No. 21-1405

In The Supreme Court of the United States

LESTER J. SMITH,

Petitioner,

v.

TIMOTHY WARD, COMMISSIONER OF GEORGIA DEPARTMENT OF CORRECTIONS IN HIS OFFICIAL CAPACITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR *AMICI CURIAE* SUPPORTING PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & RULES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

Amici are eight legal scholars who study the treatment of incarcerated people under the United States Constitution and other federal law. Writing and teaching about this topic is a central focus of their work. Amici have a shared interest in the lawful treatment of prisoners and in maintaining fidelity to the principles established by Congress and this Court to protect the statutory and constitutional freedoms of people incarcerated in the United States. The names of the amici scholars are identified in the list appended to this brief. Add. 1.

INTRODUCTION AND SUMMARY OF ARGUMENT

Lester Smith is a practicing Muslim incarcerated in the Georgia Department of Corrections. He has sought for over a decade to grow a full-length beard, as his faith commands. The Georgia Department of Corrections (GDOC) rejected this request entirely for many years. Mr. Smith then commenced this lawsuit under the Religious Land Use and Institutionalized Persons Act (RLUIPA), which requires courts to apply strict scrutiny review to prison regulations that substantially burden the free exercise of religion. Mr. Smith asserted that GDOC's prohibition substantially burdened his exercise of the Muslim faith and did not

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[1] This brief is submitted pursuant to Rule 37 of the Rules of the Supreme Court of the United States. Counsel for petitioners and respondents both have consented to this submission. No counsel for a party authored this brief in whole or in part, nor did any such counsel or anyone other than amici make any monetary contribution intended to fund the preparation or submission of this brief.

advance any compelling government interest in the least restrictive manner.

While Smith's case was pending, this Court decided *Holt v. Hobbs*, 574 U.S. 352 (2015), which held that another state corrections department violated RLUIPA by refusing to allow a Muslim prisoner to grow a half-inch beard. In the wake of *Holt*, GDOC relented to the point of allowing Smith to grow a half-inch beard—but the department refused to budge any further.

Affording extreme deference to prison officials, the Eleventh Circuit upheld this decision. The appellate court found it sufficient that allowing longer beards could raise "plausible" security risks, as the district court concluded. *See* App.16a.

The court of appeals was wrong, and this Court should grant certiorari to review the decision below. In particular, amici urge a grant of certiorari on the second question presented: "Whether RLUIPA allows religious accommodations to be denied based on any plausible risk to penological interests, if the government merely asserts that it chooses to take no risks." The Eleventh Circuit went astray on this issue by affording deference to the mere say-so of prison officials.

First, the decision below breaks with the text of RLUIPA and this Court's decision in *Holt v. Hobbs*. RLUIPA requires that where, as here, the government imposes a "substantial burden" on religious exercise, the government must "demonstrate[] that [the] imposition of the burden . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least

restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). GDOC did not contest the sincerity of Mr. Smith's religious belief, nor that its restrictions substantially burdened his religious exercise. Prison safety is admittedly a compelling government interest, so the core question is whether GDOC adopted the least restrictive means to advance that interest. In conducting this analysis, courts must hold prisons to their "rigorous" statutory burden. *Holt*, 574 U.S. at 364. The government must *prove*, and not merely assert, that its methods are the least restrictive ones available. *Id.* at 364-65.

But in this case, the Eleventh Circuit concluded that prison officials enjoy "due deference" when they restrict religious freedom and need only assert a "reasonable" justification for doing so. *See* App.27a. The court of appeals relied, wrongly, on dicta in *Cutter v. Wikinson*, which states that courts "must give 'due deference'" to prison administrators in RLUIPA cases. App.18a (citing *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005)). This Court should take the opportunity to explicitly disavow that dicta, which is totally inconsistent with *Holt's* application of true strict scrutiny. With good reason, *Holt* simply ignored *Cutter's* dicta about "due deference."

Second, the decision below is also inconsistent with decisions in at least the Second, Fifth, Sixth, and Ninth Circuits. As set forth in the Petition, those circuit courts have adhered to *Holt's* guidance when assessing whether a government policy is narrowly tailored under RLUIPA. Each of those circuits correctly requires the government to meet its

demanding and "rigorous" evidentiary burden, and have reversed lower courts for deferring too broadly to the government.

Third, the Eleventh Circuit's decision is incompatible with this Court's entire body of strict scrutiny jurisprudence. The plain language of RLUIPA makes clear that Congress codified strict scrutiny review in RLUIPA, and strict scrutiny is strict scrutiny. The statute does not contemplate second-class strict scrutiny, or some mishmash of strict scrutiny and deference. The Eleventh Circuit turned the very notion of strict scrutiny on its head by requiring only "plausible" evidence of a security risk. Such a lenient and deferential approach is flatly inconsistent with strict scrutiny. The Court does not defer to government officials seeking to regulate speech, to discriminate based upon race or gender, or to interfere with the free exercise of religious beliefs, and no such deference should be given here.

This Court should accordingly grant the Petition.

ARGUMENT

A. The Decision Below Disregards This Court's Decision in *Holt v. Hobbs* for People Incarcerated in Florida, Georgia, and Alabama

RLUIPA protects religious exercise in two areas: policies affecting institutionalized persons and land-use regulation. *See Cutter*, 544 U.S. at 715 (citing 42 U.S.C. §§ 2000cc, 2000cc-1). Congress enacted RLUIPA against the backdrop of the Religious Freedom Restoration Act (RFRA) of 1993, which broadly protected religious freedom against

encroachment by state, local, and federal governments alike. *See id*. (*citing City of Boerne v. Flores*, 521 U.S. 507, 515-16 (1997)). In *Flores*, however, this Court struck down RFRA as applied to state and local governments. *Flores*, 521 U.S. at 536. Congress responded by passing RLUIPA to ensure that all people in state and local prisons and jails could freely exercise their religion pursuant to the statute and the Constitution. *Cutter*, 544 U.S. at 715. This Court has acknowledged, RLUIPA "provide[s] very broad protection for religious liberty." *Holt* 574 at 352 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014)).

Section 3 of RLUIPA, states:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a).

In *Holt v. Hobbs*—which like this case involved an incarcerated Muslim seeking to grow his beard in accordance with his faith—this Court underscored that courts must apply the "exceptionally demanding" and "rigorous" standard in RLUIPA when evaluating whether a government policy is "the least restrictive means of furthering" its asserted compelling interest.

574 U.S. at 353, 364. In conducting this analysis, "[c]ourts must hold prisons to their statutory burden[.]" *Id*. at 369. Courts must not, therefore, "defer[] to . . . prison officials' mere say-so" that they cannot accommodate a prisoner's request for a religious exemption to a policy. *Id*. at 369. RLUIPA "does not permit such unquestioning deference." *Id*. at 364. Instead, the government institution must "prove that [the prisoner's] proposed alternatives would not sufficiently serve its . . . interests." *Id*. at 367. In addition, *Holt* requires that a prison "offer persuasive reasons why it believes that it must take a different course" than other prisons that offer the accommodation. *Id*. at 369. The Court emphasized scrutiny, not deference, in *Holt*. *See* David M. Shapiro, *To Seek a Newer World: Prisoners' Rights at the Frontier*, 114 Mich. L. Rev. First Impressions 124, 127 (2016).

Under RLUIPA, the government is not entitled to deference when it substantially burdens religious exercise. It must prove that a policy restricting religious freedom is narrowly tailored. The Court recently reaffirmed this position in *Ramirez v. Collier*, in finding unconstitutional Texas's prohibition against an incarcerated person's pastor being present at his execution. 142 S. Ct. 1264, 1284 (2022). The Court stated that Texas was "ask[ing] that we simply defer to their determination. That is not enough under RLUIPA." *Id*. at 1279.

The Eleventh Circuit's 2021 decision in *Smith*, however, conflicts with the plain language of RLUIPA and the Supreme Court's holding in *Holt*. In the decision currently before this Court, the Circuit

deferred to the prison administrators in holding that Smith's religious accommodations may be denied. *See* App.15a.[2] In reaching its decision, the court failed to require the prison to show that its policy is the least restrictive means. Though thirty-nine other prison systems nationwide accommodate untrimmed beards, and *Holt* requires that GDOC "offer persuasive reasons why it believes that it must take a different course" than those institutions, *see* 574 U.S. at 369, the Eleventh Circuit held that "*Holt* does not require the GDOC to detail other jurisdictions' successes and failures with their grooming policies to satisfy a RLUIPA inquiry." App.25a. The court thus allowed GDOC to prevail on the basis of only "plausible" security concerns and a "calculated decision not to absorb . . . added risks." App.19a, 25a. The court concluded that "a reasonable evidentiary showing by the government at trial should be met with the 'due deference' courts owe to prison administrators' expertise." App.27a (citing *Cutter*, 544 U.S. at 723). The Eleventh Circuit thus clearly erred in not requiring the government institution to prove that less restrictive alternatives would not serve its interests. *Cf. Ben-Levi v. Brown*, 577 U.S. 1169 (2016) (Alito, J. dissenting) (respondent's mere "invocation of . . . interests" was insufficient to justify the prison's policy toward Jewish inmates).

In addition, this Court should disavow the *Cutter* dicta on which the Eleventh Circuit relied in reaching its decision. In *Cutter*, this Court held that RLUIPA

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[2] The Eleventh Circuit's opinion is reported at 13 F.4th 1319 and reproduced at Petitioner's App.1a.

did not violate the Establishment Clause. As many courts and scholars have recognized, however, "this victory for prisoners' religious rights came at a cost: in dicta, the Court bled the statute of much of its force." David M. Shapiro, *supra* at 126. This is because, though the Court's holding was narrow, it had also reasoned that "[l]awmakers supporting RLUIPA . . . . anticipated that courts would apply the Act's standard with 'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.'" *Cutter*, 544 U.S. at 710. The Eleventh Circuit drew from this reasoning that it "must," therefore, give "due deference" to prison officials. App.18a. *Cutter* contains no such mandate. Further, any nod toward deference in *Cutter* was corrected in *Holt*, a unanimous decisions that contains no reference to *Cutter's* dicta, and in fact, contradicts it by eschewing deference. *See* Shapiro, *supra* at 126.

To avoid continuing confusion and inconsistency in the lower courts, this Court should expressly state that its decision in *Holt*, and not its dicta in *Cutter*, is the legal standard.

B. The Eleventh Circuit's Decision Is Inconsistent with Decisions in at Least the Second, Fifth, Sixth, and Ninth Circuits

The Eleventh Circuit's decision conflicts not just with the Court's decision in *Holt*, but also with the decisions of at least the Second, Fifth, Sixth, and

Ninth Circuits. In contrast to the Eleventh Circuit, each of these courts has adhered to *Holt's* guidance when assessing whether a government policy is narrowly tailored under RLUIPA.

In *Williams v. Annucci*, the Second Circuit vacated a district court decision that "failed to appreciate, in the wake of the Supreme Court's decision in *Holt v. Hobbs* . . . the substantial showing that the government must make to justify burdening an individual plaintiff's practice of a sincerely held religious belief." 895 F.3d 180, 184 (2d Cir. 2018). In *Williams*, the petitioner had asked the New York State Department of Corrections to accommodate his religiously required diet. *Id.* at 185. In analyzing whether its policy against doing so was narrowly tailored, the Second Circuit found that the Department "did not discuss, much less demonstrate, why it could not, at least," provide the petitioner's proposed alternatives. *Id.* at 193. The court observed, in general, that "courts abdicate their responsibility to 'apply RLUIPA's rigorous standard' by deferring to the government's 'mere say-so' without question." *Id.* at 189 (quoting *Holt*, 574 U.S. at 369).

In *Ware v. Louisiana Dep't of Corr.*, the Fifth Circuit evaluated whether the state Department of Corrections had carried its burden under RLUIPA with respect to a prisoner's challenge to its grooming policy. 866 F.3d 263 (5th Cir. 2017). The court found that the Department had failed, among other things, "to explain why its grooming policies differed from those of the vast majority of other jurisdictions" that allowed the religious accommodation. *Id.* at 273. In reversing the district court's grant of dismissal, the

Fifth Circuit stated, "[a]lthough the Court has admonished lower courts to 'respect [prison officials'] expertise,' it has also instructed them not to conduct this analysis with 'unquestioning deference' to the government." *Id.* at 268 (quoting *Holt*, 574 U.S. at 364). "[P]olicies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet [RLUIPA's] requirements." *Id.* (quoting *Davis v. Davis*, 826 F.3d 258, 265 (5th Cir. 2016)).

Similarly, the Sixth Circuit has held that RLUIPA's "standard is 'exceptionally demanding,' and requires the government to 'sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y].'" *Ackerman v. Washington*, 16 F.4th 170, 191 (6th Cir. 2021) (quoting *Holt*, 574 U.S. at 364). In *Ackerman*, which also involved the request for a prison to accommodate a religiously required diet, the Sixth Circuit found that the prison system failed to address why it could not grant the request when it had undertaken a similar accommodation in the past. *Id.* The court emphasized that, pursuant to *Holt*, "when other prison systems," or even the same prison system, "provide a similar accommodation, a prison faces a steep uphill battle" in carrying its burden under RLUIPA. *Id.*

The Ninth Circuit also adheres to *Holt*. In *Johnson v. Baker*, 23 F.4th 1209, 1217 (9th Cir. 2022), the court held that a prison's practice of banning the personal possession of scented oil violated RLUIPA. The court recognized the rigorous standard the government must satisfy, even in establishing its

compelling interest. The court stated that "we don't grant 'unquestioning deference' to the government's claim of a general security interest." *Id.* (9th Cir. 2022). "Indeed, in the RLUIPA context, prison officials cannot 'justify restrictions on religious exercise by simply citing to the need to maintain order and security in a prison.'" *Id.* (quoting *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 989-90 (9th Cir. 2008)).

In sum, there is a clear divergence between the deferential approach adopted by the Eleventh Circuit in this case and the holdings of multiple other federal courts of appeals, which further justifies granting the pending petition.

C. The Eleventh Circuit's Decision Is Incompatible with Constitutional Strict Scrutiny Jurisprudence

The plain language of the statute makes clear that Congress codified strict scrutiny review in RLUIPA. Courts should thus look to and apply constitutional strict scrutiny jurisprudence when analyzing prison policies that substantially burden religious freedom. This jurisprudence does not give "deference" to government officials seeking to regulate or suppress speech, to discriminate based upon race or gender, or to interfere with the free exercise of religious beliefs. No such deference should be given here. There is only one kind of strict scrutiny, and RLUIPA does not enact a second-class version of that exacting standard.

As an initial matter, it is clear that the standard of review language in RLUIPA and in the Court's constitutional strict scrutiny jurisprudence are

substantially the same. *Compare* 42 U.S.C. § 2000cc-1(a) ("[n]o government shall impose a substantial burden . . . unless [it] . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest"), *with United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 804 (2000) (to survive strict scrutiny review, a law "must be narrowly tailored to promote a compelling Government interest, and if a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative"); *Miller v. Johnson*, 515 U.S. 900, 920 (1995) ("To satisfy strict scrutiny, the State must demonstrate that its . . . legislation is narrowly tailored to achieve a compelling interest."). Accordingly, it is appropriate to look to the way courts have applied strict scrutiny in the constitutional context to interpret RLUIPA.

This Court routinely rejects deference to government officials when applying constitutional strict scrutiny. In *Fisher v. Univ. of Texas at Austin*, for example, the Court found that the court of appeals did not "hold the University [of Texas] to the demanding burden of strict scrutiny" when evaluating the university's consideration of race in admissions. 570 U.S. 297, 303 (2013). In reaching this decision, the Court insisted that lower courts "examine with care" and "not defer" to government officials' consideration of less restrictive alternatives: "Although '[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative,' strict scrutiny does require a court to examine with care, and not defer to, a university's

'serious, good faith consideration of workable race-neutral alternatives.'" *Id.* at 312 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339-40 (2003)). Here, Georgia prison officials plainly did not engage in "serious, good faith consideration of workable . . . alternatives."

Miller v. Johnson, 515 U.S. 900 (1995), provides another example of how this Court applies strict scrutiny. In *Miller*, the Court held that legislative districting decisions motivated by race are subject to strict scrutiny review. *Id.* at 913. In so holding, the Court stated that "blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Id.* at 922 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989)); *see also Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2480 (2018) (in evaluating the constitutionality of a state law, finding that "deference to legislative judgments is inappropriate in deciding free speech issues"). Further, in *Johnson v. California*, the Court found, with respect to racial classifications in prison, that deference to prison administrators is "fundamentally at odds with our equal protection jurisprudence." 543 U.S. 499, 506 n.1 (2005). Instead, the Court "put[s] the burden on state actors to demonstrate that their race-based policies are justified." *Id.* Indeed, the Court has contrasted strict scrutiny to more deferential standards of review. *See, e.g., id.* at 509 (comparing strict scrutiny to the "deferential standard of review articulated in *Turner v. Safley*").

Finally, RLUIPA should be interpreted consistently with its sister statute, RFRA, which

remains valid against the federal government, including federal prison officials. RFRA, like RLUIPA, contains a strict scrutiny standard of review, *see* 42 U.S.C. § 2000bb-1 (government must "demonstrat[e] that application of [a substantial] burden to the person . . . is the least restrictive means of furthering [a] compelling governmental interest"). This Court has appropriately interpreted RFRA in a manner consistent with constitutional strict scrutiny and without any "deference" to federal officials. Indeed, this Court has described the "least-restrictive-means standard" in RFRA as "exceptionally demanding," *Hobby Lobby Stores, Inc.*, 573 U.S. at 728, and the test to be the "most demanding . . . known to constitutional law." *Flores*, 521 U.S. at 534 (analyzing RFRA and stating that "[r]equiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law"). There is no plausible reason to interpret RLUIPA to allow more deference than RFRA.

In sum, there is no place for "deference" in the strict scrutiny review that RLUIPA requires. The Eleventh Circuit disregarded that principle, and this Court should grant review and correct this deviation in the law.

CONCLUSION

For the reasons set forth herein, this Court should grant the Petition.

Respectfully submitted.

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