parties can obtain information through *depositions*, which are interviews of witnesses, conducted under oath. Parties also find out information through *interrogatories*, which are written questions submitted to the opposing party. The opposing party's written answers to these questions are also under oath. Attorneys for both parties can also demand that the opposing side share documents and other physical evidence relevant to the case.

Since the pre-trial process can be so long, attorneys often try to get witness statements as soon as possible, when events are clearer in people's minds. They can then use those statements to corroborate or dispute what may be said during the trial. Contrary to what is often shown in movies and television, there should be no surprises in a trial, and everyone should have ample time to evaluate information and evidence.

Developing a Theory of the Case

Attorneys take all the statements and evidence they have gathered from discovery and develop a *theory of the case*. A theory of the case is a clear outline of what they hope to prove in court, the facts that will make up their argument, the evidence to support the facts, and the strategy that will lead others to the conclusion they want. Good lawyers develop themes around which the case will be centered, such as equality, human dignity, greed, or vengeance. Lawyers also organize the theory of the case so that it tells a coherent story throughout the trial.

Alternative to Reaching Trial: Settlements

Movies and television usually focus on the trial part of the litigation process but, in fact, most cases never go to trial. The biggest reason is that judges and lawyers try to resolve disputes out of court through negotiation. During negotiation, the opposing parties try to reach a *settlement*—an agreement that is acceptable to all that ends the dispute. Most cases settle, at some point. If they can reach a settlement and avoid trial, both parties save a lot of time, money, and other resources.

Alternative to Reaching Trial: Motions

Even apart from settlement, there is a long process prior to trial, during which many cases are resolved. Remember that litigation can concern *factual disputes*, *legal disputes*, or both. Trials are where facts are developed and decided. But legal disputes are sometimes resolved without a trial. Judges very often decide cases based on the law through *motions*—requests to the court.

Both parties have several chances to file *motions for judgment* in their favor. These are written arguments that claim, based on the law and whatever uncontested evidence exists, that their side should win. A motion of this type can occur before discovery, after discovery, before trial, during trial, and even after trial. In fact, more disputes are resolved by this kind of motion than by a trial.

A *Motion to Dismiss*, for example, seeks to have the case thrown out. A defendant might file a Motion to Dismiss claiming that even if the plaintiff's allegations are true, those allegations do not add up to a legal violation. Many other grounds for filing a Motion to Dismiss exist. For example, if the plaintiff filed the complaint in the wrong court, or failed to properly serve the complaint on the defendant, the judge may dismiss the case. If the judge grants a Motion to Dismiss, the lawsuit is over; the plaintiff has lost.

Part II: Trial

This Part describes the major steps in the litigation process that occur during trial. Although quite infrequent, trials remain the dramatic central moment of civil litigation. Cases are developed and settled based on the parties' expectations about what will happen at trial. So understanding how trials work is critical to understanding all the other possibilities. As you walk through each step, consider what rules ensure that the process is fair.

What Happens at a Trial?

Trials are mostly about disputed facts. During trial, the decision-maker (a judge or jury) finally decides whose facts are true. In order to establish their version of the facts, the parties introduce

evidence in court. Evidence can include witness or expert testimony, physical evidence, and documentary evidence. Nearly always, plaintiffs have the *burden of proof*. This means they have to convince the judge or jury of their version of the facts. Unlike in criminal cases, where the prosecutor must establish its version of events *beyond a reasonable doubt*, the plaintiff in a civil case has a lower burden, called the *preponderance of the evidence* standard. To meet the preponderance of evidence standard, civil plaintiffs must show that their version of events is *more likely than not*. The defendant tries to provide enough evidence, or a convincing enough explanation of the evidence, to prevent the plaintiff from meeting that burden of proof.

What Evidence can be Used During a Trial?

Not all of this evidence can be used at trial. The Rules of Evidence regulate what kinds of evidence can be used during the trial.

- First, all evidence and witness questions and answers must be *relevant*—that is, only evidence that is helpful in establishing a legal proposition involved in the case may be considered.
- *Hearsay*, or second-hand testimony, is often inadmissible (not allowed) in court. Witnesses usually must have directly seen, heard or experienced whatever it is they are testifying about. This is to improve the reliability of the testimony.
- *Character evidence,* defined broadly as any evidence showing a person's general tendency to act in a certain way, is nearly always inadmissible. This is because character evidence is often unfairly prejudicial, wastes time, and confuses the jury.
- *Privileged information*, such as conversations between a husband and wife, between a client and a lawyer, or a patient and a doctor, is also excluded from trial. This is because we want to respect these types of private relationships, and not encourage distrust or betrayal.
- Other rules of evidence inform the ways lawyers can ask questions and the ways witnesses can answer them.
    - For example, lawyers in a trial cannot ask their own sides' witnesses *leading questions*—questions phrased in a way that suggests the desired answer to the witness. This is to protect against unreliable, untruthful answers.
    - Further, the witness must answer reasonably specific questions, not provide *narration*. In other words, they must limit their answer to the information that the question calls for. This is to limit testimony so that it is both relevant and time efficient.
    - Except for technical experts, who can give opinions about matters relating to their field, witnesses cannot give opinions in their testimony. Testimony is limited to *facts, not opinions* for witnesses that are not testifying as experts. This is because the opinions of witnesses are typically irrelevant and can confuse the jury.

The Basic Trial Process

Only a very small proportion of civil cases go to trial. Although there is really no "typical" trial, the basic steps in the trial process are outlined below.

1. Jury Election. In criminal cases, and in civil cases, if the plaintiff is seeking damages, either the plaintiff or the defendant usually can choose to have the case presented or tried to a jury. This means the jury will decide factual disputes. Civil cases seeking other kinds

of relief—for example, court orders requiring the defendants to do something or stop doing something—are presented to a judge without a jury.

2. Jury Selection. Typically on the first day of trial, a pool of potential jurors—citizens from the same county (for state court) or state (for federal court)—is gathered in the courtroom. During jury selection, the judge and attorneys ask those potential jurors questions about the particular case, including questions about ideological views and life experiences that may indicate some involvement in the dispute or other bias. The questioning is called *voir dire.* If a potential juror's experience makes it difficult for him or her to be fair, the lawyers from either side can seek to exclude that person from the actual jury through a *challenge for cause*. For example, a juror can be excluded from the actual jury if he or she knows one of the parties or witnesses, already has an opinion about the facts of the case, or has himself or herself had an experience similar to the case's subject. In addition, the parties can exclude a set number of the potential jurors without explaining the reason for exclusion. This is called a *peremptory* challenge. However, peremptory challenges may not be based on the race, ethnicity, or gender of the juror.

   Once the jury is chosen, the trial can begin.

3. Opening Statements. At the beginning of trail, the attorneys representing each party introduce the case to the judge and jury as clearly and persuasively as possible. In theory the opening statement is not an argument. Instead, it summarizes the facts that each party sets out to prove. But the opening statement *is* an argument of sorts, since each lawyer tries to persuade the jury to begin to see the case in a certain way. The plaintiff's lawyer delivers the first statement, followed by the defendant's lawyer. Both speak in the future tense, using statements like "the evidence will show," to provide the jury with a helpful overview of what's to come.

4. The Plaintiff's Case. The plaintiff has the first chance to present evidence through witness testimony. If there is non-witness evidence—documents or physical evidence—a witness typically presents and explains that evidence. The plaintiff's lawyer has met with the witnesses in advance, and knows what they are going to say. The defendant's lawyer has usually deposed the witnesses (interviewed the witnesses under oath) during discovery, and therefore also knows what they are going to say.

   a. Direct Examination. To begin with, the plaintiff's lawyer asks the plaintiff's witnesses questions. Attorneys want to question witnesses and present evidence in such a way that tells a compelling story and convinces the judge and jury that the defendant violated the law.

   b. Cross-Examination. For each witness, the defendant's attorney has the opportunity to ask questions to show weaknesses in the witness's testimony. This happens after the plaintiff's attorney has completed the direct examination. All questions asked during cross-examination must relate to the questions asked in the direct examination.

c. Redirect Examination. At the close of the cross-examination, the plaintiff gets an opportunity to conduct a redirect examination. Redirect examination is limited to subjects from the cross-examination.

After the plaintiff's attorney has finished presenting the plaintiff's case, the defendant has an opportunity to try to get the case dismissed. The defendant can file a *Motion for Judgment as a Matter of Law*, arguing that the plaintiff has not presented sufficient evidence to meet his or her burden of proof. The judge hears this motion out of the presence of the jury (if there is a jury). If the judge believes that, given the evidence presented, no reasonable jury could find for the plaintiff, the judge may grant the motion. This means that the defendant will win the case without completing the trial.

5. The Defendant's Case. Once the plaintiff has presented all of his or her witnesses and evidence, it's the defendant's turn. The process is the same:

   a. Direct Examination
   b. Cross-Examination
   c. Redirect Examination

6. Plaintiff's Rebuttal. If (but only if) the defendant raises any issues that were not addressed in the plaintiff's initial presentation of evidence, the plaintiff's attorney gets an opportunity to address these issues with additional witnesses and other evidence, if there are any. This is called a rebuttal.

   Plaintiff's rebuttal closes the evidence phase of the trial. At that point, either party may file another *Motion for Judgment as a Matter of Law*, arguing that no reasonable jury could find for his or her opponent. If the judge grants the motion, the trial ends.

7. Closing Arguments. After all the evidence has been presented, the attorneys for each party summarize their main arguments, highlight the most important evidence in their favor, and explain why the jury should not believe or not care about evidence against them. This is called closing arguments. Unlike opening statements, closing arguments are just that—arguments, although they may not go beyond the evidence presented. They are attempts to persuade the judge and jury. Closing arguments give both parties one last chance to address doubts, reinforce sympathies, and explain why the judge or jury should agree with their theory of the case.

8. Deliberation and Verdict. Finally, the judge or jury considers the evidence and delivers a verdict. For a jury trial, the judge first provides instructions to the jury giving them information about the legal standards they should apply to reach their decision. In federal civil litigation, and in both federal and state criminal litigation, jury verdicts must be unanimous; if any member of the jury disagrees with the other members of the jury, the jury cannot render a verdict, and the case has to be retried. States often allow civil cases to be resolved by jury with one or two dissenting votes. Either way, the verdict ordinarily

does not include any explanation. It simply states who wins, and what damages (if any) are awarded.

(Once a jury verdict is reached, the parties can, one last time, file a *Motion for Judgment as a Matter of Law*. Even if the judge disagrees with the jury verdict, usually the verdict stands. This is because judges are supposed to overturn a jury verdict only if "no reasonable jury" could have reached that verdict.)

Part III: Post-Trial

This Part describes the major steps in the litigation process that occur after the trial. As you walk through each step, consider what rules ensure that the process is fair.

What Happens After the Judgment?

In a civil case, after the trial court enters its judgment, the losing party generally has a right to *appeal* the decision—to apply to a higher court for reversal of the lower court's decision. In the federal Courts of Appeals, a three-judge appellate panel is chosen at random from among that particular court's judges. The party that lost in the trial court must choose particular aspects of the process to appeal, making specific claims of trial-court error.

If the appeal deals with the trial court's decisions regarding questions of law, appellate review is undeferential—no weight at all is given to the trial court's opinion. The legal term for this type of review is *de novo* review. (De novo is Latin for "from the beginning" or "anew.")

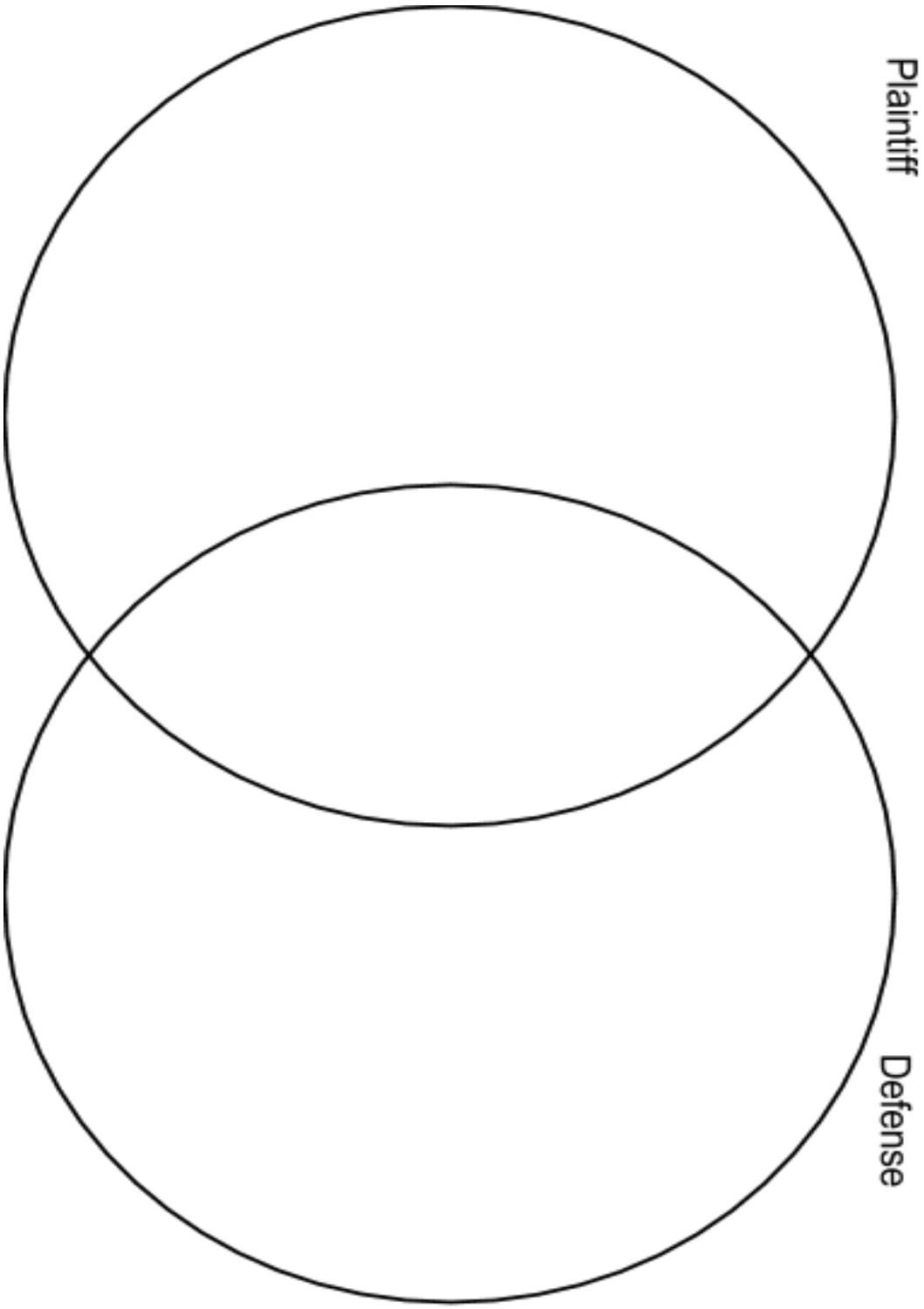
If, however, the appeal deals with factual decisions, appellate review is highly deferential to the trial court's decisions. Appellate courts will not reverse jury findings unless the findings had "no reasonable basis" in the testimony or other trial evidence. If the case was tried to a judge rather than a jury, appellate courts will not reverse trial judge findings-of-fact unless those findings are "clearly erroneous." In that situation, appellate reversal of the trial judge findings is appropriate only if the appellate judges have a "definite and firm conviction that a mistake has been committed." These high standards make it difficult for the party who lost in the trial court to win any appeal on decisions of fact.

Whichever party loses the appeal may have additional options for further review. For example, the losing party can petition the Supreme Court of the United States to hear the case. The Supreme Court can choose whether or not to hear the case. Nearly always, the Supreme Court chooses against hearing the case. At that point, the decision of the Court of Appeals becomes final.

In state's court systems, cases can be appealed from the intermediate appellate court to the state's supreme court. Depending on the state, this may be rare or routine. If the issues on appeal do not involve the federal Constitution or a federal statute, that is the end. When the issues on appeal *do* involve the federal Constitution or a federal statute, the losing party in the state supreme court may, seek even further review before the U.S. Supreme Court. However, U.S. Supreme Court review is extremely rare. The Court receives thousands of applications for review each year, and decides to hear well under a hundred of them.

Handout 10

Venn Diagram of Evidence



Handout 11

The Discovery Process

At the beginning of class today, we discussed what types of evidence we, as lawyers, might want to find in gathering evidence for our side of the case, and gathering evidence opposing the other party's side. We then tried to "discover" the information we needed by looking at the documents available to us. We were able to find some things we were looking for, but could not get answers to other questions. This is common in everyday litigation. But does this lead to fair trials?

A. Missing Information: What explanations and pieces of evidence did we fail to discover in the documents? Consider the missing information from both our party, and the opposing party.

Our Party: _____	Opposing Party: _____

B. Reasoning: Look at the pieces of missing evidence you listed above. If the documents we read today truly provide all the information available to us, what do the unanswered questions above tell us about how we should argue our (and the opposing party's) case?

Our Party: _____	Opposing Party: _____

C. Will this allow a fair trial? It's clear that both sides do not have all the information they need. Will this allow a fair trial? Regardless of the answer that you give, does the missing information help you at all in supporting your case, or opposing the other party's case?

Handout 12

Theory of the Case

Directions: A theory of a case is a clear outline of what a party hopes to prove in court, complete with the themes around which the case will revolve, the facts that will make up their argument, the evidence to support the facts, and the strategy that will lead others to the conclusion they want. In developing the theory of a case, it is important to thoroughly understand the facts of the case and the underlying law before choosing a particular strategy. As Michael Tigar, a famous trial attorney, notes, "Advocacy skills are indispensable to success, but are worthless without thorough and thoughtful preparation of facts and law." When lawyers develop their understanding of the facts, they cannot merely rely on their clients' statements; instead, they must also do independent research to get a full picture of the facts presented. At the same time, the client's emotions and interests are key. Why does he/she feel that he/she was wronged? The human side of the case is essential in telling a winning story.

Because the vast majority of cases settle before trial, the bulk of a lawyer's work occurs in this preparation stage. Armed with a full understanding of the facts and the law, the next step is to brainstorm strategies, including the strategies and narratives your opponent will likely use (in order to develop counter narratives), and select the best among them. Throughout the development of this strategy, keep in mind that the point of litigation is to tell a coherent narrative about justice. Every stage of the trial must be organized around the central theme of the case, and calculated to convince the decisionmaker that your client's version of the facts is more plausible than the opponent's version.

In developing your narrative, it is also important to remember that losing the judge or jury's trust can have disastrous results. Going into litigation, you should always know your case's strengths and emphasize them. But to deny your case's weaknesses (for example, by arguing that your client was not at a certain location at a certain time when there is clear video evidence to the contrary) will likely lead the decisionmaker, whether that's the judge or the jury, to distrust you and be skeptical about the remainder of the arguments presented.

In addition to knowing all the facts pertaining to a case, a theory of a case includes the following elements. Keep in mind that this is not necessarily the order in which you'll present your case, just the parts you should include.

Note that in this case, the trial will be about the plaintiffs' requested declaration that the military's policy violates the Religious Freedom Restoration Act, and request for a court-ordered change to the policy rather than damages. For that reason, the decisionmaker is a judge, not a jury.

A. Key Facts. *What facts do you want to emphasize in making your argument? What facts are beyond dispute?*

B. Evidence. *What are the key pieces of evidence you will use? What part of your argument will the evidence support? How will you use this evidence to convince the judge that your client's version of the facts is the more plausible version?*

C. Motive. *Why did the plaintiff/defendant act in the way they did? What explains their actions?*

D. Law. *What laws are at issue? What do you think should be the proper legal outcome of the case?*

E. Emotions. *To what kinds of emotions can your case appeal? Has an injustice been committed? Has the plaintiff/defendant been mistreated? What kind of fear, sadness, or anger is this case likely to rouse?*

F. Weaknesses. *What are the weaknesses in your case? Where will you have the most trouble convincing the judge/jury that your interpretation of the facts is correct? How, if at all, do you plan to address these weaknesses? In certain circumstances, it may undermine your case to not admit the weaknesses to the judge or jury.*

G. Opponent's Case. *What is your opponent going to argue? What key facts will their argument hinge upon and how will they use the evidence? How will you counter their argument?*

H. Short Summary. *Who did what to whom and why did they do it? What was the result? What are the legal and moral reasons this requires a verdict in your favor? What is your single most important item of evidence, and your best response to the other side's case?*

Handout 13

Evidence Overview

Not all of this evidence can be used at trial. The Rules of Evidence regulate what kinds of evidence can be used during the trial. The following explains some of the rules of evidence. We will use the case about the bible prison policy to provide an example of the rule (**Ex.**), as well as potential objections that can be raised (**Obj.**), and responses (**Resp.**).

- All evidence and witness questions and answers must be *relevant*—that is, only evidence that is related to the case's subject and helps to establish a legal proposition at issue in the case may be considered.
    - **Ex.** Mr. Singh, how often do you attend worship services as part of your religious practice?
    - **Obj.** Objection, Your Honor, this question is irrelevant to this case.
    - **Resp.** Your Honor, this series of questions will show that Mr. Singh's religious beliefs were sincerely held.
- *Hearsay*, or second-hand testimony, is often inadmissible (not allowed) in court. Witnesses usually must have directly seen, heard or experienced whatever it is they are testifying about. This is to improve the reliability of the testimony. For purposes of this mock trial hearsay evidence is only allowed if the witness is repeating a statement that was made directly to him by another witness in the case.
    - **Ex.** Nassir said Rajesh was not allowed to express his religious beliefs in his military uniform.
    - **Obj.** Objection, Your Honor, hearsay.
    - **Resp.** Your honor, since Nassir is a witness in the case, he can testify to the statement Nassir made.
- *Character evidence,* defined broadly as any evidence showing a person's general tendency to act in a certain way, is nearly always inadmissible. This is because character evidence is often unfairly prejudicial, wastes time, and confuses the jury.
    - **Ex.** Mr. Singh, have you ever been cited for misbehavior during your military service?
    - **Obj.** Objection, Your Honor, counsel is trying to introduce character evidence.
    - **Resp.** Your Honor, this series of questions will show that the plaintiff did not display a pattern of disobedience during his service.
- *Privileged information*, such as conversations between a husband and wife, a client and a lawyer, or a patient and a doctor, is excluded from trial. This is because we want to respect these types of private relationships, and not encourage distrust or betrayal.
- Other rules of evidence inform the ways lawyers can ask questions and the ways witnesses can answer them.
    - Lawyers in a trial cannot ask their own sides' witnesses *leading questions*—questions phrased in a way that suggests the desired answer to the witness. This is to protect against unreliable, untruthful answers.
        - **Ex.** Mr. Singh, you purposefully disobeyed the Army uniform policy, didn't you?
        - **Obj.** Objection, Your Honor, counsel is leading the witness.

- **Resp.** Your Honor, leading is permissible during cross-examination or I'll rephrase the question, Mr. Singh, what hairstyle did you wear during your Army service?

- The witness must answer reasonably specific questions, not provide *narration*. In other words, they must limit their answer to the information that the question calls for. This is to limit testimony so that it is relevant and time efficient.

- Except for technical experts, who can give opinions about matters relating to their field, witnesses cannot give opinions in their testimony. Testimony is limited to *facts, not opinions* for witnesses that are not testifying as experts. This is because the opinions of witnesses are typically irrelevant and can confuse the jury.

- Witnesses cannot provide their opinion on the ultimate issue of the case: whether the policy is reasonably related to a legitimate penological interest or an exaggerated response to prison concerns.
  - **Ex.** Witness: I believe the uniform policy is rationally related to the government's interest in keeping members of its military safe.
  - **Obj.** Objection, Your Honor, the witness is giving an opinion of the ultimate issue.

Introducing Documents into Evidence

Many times attorneys will want to question a witness about a document such as a letter, affidavit or some other physical evidence. In order to ask the witness questions about the item, the attorney must first introduce the evidence. To introduce letters, affidavits, or other documents or physical evidence into trial, the parties must follow the following procedure.

Attorney: Your honor, I wish to have this document marked for identification as [Plaintiff's Exhibit A, Defendant's Exhibit 1].
(Attorney takes the document to the clerk who marks the Exhibit letter/number. The attorney shows the item to opposing counsel. The attorney then shows the item to the witness)
Attorney: Do you recognize the item marked as [Plaintiff's Exhibit A]?
Witness: Yes.
Attorney: Can you please identify this item?
Witness: [States what the document is e.g. a letter I sent to Brad Smith].
The attorney can begin to ask the witness questions about the document.

Handout 14

Mock Trial Script

(As the judge enters)
CLERK (hits gavel three times): All rise. (Everyone stands) The U.S. District Court for the Eastern District of Michigan is now in session. The Honorable _____ presiding.

JUDGE: Please be seated. Calling the case of Singh v. Booth. Are both parties ready?

PLAINTIFF and DEFENSE ATTORNEYS: Yes your honor.

JUDGE: We will begin with the plaintiff's opening statement.

PLAINTIFF ATTORNEY: May it please the court. [Opening Statement]

JUDGE: We will now hear the defendant's opening statement.

DEFENSE ATTORNEY: May it please the court. [Opening Statement]

JUDGE: We will now hear the plaintiff's case. The plaintiff may call its first witness.

[The following procedure should be used for each witness for the plaintiff]

PLAINTIFF ATTORNEY: The plaintiff calls _____. (Witness walks to stand).

CLERK: Please stand. Raise your right hand. Do you promise the testimony you shall give in the case before this court shall be the truth, the whole truth, and nothing but the truth?

WITNESS: I do.

CLERK: You may be seated.

(Plaintiff's attorney questions the witness)

PLAINTIFF ATTORNEY: I have no more questions for this witness, your honor.

JUDGE: Does the defendant have any questions?

DEFENSE ATTORNEY: Yes, we do your honor.

(Defendant's attorney questions the witness)

DEFENSE ATTORNEY: I have no more questions for this witness, your honor.

JUDGE: Does the plaintiff have any further questions for this witness?

PLAINTIFF ATTORNEY: Yes/ No, your honor.

(If the plaintiff has more questions for the witness, their redirect is limited to questions arising from the plaintiff's questioning of the witness. The plaintiff's counsel will inform the court when it is finished questioning the witness.)

JUDGE: The witness is excused. Does the plaintiff have any additional witnesses?

PLAINTIFF ATTORNEY: Yes your honor. [Follow same procedure as before.] / No your honor. The plaintiff rests.

JUDGE: The defendant may call its first witness.

[The following procedure should be used for each witness for the defendant]

DEFENSE ATTORNEY: The defendant calls _____. (Witness walks to stand).

CLERK: Please stand. Raise your right hand. Do you promise the testimony you shall give in the case before this court shall be the truth, the whole truth, and nothing but the truth?

WITNESS: I do.

CLERK: You may be seated.

(Defendant's attorney questions the witness)

DEFENSE ATTORNEY: I have no more questions for this witness, your honor.

JUDGE: Does the plaintiff have any questions?

PLAINTIFF ATTORNEY: Yes, we do your honor.

(Plaintiff's attorney questions the witness)

PLAINTIFF ATTORNEY: I have no more questions for this witness, your honor.

JUDGE: Does the defendant have any further questions for this witness?

DEFENSE ATTORNEY: Yes/ No, your honor.

(If the defendant has more questions for the witness, their redirect is limited to questions arising from the plaintiff's questioning of the witness. The defendant's counsel will inform the court when it is finished questioning the witness.)

JUDGE: The witness is excused. Does the defendant have any additional witnesses?

DEFENSE ATTORNEY: Yes your honor (follow script above) / No your honor. The defense rests.

JUDGE: We will now hear closing argument.

PLAINTIFF ATTORNEY: [Closing Argument]

DEFENSE ATTORNEY: [Closing Argument]

JUDGE: Thank you. I will take these arguments into consideration. Court is adjourned.

CLERK: All rise for the Honorable _____.

Handout 15

Courtroom Roles

Role 1: Judge

During the trial, the judge must be attentive, engaged, and in control of the courtroom. Judges need to be familiar with trial procedure to make sure the trial proceeds in an orderly manner, and must resolve disputes about application of the rules. At the close of each subpart of the trial, the judge tells the parties what happens next. Unlike juries, which decide cases simply by voting, and do not need to explain their vote, judges must provide a written explanation of their decisions.

To prepare for the trial you should:

1. Read through all the case and evidence material so that you are very knowledgeable about the facts.

2. Familiarize yourself with the law pertaining to this case. You are going to decide the case by deciding what the legal standard requires based on which facts you believe.

3. Familiarize yourself with trial procedure. This is particularly important for the judge, who needs to make sure everything runs smoothly in the courtroom. Use the space below to write a "cheat sheet" for trial procedure.

Role 2: Clerk

During a trial, the clerk is in charge of ensuring that the court procedures during the case are followed and assisting the judge and attorneys in front of the court in following the proper schedule and decorum.

To prepare for the trial, you should:

1. Familiarize yourself with the clerk's script in *Handout 15*: Trial Transcript as reproduced below:

(*As the judge enters*)
CLERK (*hits gavel three times*): All rise. The U.S. District Court for the District of Oregon Portland Division is now in session. The Honorable _____ presiding.

For each witness:
CLERK: Please stand. Raise your right hand. Do you promise the testimony you shall give in the case before this court shall be the truth, the whole truth, and nothing but the truth?

WITNESS: I do.

CLERK: You may be seated.

Role 3: Witnesses

During a trial, it is important that witnesses only respond to the questions asked of them, and that they stick to their original story. You want the judge to believe that you are a credible witness. The opposing side will try to show that you cannot be believed or that there are inconsistencies in your story.

To prepare for the trial, you should:

1. Read through your statement. As much as possible, try to see this case from your character's perspective.

2. Pair up with the other witness from your team to practice questioning each other. This will help you to learn more about your witness. Drill each other until you can answer every conceivable question without looking at your statement. Use the space below to create a "cheat sheet" that you can review before going to the witness stand.

Role 4: Direct Examination Attorneys

Direct examination questions should be designed to get the witness to tell a logical story about what s/he saw, heard, or experienced. The questions should ask only for facts, not for opinions. (For example, "What did you see?" Not "Did that seem dangerous?") You should ask open-ended questions that begin with why, where, when or how. During direct examination, you may only ask questions; you may not make any statements about the facts. You may have the opportunity to conduct a redirect examination if, during cross-examination, your witness says something that requires explanation or correction.

To prepare for the trial, you should:

1. Read through all the statements from your witnesses.

2. Pair up with the other direct examiner from your team and outline a series of open-ended questions for each witness. Think about how the witness's testimony connects to the theory of the case. Write your questions in the space below.

3. Think about how you might rephrase questions in case the witness does not understand, gives an incorrect response, or there is an objection.

Role 5: Cross-Examination Attorneys

During the trial, it is important that you pay close attention to questions and responses given during direct examination. You want to undercut the opposing side's testimony, and you are only allowed to ask questions about subjects that came up during direct examination. Make sure that questions are not long or argumentative. It is best if they require only a simple yes or no answer, not long explanations. You don't want to give the witness a chance to explain their response. Leading questions that begin with something like, "Isn't it true that…." *are* allowed, and it is a good idea to use them.

To prepare for the trial, you should:

1. Read the opposing witness statements and think about how they could support the opposing case. Think about how to weaken or cast doubt on their statements. You want to highlight any inconsistencies, to show that the witness's story is implausible.

2. Discuss the questions and responses that might come out of the direct examination. Plot out a series of cross-examination questions you can then use to address the material that comes out of direct examination. Use the space below to record your potential questions.

Role 6: Opening Statement

The opening statement is the introduction to the case and the very first time attorneys get to tell their side of the story. The opening statement should include a summary of the facts, a summary of the evidence, and a statement regarding what your party hopes to get out of the trial.

To prepare for the trial, you should:

1. Work with the other attorneys to understand the core arguments that will be presented.

2. Write the opening statement for the case. The opening statement should paint a picture of the case, summarizing the evidence and testimony.

Role 7: Closing Argument

The purpose of the closing argument is to convince the judge or jury that the evidence presented is enough to win the case. The closing argument should summarize the facts, and evidence, and present a legal argument about how the law requires the judge or jury to interpret the evidence and decide the case.

To prepare for the trial, you should:

1. Work with the other attorneys to understand the core arguments that will be presented.

2. Prepare an outline for the closing argument. You can then write this in full during the trial.

Role 8: Media Reporters

The media reporters will provide a written or oral account of the trial at the close of each day of the mock trial. During the trial, the media reporters must be attentive, engaged, and taking note of everything that happens in the courtroom. The media reporters need to be familiar about the facts of the case and the pertinent law to make sure they fully understand the legal arguments that are being made. Although the media reporters should present both sides, the written account should revolve around a specific theme or lens that shapes the account.

To prepare for the trial you should:

1. Read through all the case and evidence material so that you are very knowledgeable about the facts.

2. Familiarize yourself with the law pertaining to this case.

3. Discuss with the other media reporters potential themes and lenses that you could use in writing the account of the trial.