No. 21-1405

IN THE
Supreme Court of the United States

LESTER J. SMITH,
Petitioner,

v.

TIMOTHY C. WARD, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,
Respondent.

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

BRIEF OF THE JEWISH COALITION FOR RELIGIOUS LIBERTY, AGUDATH ISRAEL OF AMERICA, AND THE ALEPH INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The Jewish Coalition for Religious Liberty ("JCRL") is an organization of Jewish rabbis, lawyers, and professionals who are committed to defending religious liberty. JCRL aims to protect the ability of all Americans to freely practice their faith and foster cooperation between Jews and other faith communities. To that end, JCRL is interested in restoring an understanding of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-2000cc5 ("RLUIPA"), that offers broad protection for religious liberty.

JCRL is particularly interested in ensuring prisoners' religious liberty. As its members may adhere to practices many in the majority may not know or understand, JCRL has an interest in ensuring that prisoners are able to practice the tenets of their faith without unconstitutional limitation and that government actors are held to the appropriate legal standard when burdening a prisoner's religious exercise. To protect that interest, JCRL has filed *amicus* briefs in the Supreme Court of the United States, as well as in state supreme courts and lower federal courts, and has submitted op-eds to prominent news outlets.

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[1] No party's counsel authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, made a monetary contribution to fund the brief's preparation or submission. All parties in this case were provided timely notice and have consented to *amici*'s filing of this brief.

Agudath Israel of America ("Agudath Israel"), founded in 1922, is a national grassroots Orthodox Jewish organization that articulates and advances the position of the Orthodox Jewish community on a broad range of issues affecting religious rights and liberties in the United States. Agudath Israel regularly participates at all levels of government—federal, state, and local legislative, administrative, and judicial (including through the submission of or participation in *amicus* briefs)—to advocate for and protect the interests of the Orthodox Jewish community in the United States in particular, and religious liberty in general. *See, e.g.*, *Agudath Israel of Am. v. Cuomo*, 141 S. Ct. 889 (Mem.) (2020) (obtaining grant of injunctive relief in Free Exercise case). Indeed, Agudath Israel played a key role in advocating for the passage of RLUIPA, and it is keenly aware of the importance of RLUIPA for religious minorities.

The Aleph Institute ("Aleph") is a national nonprofit educational, humanitarian, and advocacy organization. Aleph was founded in 1981 and provides spiritual and emotional support, as well as rehabilitation and family counseling, to thousands of individuals of all faiths and their families who are enmeshed in the criminal justice and penal systems. In many cases, Aleph provides advocacy for defendants at their sentencing hearings. Aleph also has been involved in the formulation and implementation of prison policies with respect to kosher meal plans in correctional departments across the country. Aleph's overarching mission is to bring about criminal justice outcomes that are beneficial to

the sentenced individuals, their families and communities, and society as a whole.

Together, JCRL, Agudath Israel, and Aleph share an interest in preserving RLUIPA's protections, and appear as *amici* to provide a broader perspective on RLUIPA, including the protections the law affords to prisoners in the Jewish community and other minority faiths.

SUMMARY OF ARGUMENT

RLUIPA requires the government to demonstrate that a substantial burden on religious exercise constitutes the "least restrictive means" of furthering a compelling government interest. 42 U.S.C. § 2000cc-1(a). This case is about protecting the religious exercise of prisoners, including religious minorities who would be disproportionately affected by the Eleventh Circuit's improper relaxation of the standard of review codified by RLUIPA. *See* The Pew Forum on Religion & Public Life, *The Supreme Court's Decision in* Cutter v. Wilkinson*: The Constitutional Status of the Religious Land Use and Institutionalized Persons Act*, 2 (June 2005), https://www.pewresearch.org/wp-content/uploads/sites/7/2005/06/RLUIPA-addendum.pdf ("[The Supreme Court] articulate[d] a more specific justification for RLUIPA, emphasizing the evidence before Congress that majority faiths are frequently favored and minority faiths frequently disadvantaged in the administration of prisons."); *see also Cutter v. Wilkinson*, 544 U.S. 709, 716 n.5 (2005) (recounting evidence that religious accommodations were historically granted for some religious practices,

while similar accommodations were denied to religious minorities). Instead of applying the strict-scrutiny standard required by RLUIPA, the Eleventh Circuit eased the Georgia Department of Corrections' (the "GDOC") obligation to justify its substantial burden on Petitioner Lester J. Smith's ("Petitioner" or "Mr. Smith") sincerely held religious beliefs. As a result, the Eleventh Circuit made it easier for the GDOC, and prison officials everywhere in the Circuit, to deny religious accommodations.

More specifically, the Eleventh Circuit improperly lightened the burden of proof for prison officials who required Petitioner to cut his beard in violation of his religious beliefs in two ways. *First*, the Eleventh Circuit granted the GDOC undue deference regarding its obligation to prove that its half-inch beard policy was the least restrictive means of furthering its interests in "safety, security, and uniformity, minimizing the flow of contraband, identification of inmates, hygiene, and cost." App.7a. That is, rather than requiring the GDOC to present concrete evidence proving that Mr. Smith's untrimmed beard accommodation was ***actually*** unmanageable—as required by this Court's precedent and as four other circuits have held—the Eleventh Circuit allowed the GDOC to rest on testimony that the request could only ***plausibly*** result in adverse effects. App.21a. *Second*, the Eleventh Circuit undermined RLUIPA's requirement that a prison must show it employed the "least restrictive means" to serve its interests by allowing the GDOC entirely to ignore similar accommodations or practices of other prisons. This decision conflicts with this Court's precedents and virtually all other circuits that have addressed the

issue, which require prison officials to demonstrate why an accommodation that succeeded at a different prison could not succeed at theirs.

Holding the prison to a robust standard of proof is especially important for religious minorities. The failure to do so may result in the reduction of religious accommodations, which will be inordinately felt by religious minorities who file a disproportionate number of religious accommodation claims. *See* Dep't of J., *Update on Justice Department's Enforcement of the Religious Land Use and Institutionalized Persons Act: 2010-2016*, 11 (July 2016) (finding that "RLUIPA claims in institutional settings are most often raised by people who practice minority faiths"); Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. 353, 376 (2018) (analyzing a subset of religious liberty cases from 2012-2017 and finding that "[o]ver half of all prisoner decisions involved non-Christian religious minorities," comprising primarily Muslims, Jews, and Native Americans).

Indeed, the more deference that a court gives to a prison's calculus regarding the danger posed by a religious practice, or the feasibility or cost effectiveness of an accommodation, the more likely it is that the prison will limit or burden practices that it does not favor or understand. This is because prison officials are less likely to see danger or cost associated with accommodating a religious practice that is familiar and widely practiced. Or, put another way, prison officials might be more willing to consider an alternative possible or economically feasible when it

is taken in the furtherance of a religious claim they understand and recognize as important. But that same level of comfort or flexibility may not be present for minority religious practices that prison officials have never participated in nor observed. *See, e.g.*, *Watson v. Christo*, 837 F. App'x 877, 881 (3d Cir. 2020) (denying Jewish prisoner's request to pray with *tefillin*—set of small black leather boxes with leather straps containing scrolls of parchment inscribed with verses from the Torah—due to its "risky attributes").

If a prison is not required to offer concrete proof of danger or unworkability—or explain why accommodations offered at other prisons are not replicable—it might well imagine a litany of dangers or problems associated with a "strange" religious practice. Or, if courts are allowed to defer to a prison's "mere say-so" regarding the feasibility of an accommodation, a prison official may misunderstand the religious basis for a prisoner's accommodation request and reject the request for accommodation as religiously unnecessary.

And, in fact, both of these mistakes make it easier for a prison to deny religious accommodations for religious minorities. Indeed, were prison officials given the deference erroneously allowed by the Eleventh Circuit, a wide variety of religious accommodations sought by religious minorities would be denied based on minimal (if any) actual evidence of harm or risk. *See, e.g.*, *Warsoldier v. Woodford*, 418 F.3d 989, 998 (9th Cir. 2005) (refusing deference to the prison's "conclusory statements" that its hair-length policy was necessary to preserve prison security). And if prison officials were allowed to

ignore the accommodations and practices of other prisons, adherents to minority religions would be denied a powerful tool often used to show the feasibility of accommodating their religious exercise. *See, e.g.*, *Nance v. Miser*, 700 F. App'x 629, 632-33 (9th Cir. 2017) (overturning ban on Muslim prisoner's use of scented religious oils, in part, because "other well-run institutions permit the use of scented oils").

The Court, therefore, should grant review to correct the Eleventh Circuit's erroneous interpretation of RLUIPA and to ensure that the important interests protected by RLUIPA—including a prisoner's right to freely practice a sincerely held religious belief, even if not in the mainstream—are upheld.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ELEVENTH CIRCUIT'S FAILURE TO PROPERLY APPLY STRICT SCRUTINY IGNORES THIS COURT'S PRECEDENT AND DEEPENS TWO CIRCUIT SPLITS IN A MANNER THAT THREATENS RELIGIOUS LIBERTY OF MINORITY FAITHS.

RLUIPA expressly codified the strict-scrutiny standard of review. *See* 42 U.S.C. § 2000cc-1(a). In doing so, RLUIPA provided the utmost protection for the religious practices of prisoners of all faiths, including religious minorities. Indeed, this Court has recognized that "Congress enacted RLUIPA . . . 'in order to provide very broad protection for religious liberty.'" *Holt v. Hobbs*, 574 U.S. 352, 356 (2015) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573

U.S. 682, 693 (2014)). In prisons, "the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise" and "[i]nstitutional residents' right to practice their faith is at the mercy of those running the institution." *Cutter*, 544 U.S. at 720-21; *see* Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 CARDOZO L. REV. 1907, 1933 (2011) (noting that burdens on a prisoner's religious exercise are particularly onerous because that person must "depend on government to facilitate their religious exercise by providing chaplains, worship space and time, and other aspects of religious life"). RLUIPA is thus designed to "alleviate[] exceptional government-created burdens on private religious exercise" and to "protect[] institutionalized persons who are unable freely to attend to their religious needs." *Cutter*, 544 U.S. at 720, 721. Any interpretation or application of RLUIPA that affects adherents of minority religious more harshly than others is, by definition, contrary to RLUIPA's nature and purpose, as RLUIPA "singles out no bona fide faith for disadvantageous treatment." *Cutter*, 544 U.S. at 724.

It is undisputed that the GDOC's policy of prohibiting all beards longer than one-half inch "substantially burdens [Mr.] Smith's religious exercise because it does not allow Smith to grow an untrimmed beard." App.10a. Thus, there is no question that the GDOC bore the burden of proof to justify its policy, including demonstrating that its beard-length limitation was the "least restrictive means" of furthering its interests. *Id.*

Instead of holding the GDOC to its burden, the Eleventh Circuit misapplied the strict scrutiny required by RLUIPA in two ways. *First*, in contravention of this Court's precedent and that of four other circuits, the Eleventh Circuit gave undue deference to the GDOC's factual presentation, allowing the GDOC to rely only on unsupported or conjectured—rather than actual—***potential*** for harm created by Mr. Smith's requested accommodation. *Second*, the Eleventh Circuit failed to require the GDOC to show its policy represented the "least restrictive means," by allowing the GDOC to ignore policies or accommodations offered at other prisons. This ruling similarly violated this Court's precedent and conflicted with virtually every other circuit to address the issue. By failing to put the GDOC through its paces, the Eleventh Circuit's analysis threatens to make it more difficult for all prisoners, but especially religious minorities, to prevail under RLUIPA and to obtain accommodations for their religious exercise.

A. The Eleventh Circuit Failed to Require the GDOC to Adequately Support Its Decision to Burden Petitioner's Religious Liberty.

The standard of review applied by the Eleventh Circuit directly conflicts with the strict-scrutiny standard imposed by RLUIPA and this Court's ruling in *Holt v. Hobbs*, as well as four other circuits. Rather than requiring the GDOC to show evidence of actual harm or unworkability, as required by *Holt*, the Eleventh Circuit held that RLUIPA "does not require prison systems to show with absolute certainty that

an alternative policy will have adverse effects," and that "[i]t is enough to show the risk of those effects" based on the deference that prison officials are due. App.21a. Further, as Petitioner notes, the Eleventh Circuit joins the Third and Fourth Circuits in its incorrect analysis, deepening a circuit split with the Second, Fifth, Sixth, and Ninth Circuits regarding whether prison officials' explanations are afforded deference and threatening religious liberty for all prisoners, but especially religious minorities.

First, such deference to prison officials' identification of "plausible" security concerns—without proof that such risks even exist—conflicts with the Court's decision in *Holt v. Hobbs*. *Holt* plainly rejected "deference" to prison officials that was merely a masquerade for "unquestioning acceptance." *Holt*, 574 U.S. at 364. This Court held that the strict-scrutiny test codified in RLUIPA "requires the [prison] not merely to explain why it denied the exemption but ***to prove*** that denying the exemption is the least restrictive means of furthering a compelling governmental interest." *Id.* (emphasis added). *Holt* further explained that although prison administrators deserve "respect" as "experts in running prisons," "that respect does not justify abdication of the [court's] responsibility, conferred by Congress, to apply RLUIPA's rigorous standard." *Id.*; *see also id.* at 371 (Sotomayor, J., concurring) (criticizing deference that goes "so far that prison officials may declare a compelling government interest by fiat" (quoting *Yellowbear v. Lampert*, 741 F. 3d 48, 59 (10th Cir. 2014) (Gorsuch, J.))).

Second, the Eleventh Circuit's deference conflicts with the standard applied by at least four other circuits. As Petitioner explains, the Second, Fifth, Sixth, and Ninth Circuits all correctly apply RLUIPA's strict-scrutiny standard and, in doing so, require that prison officials support any assertions of risk or feasibility with probative evidence. Pet. Writ Cert. 21 (Apr. 28, 2022) ("Pet."). "*Holt* made it plain that courts need not accept the government's claim that its interest is compelling on its face," and "courts abdicate their responsibility to 'apply RLUIPA's rigorous standard' by deferring to the government's 'mere say-so' without question." *Williams v. Annucci*, 895 F.3d 180, 189-90 (2d Cir. 2018).

As discussed in more detail below, the Eleventh Circuit's improper deference to prison officials limits the availability of religious accommodations and disproportionately affects religious minorities. By nature, prisons are disinclined to grant religious accommodations and will utilize deference to limit the amount of cost or burden, or even the discomfort associated with the potential for such burdens that RLUIPA compliance may impose. This inclination is particularly acute when prisons receive accommodation requests from religious minorities whose practices are unfamiliar to prison officials and may be met with increased skepticism or fear. Prisons must be held to the proper standard for evaluating requests for religious accommodation and should not be allowed to act—even unconsciously—as if the practices of religious minorities are either more dangerous or harder to accommodate.

B. The Eleventh Circuit Improperly Ignored Accommodations Offered in Other Prisons.

As part of the least-restrictive-means test required by RLUIPA, the Supreme Court and at least seven other circuits have required prisons to look to other prisons in evaluating religious accommodation requests. The GDOC, however, failed to consider accommodations offered by other prison systems. *See* App.35a-36a. And contrary to this Court's precedent, the Eleventh Circuit rubber-stamped that failing, finding that the GDOC's obligation was merely to show that "its departure from the practices of other jurisdictions stems not from a stubborn refusal to accept a workable alternative, but rather from a calculated decision not to absorb the added risks that its fellow institutions have chosen to tolerate." App.25a (quoting *Knight v. Thompson*, 797 F.3d 934, 947 (11th Cir. 2015)).[2] The Eleventh Circuit's decision further deepens a circuit split and is particularly harmful to the rights of religious minorities, whose practices are not widely represented and may only be made familiar or accessible as a result of other prisons' practices.

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[2] The Eleventh Circuit's heavy reliance on *Knight v. Thompson* is unpersuasive at best. As Petitioner explains, *Knight* was written before this Court's decision in *Holt v. Hobbs*, and it was vacated and remanded for reconsideration in light of *Holt*. Yet, on remand, the Eleventh Circuit reissued its decision with a change to only two sentences, failing to revise its opinion in light of *Holt* and rejecting precedent from three other circuits. *See* Pet. at 5.

First, contrary to the Eleventh Circuit's ruling, RLUIPA's least-restrictive-means standard and this Court's precedent require consideration of other prisons' practices. In *Holt*, this Court reminded prisons everywhere that RLUIPA's least-restrictive-means test is an "exceptionally demanding" one, and if a less restrictive means is available, the Government "must use it." *Holt*, 574 U.S. at 364-65 (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 815 (2000)). Accordingly, when "many other" jurisdictions have accommodated religious practices safely, a state refusing that accommodation bears the burden "to show … that its prison system is so different from the many institutions that allow" the practice. *Id.* at 367, 368. The prison "must, at a minimum, offer persuasive reasons" why it cannot provide the same accommodation. *Id.* at 369.

This principle was reaffirmed in the recent decision of *Ramirez v. Collier*. In *Ramirez*, this Court criticized Texas's failure to "explore any relevant differences between Texas's execution chamber or process of those of other jurisdictions" when the prison refused to allow a Christian death row prisoner to "permit his pastor to 'lay hands' on him and 'pray over' him during the execution." 142 S. Ct. 1264, 1276, 1279 (2022); *see id.* at 1288 (Kavanaugh, J., concurring) (explaining the importance of considering other prisons' practices, as "experience matters in assessing whether less restrictive alternatives could still satisfy the State's compelling interest"); *cf. Mast v. Fillmore County*, 141 S. Ct. 2430, 2431, 2433 (Mem.) (2021) (Gorsuch, J., concurring) (finding that "lower courts failed to give sufficient weight to rules in other jurisdictions" when considering

Swartzentruber Amish's objection to a county's ordinance requiring installation of modern septic systems). This Court's message has been clear: prison officials can and must take into consideration accommodations offered at other prisons and explain why those same accommodations cannot be offered to the requesting prisoner.

Second, at least seven other circuits similarly require prison officials to consider accommodations granted in other prisons and to explain why they cannot provide those same accommodations. Where there is evidence from other prisons that less restrictive alternatives exist, most circuits require prison officials to "explain why another institution with the same compelling interests was able to accommodate the same religious practices." *Warsoldier*, 418 F.3d at 999; *see Ackerman v. Washington*, 16 F.4th 170, 191 (6th Cir. 2021) ("[T]he government faces a steep uphill battle when other prison systems can accommodate a particular religious practice."). Thus, as Petitioner points out, the Eleventh Circuit stands alone in its broad deference to prison officials, and its decision further deepens this circuit split. *See* Pet. at 13-17.

This mistake is most harmful to religious minorities, who may be alone or one of only a few adherents to a particular religion in a specific institution. Indeed, as the cases discussed below demonstrate, without the requirement to consider other prisons' practices, some prison officials may never be exposed to certain religious practices or potential acceptable alternatives. And, as a result, those prison officials would have no information to

counter-balance or test a belief that accommodating an unfamiliar religious practice is risky, expensive, or infeasible.

II. THIS CASE PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE BECAUSE THE FAILURE TO HOLD PRISON OFFICIALS TO THEIR BURDEN GREATLY THREATENS ACCOMMODATIONS FOR RELIGIOUS MINORITIES.

If allowed to stand, the Eleventh Circuit's ruling weakens the strict-scrutiny standard required by RLUIPA and reduces RLUIPA's intended protections for institutionalized religious minorities. This is so because—as exemplified below—prison officials are more likely to deny accommodations for religious practices with which they are not familiar, either due to speculation about the viability of an accommodation or personal beliefs regarding the value or importance of a requested accommodation. Thus by giving undue deference to the GDOC's position and allowing the GDOC to ignore accommodations granted by other prisons, the Eleventh Circuit's decision specifically threatens the availability of accommodations for Jewish prisoners and other religious minorities.

A. Jewish Prisoners and Other Religious Minorities Are More Likely to Be Denied Accommodation As a Result of the Eleventh Circuit's Ruling.

The Eleventh's Circuit's erroneous interpretation of RLUIPA—and its lightening the burden of proof for prison officials—will potentially have the harshest

consequences for religious minorities. As the examples below make clear, prison officials are more likely to deny accommodations for religious practices with which they are not familiar—either (1) due to fear or speculation about the viability of accommodating a particular religious practice or (2) based on a prison official's own beliefs about the value or importance of that practice—leaving minority-faith groups to face disproportionate injury when prison officials are not held to the appropriate burden. *Cf.* U.S. Comm'n on Civil Rights, *Enforcing Religious Freedom in Prison*, 31 n.71 (2008) (reporting that the lack of availability of chaplains or volunteers, "especially of minority faiths, can pose challenges for religious accommodation of minority faiths in prison and sometimes lead to wrongful denials, especially where chaplains of one faith are not interested in assisting inmates professing another faith of which they know little").

Examples suggesting the harm to religious minorities likely to flow from the Eleventh Circuit's ruling are unfortunately abundant. *First*, prison officials regularly deny accommodations for religious practices based on misunderstanding or lack of knowledge about a religious practice. In *Watson v. Christo*, for example, the prison asserted that it could not properly supervise a Jewish prisoner while he was praying with *tefillin* based on the "risky attributes" of *tefillin*. 837 F. App'x at 881. *Tefillin* is a set of small black leather boxes with leather straps containing scrolls of parchment inscribed with verses from the Torah, and the prison allowed use of other religious objects that posed similar risks. Nonetheless, and despite allowing similar risk for other religious

practices, the prison barred the prisoner's use of *tefillin*. *Contra Spigelman v. Samuels*, No. 13-CV-074, 2015 WL 1411942, at *1-2 (E.D. Ky. Mar. 26, 2015) (providing *tefillin* to maximum security prisoners); *Searles v. Bruce*, No. 01-CV-3379, 2003 WL 23573643, at *3 (D. Kan. Oct. 20, 2003) (providing *tefillin* to prisoners "in segregation" and then, "after prayer, the *Tefillin* is required to be placed back in a secure area").

Similarly, in *Estes v. Clarke*, a prison denied a Jewish prisoner the right to blow the Shofar, a ram's horn trumpet used in religious ceremonies. No. 7:15-CV-00155, 2018 WL 2709327, at *1 (W.D. Va. June 5, 2018). The prison claimed that the Shofar could be used as a weapon and that allowing individual prisoners to blow the Shofar posed a contamination risk. *Id.* at *8. The prison's lack of familiarity with the religious instrument, coupled with the improper exercise of deference by the court, caused Estes to be denied a basic tenet of his religious beliefs. *Id.* (granting in part Estes's request for kosher diet, despite the prison's claim of excessive cost and administrative concerns); *cf. Ajala v. West*, 106 F. Supp. 3d 976, 983 (W.D. Wis. 2015) (finding that prison's refusal to allow a Muslim prisoner to wear a *kufi* (a type of head covering) based on potential use as a gang identifier, risk of hiding contraband, and risk of prison violence was not supported by the record). And it is not difficult to imagine other scenarios where an unfamiliar religious practice would be denied to a prisoner—such as refusing to accommodate a Jewish prisoner's practice to avoid *shatnez* (cloth containing a mixture of wool and linen)—simply because a prison does not understand

the practice's importance or views accommodating the unfamiliar practice as an unreasonable burden. *See generally Smith v. Drawbridge*, No. 16-CV-1135, 2018 WL 3913175 (W.D. Ok. May 22, 2018) (noting that a Jewish prisoner was denied a non-wool blanket, in violation of the Jewish practice to avoid *shatnez*).

Second, prison officials also may deny religious accommodation based on doubt or misunderstanding—or the imposition of their own beliefs—about a prisoner's sincerely held religious belief. For example, in *Haight v. Thompson*, prison officials barred Native American prisoners from purchasing corn pemmican and buffalo meat for a powwow and claimed that such refusal did not substantially burden the prisoners' faith, relying on their reading of "Inmate Religious Beliefs and Practices," a state-authored manual that described certain religious practices, as justification. 763 F.3d 554, 567 (6th Cir. 2014). The Sixth Circuit, however, rejected this reliance, as a "manual written by government officials" was insufficient "to allow other government officials to decide on that basis alone that a practice is not central to this or that faith." *Id.*; *see also Lindell v. McCallum*, 352 F.3d 1107, 1109-10 (7th Cir. 2003) (finding that complete ban of prisoner's Wotanist literature was a substantial burden, because "[w]e are given no reason to think that the fact that Wotanism is not a mainstream religion is disqualifying"); *Marria v. Broaddus*, No. 97-CV-8297, 2003 WL 21782633, at *15 (S.D.N.Y. July 31, 2003) (rejecting prison's complete ban on Five Percenter literature, materials, and activities, because the prison conceded the literature was "facially innocuous" and the prison's security concerns were

overblown because of the religious group's "law-abiding existence outside prison for the better part of 40 years").

Cavin v. Michigan Department of Corrections is a further example of how a lack of familiarity can cause prison officials to impose their own understanding of a religious practice in a way that specifically harms religious minorities. 927 F.3d 455, 459 (6th Cir. 2019). In *Cavin*, the prison denied a Wiccan prisoner's requested accommodation to celebrate a religious holiday with other members of his faith, and instead ordered "a second-best option" of allowing the prisoner to celebrate alone. *Id.* Thus, the prison's assumptions about the prisoner's religion caused it to entirely miss the point of the protections granted by RLUIPA. Indeed, as the Sixth Circuit noted, the prison's "approach reframe[d] the nature of what Cavin s[ought] to do: worship with others according to his beliefs." *Id.*; *see also Ben-Levi v. Brown*, 577 U.S. 1169 (2016) (Alito, J., dissenting from denial of certiorari) (addressing refusal to accommodate a Jewish study group based on prison official's mistaken belief that policy of requiring ten adults for a Jewish study group furthered religious practice more effectively than the prisoner's requested accommodation and noting that the same restrictions were not imposed on prisoners of other religions); *Charles v. Verhagen*, 220 F. Supp. 2d 937, 948 (W.D. Wis. 2002), *aff'd*, 348 F.3d 601 (7th Cir. 2003) (overturning policy of denying use of prayer oils—an act of "religiously motivated conduct" for Muslims—and rejecting prison's argument that use of Islamic prayer oils was not required under Islam).

Relaxing RLUIPA's standard would no doubt increase these kinds of examples. Indeed, the Eleventh Circuit's decision empowers prison officials to erroneously deny accommodation of a religious practice—either due to fear or speculation about accommodating a particular practice or by improperly imposing their own understanding of a religious practice on a prisoner's request—rather than hold such officials to the heavy burden imposed by RLUIPA.

B. Allowing Prisons to Burden Religious Exercise Without Adequate Support Threatens Religious Minorities.

The Eleventh Circuit's exercise of undue deference to the GDOC drastically alters the strict-scrutiny standard imposed by RLUIPA, effectively alleviating the need for the GDOC to prove its case with real facts and evidence specific to the prisoner requesting accommodation. Prison officials regularly attempt to rely on unfounded or overly sensitive risk concerns to deny religious accommodations. This is especially likely to occur in situations where a prison official either does not understand or does not approve of the religious practice at issue. It is therefore critical that prison officials be held to their burden of proof to support a challenged policy with more than "mere say-so." *Holt*, 574 U.S. at 369. Were the Eleventh Circuit's position maintained, a wide variety of religious accommodations would be denied based on minimal (if any) evidence of actual harm or threat of harm.

This concern is particularly acute in cases where Jewish prisoners seek dietary accommodations as part of their religious exercise. For example, in *Ackerman v. Washington*, prison officials relied on an asserted interest of "avoiding an annual $10,000 outlay"—in comparison to the prison's $39 million annual food budget—to deny Jewish prisoners' dietary requests. 16 F.4th at 184-85, 188. There, the Sixth Circuit noted that "deference does not mean blind deference" and rejected the prison's purported interest as "not compelling." *Id.* at 188, 190; *see also Ashelman v. Wawrzaszek*, 111 F.3d 674, 677 (9th Cir. 1997) (finding that prison's refusal to provide a kosher diet—based on the alleged costs and nutritional concerns—was not sufficiently supported). Rejection of the prison's position likely would not be the result if the same case were heard in the Eleventh Circuit under the rule applied below.

Further, prison officials often rely on their interest in ensuring prison safety and security (or other related interests, like uniformity, identification, etc.) to justify denial of a particular accommodation, but they fail to provide any evidence that a requested accommodation threatens such interests. For example, in *Benning v. State*, a prison prohibited Jewish prisoners from growing *payot* (ear locks). 864 F. Supp. 2d 1358, 1360 (M.D. Ga. 2012). But the prison provided no evidence of why growing ear locks would specifically threaten the prison's interests, and the prison's "bare assertion—that a grooming policy prohibiting earlocks furthers the Defendants' interest in uniformity—[was] not particularly persuasive." *Id.* at 1366; *see also Warsoldier*, 418 F.3d at 998 (rejecting as "conclusory statements" prison's security

justification underlying its hair-length policy that substantially burdened Native American prisoners' ability to grow their hair in accordance with their religious beliefs).

RLUIPA requires prisons to do more than simply say magic words—such as "safety," "security," or "expense"—in order to carry their statutory burden of proof. But under the Eleventh Circuit's interpretation, a prison need only make such bare assertions in order to prevent a wide variety of religious exercise.

C. Allowing Prisons to Improperly Ignore Other Prisons' Practices Threatens Religious Minorities.

By omitting the requirement to consider other prisons' practices, RLUIPA's least-restrictive-means requirement becomes a forgiving test, under which a prison has no obligation to explain why other institutions—across a wide range of security classifications—are able to permit the exact religious accommodation that it rejects. Indeed, were the Eleventh Circuit's position the rule, a variety of religious accommodations, although widely available at certain prisons, would not be considered, let alone granted, at others.

For example, in *Holt*, an Arkansas prison imposed an absolute ban on prisoners wearing beards for religious reasons. In striking down the Arkansas policy, the Court insisted that any deference otherwise owed to prison officials cannot be based on speculation or generalized security concerns. Because

the prison officials in *Holt* could not explain why the prison was unique from the forty-four other prison systems that would allow Holt's beard, the Court found it could not overcome the de facto presumption that the prison's outlier policy failed RLUIPA's least-restrictive-means test. *Holt*, 574 U.S. at 368-69; *see Warsoldier,* 418 F.3d at 1000 (overturning a hair-length limitation, in part, because that policy was stricter than ones adopted by the Federal Bureau of Prisons and various state prison systems, and the prison "offer[ed] no explanation why these prison systems are able to meet their indistinguishable interests without infringing on their inmates' right to freely exercise their religious beliefs").

Similarly, were the Eleventh Circuit's rule allowing prison officials to ignore other prisons' practices to be accepted, the Pennsylvania Department of Corrections' former policy limiting a prisoner to ten books in his cell—which substantially infringed on a prisoner's religious exercise of reading certain texts each day—might have been allowed to stand. *See Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007) (overturning the ten-book limitation, in part, because other prisons in the Pennsylvania system were able to achieve their compelling interests in health, safety, and security without rigid enforcement of the policy). Jewish prisoners would be denied access to kosher meals, even if such options are available and not deemed impracticably expensive at other institutions ***within the same challenged prison system***. *See Moussazadeh v. Texas Dep't of Crim. Just.*, 703 F.3d 781, 794-95 (5th Cir. 2012) (finding that compelling interest in denying kosher meals to a Jewish prisoner at a particular institution was

"dampened" by the fact the prison had been offering kosher meals at another institution for years); *Shakur v. Schriro*, 514 F.3d 878, 890 (9th Cir. 2008) (similar). And the Arizona Department of Corrections would have been allowed to ban a Muslim's use of scented religious oils, without considering the fact that "other well-run institutions permit the use of scented oils." *Nance*, 700 F. App'x at 632-33; *see also Ware v. Louisiana Dep't of Corr.*, 866 F.3d 263, 273 (5th Cir. 2017) (invalidating a Louisiana prison regulation requiring Rastafarian prisoners to cut their dreadlocks when the state failed to sufficiently distinguish "the grooming policies of the prisons of 39 other jurisdictions").

Further, in some cases, religious minorities may only receive an accommodation for an unfamiliar practice ***because*** another prison systems—with more familiarity or understanding of the religious practice at issue—grants the accommodation first. For example, in *Haight v. Thompson*, Kentucky prison officials also imposed an absolute prohibition on sweat lodges—which substantially burdened the religious exercise of Native American prisoners—and that policy was struck down largely because the Sixth Circuit looked to "how other prisons have dealt with these requests" and found that "[m]any other States, it turns out, permit Native American inmates to have access to sweat lodges for religious ceremonies." 763 F.3d at 563; *cf. Farrow v. Stanley*, No. Civ. 02-567, 2004 WL 224602, at *10 (D.N.H. Feb. 5, 2004) (finding that because thirty other prisons allowed sweat lodges, "further development of the record" was needed on "whether there are less restrictive alternatives to complete denial of access"). Thus, the

Eleventh Circuit's ruling removes one of the most powerful comparative elements from the least-restrictive-means test and thereby allows prison officials to burden religious practice even where evidence of an alternative exists.

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In sum, this Court should grant plenary review to vindicate the important RLUIPA rights of religious prisoners. Allowing the incorrect, deferential standard asserted by the Eleventh Circuit to stand would harm prisoners of all faiths, particularly those who espouse minority views.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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