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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This case squarely presents two circuit splits on legal issues of great importance for religious prisoners nationwide. As to each split, Respondent points to language in the Eleventh Circuit's opinion that pays lip service to the requirements enforced by this Court in *Holt* v. *Hobbs* and by other circuits, while ignoring the actual substance of the Eleventh Circuit's holding that effectively guts those requirements.

As to the first split, this Court held in *Holt* that prisons cannot prohibit religious practices that are accommodated by most other prison systems without providing "persuasive reasons" why they are "so different" from those other systems. 574 U.S. 352, 367, 369 (2015). At least seven other circuits faithfully enforce that requirement. But the Eleventh Circuit held that Respondent could justify its refusal to accommodate untrimmed beards merely by asserting that it had made a "calculated decision not to absorb the added risks that its fellow institutions have chosen to tolerate," App.25a, even though the district court found that Respondent did not even know how other jurisdictions manage beards. Respondent could not have even genuinely *considered* the feasibility of an accommodation it made no effort to understand.

On the second split, Respondent does not dispute that at least four circuits require prison officials to offer probative "evidence" to prove that their practices are the least restrictive means of pursuing compelling interests, agreeing that "speculation, exaggerated fears" and "mere say-so" are not sufficient. Opp. 23-26. Yet Respondent relied exclusively on opinion testimony about the hypothetical, speculative risks of untrimmed beards, unsupported by any empirical

evidence or data. And the Eleventh Circuit held, as a matter of law, that these "plausibl[e]" articulations of "risk" satisfied RLUIPA. App.21a.

In reviewing this case, the Court would also have the opportunity to clarify RLUIPA's burdens of proof and remedial framework. Respondent implausibly casts the Eleventh Circuit's decision as merely deferring to the district court's factual findings, when in reality the Eleventh Circuit *reversed* the district court's core findings and ruling and *vacated* the relief it entered—including the district court's injunction against enforcement of Respondent's existing half-inch policy, which the district court found to be completely unsupported. App.60a, 70a. And the Eleventh Circuit's holding that the district court erred by considering any less restrictive alternatives other than Smith's "final request" for an untrimmed beard, App.14a n.6, is flatly inconsistent with *Ramirez* v. *Collier*, 142 S. Ct. 1264 (2022), and effectively shifts RLUIPA's burden of proof.

Once Respondent's misdirection is cleared away, it becomes apparent that the legal issues are squarely presented, that the essential facts are undisputed, that (as the eight amici attest) these are important and long-standing legal disagreements, and that (as Judge Martin confirmed) the legal standard adopted in the Eleventh Circuit has rendered *Holt* "meaningless." These questions are also particularly important to the thousands of religious minority prisoners within the Eleventh Circuit. The Court should grant certiorari.

ARGUMENT

I. The Eleventh Circuit alone permits prison systems to ignore evidence of workable accommodations elsewhere.

Respondent does not dispute that after *Holt* every other circuit to address the issue has confirmed that when other well-run prison systems offer an accommodation, the burden is on a prison system denying the accommodation to consider the practices of those prison systems and, "at a minimum, offer persuasive reasons" why it is "so different." *Holt*, 574 U.S. at 367, 369; Opp. 22. Respondent argues that the Eleventh Circuit applied that rule. Opp. 17. But in substance the Eleventh Circuit eviscerated the rule, holding that the necessary "persuasive reasons" may be supplied merely by articulating a preference "not to absorb the added risks that its fellow institutions have chosen to tolerate." App.25a.

This is the direct opposite of *Holt*. Yet the Eleventh Circuit *had* to ground its holding in Respondent's manufactured claims about risk tolerance because, as the district court found, Respondent never even genuinely *considered* how other prison systems accommodate beards, much less provided "persuasive reasons" for rejecting their approaches. The district court's findings on this point are devastatingly clear:

- "GDOC has not even attempted to determine how other states manage inmates with beards." App.66a.
- "Notwithstanding GDOC's numerous assertions that beards lead to more violence, contraband smuggling, and security issues, GDOC offered no evidence showing that states that

allow beards experience more of these issues." App.66a.[1]

- "GDOC's assertions to the contrary [that beards cause jealousy among inmates] are pure conjecture as it has no experience with beards and has not sought to inquire about these issues with states that allow beards." App.58a.
- "GDOC has no information on the percentage of violent inmates in other prison systems, gang membership in other prison systems, or inmates serving a life sentence in other prison systems." App.66a.
- "The testimony of GDOC's director made clear that … he is 'not adding to the already difficult task of managing inmates' by checking to see how beards are managed elsewhere." App.66a.

Given these findings, it is unsurprising that the two purportedly "persuasive" reasons Respondent does offer for breaking from nationwide norms (low staffing and a supposed history of problems with beards), Opp. 13, are nothing more than mere speculation. The district court specifically found that GDOC's staffing is similar to that of the federal Bureau of Prisons and about average for systems nationwide, and that GDOC had "no experience with beards," App.58a, and thus could not have "demonstrated a history" of "specific issues" with beards. Opp. 13; App.48a, 65a-66a, 70a. Respondent's own decision to offer admittedly "low" pay to prison guards, Opp. 4, is hardly a compelling government interest. See*, e.g.,* Former Prison

[1] See also Former Prison Officials Amicus Br. 7-8 & n.2 (citing examples of how beards are safely accommodated).

Officials Amicus Br. 17 ("personnel challenges, without something more, cannot constitute a persuasive reason why an institution is *different* in a way that prevents it from implementing policies commonly accepted in other jurisdictions").

Finally, Respondent claims that other jurisdictions might, *theoretically*, deny Smith a beard because of his disciplinary record. As the petition explained, this is pure appellate speculation—it is both unfounded and beside the point in light of GDOC's policy *categorically* prohibiting all beards longer than a half-inch. Pet. 18-19. Neither Respondent nor the district court have made any individualized determination that Smith is personally "unsuitable" for an untrimmed beard. Opp. 12. The district court instead found that "GDOC has failed to persuade the Court that Smith should be disallowed a religious exemption" because of his personal history. App.69a. Furthermore, the Congress that unanimously passed RLUIPA obviously understood that prisoners often have violent or disruptive pasts. The disciplinary violations Respondent points to are approaching a decade old, Opp. 6-7, and none involved abuse of a religious accommodation. Smith's more recent record, while not perfect, is consistent with the arguments of amici (and the testimony at trial) that protecting prisoners' religious exercise rights can reduce violent behavior. App.67a; see also Prison Safety Amicus Br. 5-22 (robust religious accommodations benefit prisons and prisoners).

The district court's findings make clear that GDOC chose to be willfully ignorant of the beard accommodation practices of other jurisdictions and offered no evidence to show that its prison system

differed in any significant way from the at least 39 other jurisdictions that accommodate religious beards. App.66a. Respondent therefore could offer only an *ipse dixit* about risk tolerance instead of the "persuasive reasons" needed to satisfy *Holt*. Pet. 12. In at least seven other circuits, this would be fatal as a matter of law. Pet. 13-19. Instead, on these facts, the Eleventh Circuit ruled in favor of GDOC, vacated the district court's injunction, and reversed the decision below. App.27a-28a. The circuit split could not be clearer.[2]

II. The Eleventh Circuit's reliance on unsupported speculation is by definition "mere say-so" and contradicts what Respondent admits four other circuits require.

Respondent does not dispute that four circuits place the burden on prison systems to justify, with probative evidence, that their policies satisfy strict scrutiny. Pet. 21-25; Opp. 25-26. The Eleventh Circuit's reasoning eviscerates that requirement by accepting as sufficient the otherwise unsupported testimony of officials articulating what the district court found were merely "plausible" "risks." App.21a-22a, 25a. See Former Prison Officials Amicus Br. 4, 15-17; CLS Amicus Br. 15-17.

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[2] Respondent's nitpicking of a few other cases in this split is unpersuasive. *Jova* specifically "consider[ed]" the standard adopted in *Warsoldier*, 582 F.3d at 416; *Ackerman* applies *Holt*'s standard and concludes that prior accommodations *by the same prison system* is an *a fortiori* case, 16 F.4th at 191; and *Yellowbear* concluded that the prison system's comparisons were insufficient, but it did not dispute that the government must still "demonstrate the claimant's alternatives are ineffective," 741 F.3d at 63.

Respondent presented no evidence to support its arguments, just the testimony of its own officials who provided unsupported speculation about the potential risks associated with beards. But the district court found, explicitly and repeatedly, that those witnesses had little experience with beards themselves (as GDOC only began permitting half-inch beards after *Holt*) and no knowledge of or experience with practices in jurisdictions that accommodate beards. *Supra* 4. The district court also found that Respondent's concerns about contraband, jealousy, and inmate identification were unsupported by evidence. See*, e.g.,* App.57a ("GDOC has failed to demonstrate why beards would pose a contraband problem if they were searched along with head hair, mouths, and clothes."); App.63a-64a (finding that GDOC's concerns about identification could be addressed by enforcing its existing policies, perhaps with minor improvements).

The district court could find only that Respondent's concerns about untrimmed beards were "plausible," *e.g.,* App.61a-62a, because those concerns were not based in anything other than Respondent's uninformed speculation. To rule for Respondent, then, the Eleventh Circuit had to hold that these speculative, "plausible," concerns were "enough," because GDOC somehow is entitled to treat any "plausible" danger as an "unmanageable" threat. App.21a-22a. By holding that uninformed opinion testimony about "plausible" hypothetical concerns satisfied Respondent's burden

of proof under strict scrutiny, the Eleventh Circuit *by definition* deferred to "mere say-so."[3]

All of the cases on the other side of the split would have come out differently under the Eleventh Circuit's recasting of the standard to accept plausible risks as sufficient. Indeed, the testimony and findings that this Court in *Holt* characterized as "mere say-so" closely resemble the record here.

In *Holt*, Arkansas similarly relied on testimony from prison officials with a "combined 70 years of experience" who cited anecdotal evidence of what could be hidden in a beard, claimed that prisoners like Holt in "maximum security facilities" are a unique security risk, and raised identical concerns regarding contraband, identification, and the supposed dangers of searching beards. Resp. Br. 54-55, *Holt*, *supra* (No. 13-6827). And Arkansas wrapped itself in the Eleventh Circuit's pre-*Holt* decision in *Knight*, arguing that it had made a calculated decision not to accept the risks assumed by other prison systems. *Id.* at 42-43, 60 (citing *Knight* v. *Thompson*, 723 F.3d 1275 (11th Cir. 2015)). The magistrate judge (whose findings were wholly adopted by the district court) even found that Arkansas's witnesses had articulated "reasonable" "safety and security concerns" to which deference was due. Appx. at 168, *Holt*, *supra* (No. 13-6827).

Nonetheless, this Court held that Arkansas's testimony, anecdotal evidence, and "reasonable"

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[3] Respondent argues that both the Third and Fourth Circuits apply the correct legal standard, but similarly relies solely on the courts' invocation of *Holt* to overlook their actual holdings. Compare Opp. 25-26 with Pet. 25-27.

concerns *were* "mere say-so" since they were not supported by actual, probative evidence sufficient to prove that the state's policy was the least restrictive means of advancing its compelling interests. *Holt*, 574 U.S. at 369. All the more so here. Respondent's *own characterization* of the record confirms as much. Opp. 25 (pointing to "testimony" and "anecdotal evidence" based on "decades of combined experience as corrections officers" as the relevant evidence).

By treating GDOC's subjective risk preferences as sufficient, App.21a, the Eleventh Circuit's holding effectively resurrects the deference to prison officials' "mere say-so" that this Court condemned in *Holt* and transforms strict scrutiny into a requirement that the defendant merely utter the right incantation. Contra *Holt*, 574 U.S. at 364 (courts may not abdicate "the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard"); see CLS Amicus Br. 16 ("the court of appeals cut the legs out of the statutorily required strict scrutiny").

The Eleventh Circuit, like the Third and the Fourth, thus rejects *Holt* and splits with the approach taken by at least four other circuits. Pet. 19-29.

III. The Eleventh Circuit's approach to remedies under RLUIPA conflicts with *Ramirez* and further supports review.

As Petitioner explained, Pet. 29-31, *Ramirez* confirmed that the burden of proof is on GDOC to rebut obvious alternative religious accommodations and, of course, to rebut the alternative accommodations *actually raised* by Smith as part of the least restrictive means analysis. In response, Respondent misreads *Ramirez* and ignores the fact that a three-inch beard

was both suggested by Smith's mention of a fist-length beard and an obvious alternative well supported by the record. App.44a n.5; App.70a.

Ramirez confirms that an RLUIPA defendant bears the burden to prove that "its policy is the least restrictive means of furthering a compelling government interest," and to rebut "obvious alternative[]" less restrictive means, including obvious alternatives that were not specifically proposed by the plaintiff. *Ramirez*, 142 S. Ct. at 1281(cleaned up); see RFI Amicus Br. 12-15. Like Texas in *Ramirez*, the Eleventh Circuit got the burdens backward by holding that Respondent had no obligation to consider or rebut any less restrictive alternatives other than Smith's "final request for relief" at trial, which it claimed was an untrimmed beard. App.14a n.6.

Here, in a case about beard length, a less-than-full-length beard is both an "obvious" alternative and an alternative that was specifically raised by Smith. See RFI Amicus Br. 16-18 ("partial accommodation is simply a less permissive subset of the full relief the plaintiff seeks"). The district court, which was intimately familiar with the record, found that "unlike in *Knight*, Smith has testified that although it is preferable in his religion not to trim his beard, he must maintain 'at least no minimum than a fistful ... to be able to grab a fistful of [] beard.'" App.70a (quoting Doc. 183-3 at 25); App.44a. There was also extensive discussion at trial, which featured prominently in the district court's opinion, about the obvious relevance of GDOC's policy permitting three inches of head hair—a policy that the district court correctly recognized was flatly inconsistent with GDOC's contention that any beard longer than a ½-inch posed intractable

safety or contraband concerns. See, *e.g.*, App.54a, 60a, 62a.

Of course, Respondent may not be required to consider less restrictive possibilities that are genuinely unforeseeable, see Pet. 31, such as the possibility that Smith's religious needs might have been satisfied by a shorter beard that was "dyed blond" or had "braids," Opp. 30. But the Eleventh Circuit has twisted that limitation in a way that turns RLUIPA litigation into a game of "gotcha," relieves the government from having to defend its actual policy, and flips the statutory burden of proof in violation of *Ramirez*. Smith undeniably challenged Respondent's existing beard policy, and the district court squarely held that Respondent failed to carry its burden to justify that policy under RLUIPA. The Eleventh Circuit's holdings that it was error to enjoin a policy that Respondent failed to support, or to give Smith any relief at all if it found he was not entitled to an untrimmed beard, clearly misunderstand RLUIPA. While correcting these errors will not give Smith full relief, Pet. 31, it would provide important guidance to lower courts and could be done in conjunction with resolving the two circuit splits described above.

IV. As amici confirm, this is an ideal vehicle to address important and recurring legal issues.

This case is an ideal vehicle to resolve the important legal issues presented here, and Respondent does not (and cannot) raise any hurdles that would prevent this Court from reaching them. The relevant facts are clear from the record and undisputed: (1) Smith's sincere religious beliefs require him to grow an untrimmed beard, App.49a; (2) Respondent denied

Smith this religious accommodation, a denial it admits burdened his religious practice, and it categorically denies all inmates the same accommodation, App.15a, 49a; and (3) Respondent presented no actual evidence, just speculative testimony from its own employees, to support this denial, App.60a-62a. This case also comes to the Court after a full bench trial with a substantial record showing the feasibility of accommodating Smith's request. Pet. 31-32.

And the significance of the issues here presented is confirmed by the eight amicus briefs filed in support of Smith. As amici explain, this case is of crucial importance to religious minority prisoners in the Eleventh Circuit, which covers three states with a disproportionately high incarceration rate and "thousands" of prisoners of minority faiths with facial hair requirements. See Sikh Coalition Amicus Br. 13; JCRL Amicus Br. 16 (impact on religious minorities); CLCMA Amicus Br. 6 (Muslims "disproportionately represent almost nine percent of state prisoners."). And religious beard accommodations are common, easily administered, and advance a prison system's interests in safety, security, and prisoner reform. See Former Prison Officials Amicus Br. 7-9. Finally, the legal dispute is clearly teed up by the decision below and is a longstanding, entrenched split. See Eight Legal Scholars Amicus Br. 8-11.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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