No. _____

In The
Supreme Court of the United States

BRAD FAVER,

Petitioner,

v.

HAROLD CLARKE, Director,
Virginia Department of Corrections,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The following question stems from the Fourth Circuit Court of Appeals' Published Opinion regarding claims asserted by Mr. Faver:

1. Whether the Appellate Court erred in failing to shift the burden to the Defendant's once Mr. Faver established a sincerely held belief that was burdended by the Defendant's single vendor policy.

2. Whether the Appellate Court erred in failing to find that the District Court clearly erred when it found that the Defendant had considered and rejected a contract with an Islamic vendor as a reasonable less restrictive alternative.

PARTIES TO THE PROCEEDING

Brad Faver is the Petitioner. The Respondent is Harold Clarke, Director of Virginia Department of Corrections.

RELATED CASES STATEMENT

- *Faver v. Clarke*, No. 17-1733, United States Court of Appeals for the Fourth Circuit, Judgment Entered February 1, 2022
- *Faver v. Clarke*, No. 7:16-cv-00287-JCH, United States District Court for the Western District of Virginia, Order Dismissing Case Entered September 30, 2019

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PETITION FOR WRIT OF CERTIORARI

Mr. Faver respectfully submits his petition for a writ of certiorari to review the Fourth Circuit Court of Appeals' Published Opinion.

OPINIONS BELOW

The Published Opinion of the United States Court of Appeals for the Fourth Circuit, which affirmed the District Court, is available at *Faver v. Clarke*, 24 F.4th 954 (4th Cir. 2022), and is reprinted in the appendix at App. A. The Order of the United States District Court for the Western District of Virginia, which found in favor of the Respondent, is available at *Faver v. Clarke*, 2019 U.S. Dist. LEXIS 169353 (W.D. Va. 2019), aff'd, 24 F.4th 954 (4th Cir. 2022) and is reprinted at App. B.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit rendered its Published Opinion February 1, 2022. (App. A.) The March 1, 2022 Order of the United States Court of Appeals for the Fourth Circuit Denying Rehearing is reprinted at App. C. As a result, this Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et seq.*, provides, in relevant part:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. § 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –
>
> **(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.)

STATEMENT OF THE CASE

A. Factual Background

1. Relevant Policies

The Respondent has a contract with Keefe Commissary ("Keefe") to provide all commissary items, including religious items, to Virginia Department of Corrections ("VDOC") inmates. The contract between the VDOC and Keefe contains several provisions for the security of the facility and provides a financial

incentive for Keefe to ensure the compliance of its products with the VDOC's security needs. (Joint Ex. 5, JA, p. 154.) No such contract has been established or considered with any religious vendor. (Trial Tr., JA, 156:5-25.) Operating Procedure (OP) 802.1, titled Offender Property, sets out the requirements for the purchase of items by inmates, including religious items. (Joint Ex. 2, JA, p. 178.) This policy is considered the single vendor policy and requires all purchases, including religious items, to go through Keefe Commissary. *Id.* OP 841.3, Offender Religious Programs, provides both the list of religious items approved for purchase by inmates as well as the method for getting new items for purchase approved. (Joint Ex. 4, JA, p. 225.) Under these two policies, OP 802.1 and 841.3, Keefe Commissary tracks all of the religious items purchased by inmates after Keefe sources them from approved religious venders, such as Halalco. *Id.* The VDOC also has "a large master listing of what we have for sale that Keefe is allowed to sell, or any contractor for that matter." (Trial Tr., JA, 117:15-17.)

On the approved religious items list, there are multiple religious oils available, which Keefe sources from the approved religious vendors and the VDOC then approved as safe. *Id.* There is an exception for the purchase of books, religious texts, and periodicals. (Joint Ex. 3, JA, p. 213.) Rather than purchasing from Keefe, inmates may purchase books, religious texts, periodicals or other publications directly from vendors, including Halalco. *Id.*

2. Facts relevant to the Respondent's compelling governmental interest

The Respondent has alleged two separate, but interrelated and compelling governmental interests addressed by the single vendor policy: security and cost containment. (Trial Tr., JA, 83:11-19.) The use of a contract vendor, as opposed to a vendor not under contract with the VDOC, addresses "the actual administrative burden with having offenders directly source from independent vendors **that are not contractually obligated**," which is "extra staff, costs, search procedures." (Trial Tr., JA, 132:14-18.) A key factor contributing to this cost reduction is that "without that financial relationship, contractual relationship . . . small vendors [inmates order from directly] may be connected with a specific inmate." (Trial Tr., JA, 119:12-13.) Anonymity between vendor and inmate resulting from the fact that all orders go to one vendor provides an extra level of protection. (Trial Tr., JA, 120:13-15.)

3. Facts relevant to the government's use of a contract with Keefe Commissary as a single vendor so as to address security concerns

The Respondent has a well-established procedure for the introduction of personal property into the VDOC's facilities. (Trial Tr., JA, 84-85.) All packages received by any facility go to a processing facility outside of the secure perimeter. (Trial Tr., JA, 84:1-9.) The packages are then opened, searched, x-rayed, scanned, and placed in uniform plastic bags for delivery inside

the facility. (Trial Tr., JA, 84:18-85:4, 85:16-22.) All items entering the facility through mail, even those from Keefe, go through this process. (Trial Tr., JA, 84-85.) Any item coming into a VDOC facility by any means is also searched, x-rayed, or scanned. (Trial Tr., JA, 85:2-3.)

The Respondent has asserted that the "contract with Keefe provides [DOC] the ability to have financially contractual methods of enforcing security concerns." (Trial Tr., JA, 152:23-25.) Specifically, the Respondent has stated that the "financial contract" makes the VDOC more comfortable with Keefe because the financial incentive of the contract ensures that Keefe provides safe and compliant items purchased by the innates. (Trial Tr., JA, 113:13-14, 114:4-6, 116:3-4.) The Respondent has stated that "the contractual obligations and the fiduciary responsibility" found within the subject contractual relationship gives the VDOC confidence because contractual obligations and responsibilities help ensure that Keefe will "abide by DOC's operating procedures and provide things that are only already approved." (Trial Tr., JA, 114:4-5, 116:3-4.)

This single vendor contract provides certain security precautions in section "F. Security Rules and Regulations." (Joint Ex. 5, JA, p. 154.) The majority of these contractual security provisions provide for the security of Keefe employees in the facility. *Id.* Section F, paragraph 11, however, relates to mail or packages received at the facility, stating all mail or packages "will be

searched prior to being delivered inside the secured perimeter." *Id.* at F(11).

4. Facts relevant to the government's use of a contract with Keefe Commissary as a single vendor so as to address cost concerns

Without having the assurance of a contract with a vendor providing the item(s), the DOC has to screen "all those items to ensure that they are actually approved – from the actual approved vendor, or vendor that the box says it is." (Trial Tr., JA, 132:19-23.) Items "purchased through a third party" that are not in a contractual relationship with the Respondent requires the Respondent to "verify the offender actually requested this" and "search the item well." (Trial Tr., JA, 134:12-16.) "[T]he actual administrative burden with having offenders directly source from independent vendors that are not contractually obligated" to the VDOC "is extra staff, costs, search procedures." (Trial Tr., JA, 132:13-18.)

With contracted vendors, like Keefe, however, the Respondent is required to complete only "box checking as opposed to hard-core searching" of the incoming packages. (Trial Tr., JA, 134:8-9.) *This confidence comes from the contract*. (Trial Tr., JA, 114:4-5, 116:3-4.) In fact, when dealing with books, which cannot be provided by Keefe, the Respondent's witness stated, "we would be a lot more confident about security issues

if . . . [the books] were being provided by the contract vendor." (Trial Tr., JA, 136:6-8.)

5. Facts relevant to the Respondent's failure to consider entering into a contract directly with a religious vendor

The Respondent has the ability to contract with religious vendors for the provision of religious items to inmates, a fact that would result in one religious vendor for religious items, such as prayer oils. (Trial Tr., JA, 153:9-11.) A contract regarding one religious vendor could have the same provisions as the Keefe contract, providing the same financial incentives to enforce security concerns. (Trial Tr., JA, 153:9-11.) A contract with a religious vendor could also provide the same security provisions and financial incentives as the Keefe contract. (Trial Tr., JA, 155:5-10.) There are multiple religious vendors that would wish to have such a contract, which would permit the Respondent to shop for the best religious vendor for said contract. (Trial Tr., JA, 153:17-25.)

But the Respondent did not consider a contract similar to Keefe's with a religious vendor to provide religious items to inmates. Specifically, the Respondent's witness testified that she "did not know for sure" but the DOC "probably have at some point" considered it. (Trial Tr., JA, 156:5-15.) The Respondent's witness ultimately admitted that contracting with an Islamic vendor had not been considered "at this time." (Trial Tr., JA, 156:25.)

Notably, the contract with Keefe provides for Keefe workers to operate a "Commissary Window Operation" and a "Commissary Bag Operation," both inside and outside the secure perimeter, to deliver purchased items to inmates. (Joint Ex. 5, JA, p. 154.) This is relevant because this portion of the contract would still permit Keefe to deliver (not sell) prayer oils purchased from a separate religious vendor to the inmates without the need for additional staff or facilities.

B. District Court's Decision

1. The District Court's Finding that the single vendor policy was the least restrictive means of achieving the Respondent's interest

The District Court granted judgment in favor of the Respondent, finding that Mr. Faver had failed to prove that "a contract between VDOC and an outside Islamic vendor is even possible." (App. 51.) Relevantly, the District Court acknowledged that Respondent never considered and rejected the proposed less restrictive alternative, that is entering into a contract with an Islamic vendor similar to that with Keefe, which is what meets the Respondent's identified government interest. (App. 50.) To justify this departure from the standard, the District Court misapplied *Legtus*, which states that a defendant need not refute each and every conceivable alternative but must, instead, only refute the alternative schemes offered by the challenger, which refutation must be by evidence in the record. *Legatus v. Sebelius*, 988 F.Supp.2d 794, 811

(E.D. Mich. 2013). The District Court thus failed to shift the burden to the Respondent after Mr. Faver proved a substantial burden on his sincerely held religious beliefs, as required by this Court's decisions. *Holt v. Hobbs*, 574 U.S. 352, 362 (2015) (holding that upon a showing of a substantial burden to plaintiff's exercise of religion, burden shifts to the government to show its policy is the least restrictive means of achieving its compelling government interest).

2. The Fourth Circuit Court of Appeals' Decision

The opinion of the Fourth Circuit Court of Appeals is published. Thus, the findings and reasoning supporting the Fourth Circuit's holding are precedential. The Fourth Circuit, critically, held that it is far from clear that the Respondent could simply add a single Islamic vendor, noting that the Respondent has more than 40 religious groups that would be entitled to request a similar contractual arrangement as Faver should he prevail, and therefore the classic rejoinder of bureaucrats through history, rejected by this Court, "if I make an exception for your, I'll have to make one for everybody, so no exceptions" is persuasive in this case. (App. 40); *Holt*, 574 U.S. at 368. The Dissent correctly noted, the Respondent stated it is the contract that gives the Respondent confidence in the safety and security of the single vendor policy, yet offered no evidence as to why a similar contract with an Islamic vendor would not offer the same confidence nor offered any evidence that receiving items from additional vendors alone

would create safety and security issues. (App. 22.) The only evidence against the policy was the Respondent's assertion that it would have to do the same for other faith groups, without any evidence they could meet the rigorous burden of demonstrating a substantial burden to a sincerely held religious belief. (App. 23.)

REASONS FOR GRANTING THE PETITION

The right at issue is the following:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. § 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –
>
> **(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.)

The VDOC created a single vendor policy that burdens Mr. Faver's religious beliefs because the contract with that vendor addresses VDOC's interest in safety and security. The Fourth Circuit has created precedent

wherein the "classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions" is accepted, defying this Court's rejection of that precise argument. *Holt*, 574 U.S. at 368. Having accepted this excuse, the Fourth Circuit held that the single vendor policy challenged was the least restrictive means of achieving the VDOC's legitimate interest despite the VDOC having failed to provide any evidence that the proposed contract with an Islamic vendor would not meet that same interest. (App. 16-17.)

I. The VDOC Offered No Evidence That A Contract With An Islamic Vendor Would Not Be Possible Despite Testifying That It Is The Contractual Relationship That Meets Its Legitimate Interest

The VDOC conceded that its single vendor policy was a substantial burden on Plaintiff's religious exercise. (App. 18.) As such, the burden shifts to the VDOC to demonstrate that its policy is the least restrictive means of achieving a compelling government interest. *Holt*, 574 U.S. at 362. One of the proposed alternatives was to enter into a contract similar to that with the current single vendor with an Islamic vendor to provide religious oils. (App. 21.)

As the dissenting opinion notes, the VDOC representative testified that what gives the VDOC confidence in the safety and security served by the single vendor policy was the contractual obligations and

fiduciary responsibility that a contract with the vendor provides. (App. 21.) The representative further explained that a financial contract with a vendor creates an expectation that the service will definitely be provided or the contract will cease. (App. 22.)

The representative offered no reason why such a contract with an Islamic vendor would fail to provide the VDOC the same confidence. (App. 22.) The representative further testified that entering into such a contract was possible. (App. 22.) Having thus testified, the only evidence against the effectiveness of the proposed contract with an Islamic vendor is that if the VDOC did so for and Islamic vendor it would have to do so for other faith groups. (App. 22.) The VDOC representative provided no evidence, testimonial or otherwise, that there is any other faith group that suffers a substantial burden to any sincerely held belief as a result of the single vendor policy.

Having provided no evidence that the proposed alternative was ever considered, or that it would not be effective in achieving the VDOC's legitimate interests, it was clear error to hold that the single vendor policy was the least restrictive means of achieving the VDOC's legitimate interests. *Holt*, 574 U.S. at 362. As such, the District Court committed clear error in finding that the proposed alternative would create at least some of the same safety and security concerns the VDOC experienced prior to the single vendor policy. *Id.* Failing to require the VDOC to meet its burden undermines Congress' intent to provide "broad protection of religious exercise," as demanded within the Religious

Land Usage and Institutionalized Persons Act. § 2000cc-3(g). As has been repeatedly held, Courts must hold prison officials to their statutory burden and cannot rubberstamp the decisions of prison administrators. *Holt*, 574 U.S. at 369; *Lovelace v. Lee*, 472 F.3d 174, 190 (4th Cir. 2006) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)).

II. The Fourth Circuit's Opinion Violates This Court's Repeated Rejection Of The Classic Rejoinder Of Bureaucrats

This Court has repeatedly rejected arguments against RLUIPA claims that resort to the "classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Holt*, 574 U.S. at 368. Despite this repeated rejection, the Fourth Circuit permitted the VDOC to escape its burden under RLUIPA of considering and rejecting Mr. Faver's proposed alternative on that basis. (App. 14.) This Court should again reject that argument. There has been no other evidence that Mr. Faver's proposed alternative of entering into a contract with an Islamic vendor would not achieve the VDOC's legitimate interest. (App. 14.)

This Court must ensure that the Fourth Circuit, and courts within it, "hold prisons to their statutory burden" and "not assume a plausible, less restrictive alternative would be ineffective." *Holt*, 574 U.S. at 369. While a prison's interest in security deserves sensitivity, Courts cannot rubberstamp or mechanically

accept the decisions of prison administrators. *Lovelace v. Lee*, 472 F.3d 174, 190 (4th Cir. 2006) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)). As such, this Court should grant this petition and reverse the Fourth Circuit's decision, once again rejecting the "classic rejoinder of bureaucrats."

CONCLUSION

The Fourth Circuit's published opinion clearly defies the broad protection of religious exercise that Congress explicitly sought to provide with the Religious Land Usage and Institutionalized Persons Act and could haunt this Court's precedent for years to come. § 2000cc-3(g). This case is about more than Mr. Faver's religious liberty, it is about the law and its proper application to the protection of religious liberty. Please accept this Petition and vacate the Fourth Circuit's harmful opinion.

Respectfully submitted this 30th day of June, 2022.

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