

No. _____

**In The
Supreme Court of the United States**

LOUISIANA DEPARTMENT
OF CORRECTIONS, et al.,

Petitioners,

v.

CHRISTOPHER JEROME WARE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent Christopher Ware, a Louisiana state prison inmate convicted of sexual battery, is a Rastafarian who wears his hair in “dreadlocks that fall past his shoulders” for religious reasons. App. 1. Ware has vowed not to cut or style his dreadlocks and intends to grow them to an indefinite size, thickness, and length over his 40-year sentence. App. 52. Diverging from the Eleventh Circuit’s decision in *Knight v. Thompson*, 796 F.3d 1289 (11th Cir. 2015), a Fifth Circuit panel held that the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc et seq. (“RLUIPA”), forbids Petitioner Louisiana Department of Corrections from requiring Ware to cut his hair under established inmate grooming policies.

The question presented is:

Does RLUIPA require a state prison to allow religious prisoners to wear dreadlocks of unlimited size, thickness, and length?

PARTIES TO THE PROCEEDING

Petitioners Louisiana Department of Corrections and Secretary James LeBlanc were Defendants in the district court and Appellees in the court of appeals.

Respondent Christopher Jerome Ware was Plaintiff in the district court and Appellant in the court of appeals.

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INTRODUCTION

The Louisiana Department of Corrections (“DOC”) requires that male inmates keep their hair short, based on its considered belief that short hair makes the prison population safer, healthier, and easier to administer. Inmate Christopher Ware is a Rastafarian who wishes to grow uncut dreadlocks of indefinite size, thickness, and length for the entirety of his 40-year prison sentence: even to his feet, if it comes to that. Although DOC endeavors to protect its inmates’ religious exercise, it cannot grant Ware the exemption he wishes.

Yet a panel of the Fifth Circuit has held that it *must* grant Ware such an exemption under RLUIPA. The panel held that DOC’s short-hair policy serves no compelling purpose – rejecting explanations based on prison safety, hygiene, and contraband control – and (in the alternative) is not the least restrictive means of furthering any such purpose. That result quite literally compels DOC to permit floor-length dreadlocks in its prisons.

That outcome, and its underlying reasoning, is nothing short of shocking. It threatens serious disruptions in the Louisiana prison system and elsewhere. And it creates conflicts with several other circuits, most notably the Eleventh, which has reached the opposite result in an indistinguishable case involving Alabama's prison grooming standards. This Court's decision in *Holt v. Hobbs*, 135 S.Ct. 853 (2015) did not eviscerate all state grooming restrictions in prison settings, nor does it command a state to permit unrestricted, unlimited growth of dreadlocks.

This Court should grant review to resolve the conflict between the circuits and forestall the lower court's disruption to state prison administration.



OPINIONS BELOW

The opinion of the court of appeals is reported at 866 F.3d 263. App. 1-21. The opinion of the district court is unreported but is available at 2016 WL 4916844. App. 24-55.



JURISDICTION

The court of appeals entered its judgment July 28, 2017. App. 1. On October 11, 2017, Justice Alito extended the time for filing a petition for writ of certiorari to November 27, 2016. No. 17A387. On November 14, 2016, Justice Alito further extended the time for

filing a petition for writ of certiorari to December 27, 2017. *Id.* This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction under 28 U.S.C. §§ 1291 and 1331.



STATUTORY PROVISIONS INVOLVED

RLIUPA 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 . . . 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).

Additional relevant statutory and regulatory provisions are reproduced in the appendix.



STATEMENT OF THE CASE

A. The RLUIPA Framework

In *Employment Division v. Smith*, this Court held that “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability[.]” 494 U.S. 872, 879 (1990) (quotes omitted). Following *Smith*, Congress

took action “to provide greater protection for religious exercise than is available under the First Amendment.” *Holt v. Hobbs*, 135 S.Ct. 853, 859-60 (2015).

Congress’s first response was the Religious Freedom Restoration Act of 1993 (“RFRA”), 107 Stat. 1488, 42 U.S.C. §§ 2000bb et seq., which requires that “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless the government shows that burden furthers “a compelling governmental interest” and is the “least restrictive means” of doing so. 42 U.S.C. §§ 2000bb-1(a), (b). After this Court invalidated RFRA’s application to States as exceeding Congress’s authority under Section 5 of the Fourteenth Amendment, see *City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress enacted RLUIPA, which relies on Congress’s Commerce Clause and Spending Clause authorities and provides targeted protection for religious exercise (1) in the context of State land-use regulation, 42 U.S.C. § 2000cc, and (2) by persons “residing in or confined to” institutions, *id.* § 2000cc-1. RLUIPA thus reflects Congress’s effort to ensure that State prison systems reasonably accommodate the religious exercise of their inmates.

As applied to prison inmates, RLUIPA mirrors the standard originally enacted in RFRA. See *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 436 (2006) (explaining RLUIPA allows prisoners “to seek religious accommodations pursuant to the same standard as set forth in RFRA”). Prisoners who bring RLUIPA claims must first show that a

prison policy substantially burdens religious exercise that is “grounded in a sincerely held religious belief.” *Holt*, 135 S.Ct. at 862. Once the prisoner does so, the burden shifts to the State to justify its policy by showing that it “(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); *see Holt*, 135 S.Ct. at 863. RLUIPA carefully balances the sometimes competing interests of prisoner religious exercise and prison administration. The statute provides “expansive protection for religious liberty,” *Holt*, 135 S.Ct. at 860, based on Congress’s judgment that States should not substantially burden religious exercise without genuine justifications.

RLUIPA, however, does *not* require “courts [to] blind themselves to the fact that the analysis is conducted in the prison setting.” *Id.* at 866. When Congress enacted RLUIPA, it was “mindful of the urgency of discipline, order, safety, and security in penal institutions,” and “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 v. Wilkinson*, 544 U.S. 709, 723 (2005) (quoting 146 Cong. Rec. 16699 (2000)). RLUIPA therefore does not “elevate accommodation of religious observances over an institution’s need to maintain order and safety.” *Id.* at 722. Rather, it recognizes that “[p]rison

officials are experts in running prisons and evaluating the likely effects of altering prison rules, and courts should respect that expertise.” *Holt*, 135 S.Ct. at 864.

Louisiana takes its RLUIPA obligations seriously. It accommodates prisoners exercising many faiths, including Judaism, Islam, Wicca, the Institute of Divine Metaphysical Research, and Native American religions, in addition to Christian denominations. ROA.3550-51. For instance, inmates are allowed special religious diets and may take their meals at particular times during holy periods. Tr. 250:3-6, :15-19; *see also* ROA.3548 (Louisiana prison policy stating that “[o]ffenders will not be required to take foods that are forbidden by their faith and a nutritionally acceptable alternative shall be provided as a replacement when the objectionable food is the main entrée”). Inmates also may possess or wear items of religious significance that would not otherwise be permitted. For example, Muslim inmates have special permission to wear kufi caps, Tr. 388:12-16, and DOC publishes a list of items inmates may possess for religious exercise – including articles of clothing and other objects – many of which would not be permitted to inmates otherwise. ROA.3550-551; *see also* Tr. 307:16-308:3.

B. Facts and Procedural History

1. Ware’s Dreadlocks

Ware is a DOC inmate, now serving two concurrent sentences of 40 years of hard labor after a 2014 conviction (on guilty plea) for two counts of sexual

battery. App. 3. In late 2011 or early 2012 Ware joined the Rastafari faith and “took what he describes as the ‘Vow of the Nazarite,’ one aspect of which requires him not to cut or style the hair on his head.” App. 25. He began growing his dreadlocks while awaiting trial in the Caddo Correctional Center, the local detention facility operated by the Caddo Parish Sheriff. App. 25.

At the time of trial, Ware’s dreadlocks had grown past his shoulders. He does not braid them, but forms them by “separating, gathering and squeezing groups of hair strands” when he washes his hair. App. 30. At the time of trial, Ware wore approximately 16 dreadlocks, each roughly ¼-inch thick. App. 2. Ware testified that he would “[n]ot willingly” allow his dreadlocks to be cut. App. 2. But “it is Ware alone who chooses how thick, how long and how many dreadlocks he forms after each time he washes his hair.” App. 38.

Ware plans to let his hair grow for the entirety of his 40-year sentence. ROA.1892. He was quite candid regarding the potential consequences:

Q. So another twelve years of growing [your hair] could be past your feet length then, couldn’t it?

A. It could.

ROA.1892.

The Caddo Correctional Center where Ware is now held – like some other parish detention facilities operated by sheriffs – permits Ware to keep his dreadlocks.

Parish facilities are governed by a set of DOC regulations called the Basic Jail Guidelines (“BJG”). App. 13. The BJG do not require that inmates maintain short hair.

Some inmates in DOC’s legal custody – those with sentences of 20 years or less – serve sentences in parish facilities under agreements between DOC and local sheriffs. App. 12. Ware, however, is ineligible to remain in parish detention because of the length of his sentence, and was to be transferred to the physical custody of DOC for placement in a DOC-run prison. App. 3, 25.

The policy for prisoner grooming in DOC prisons, in contrast to policies applicable in some parish facilities, does not permit Ware to retain his dreadlocks. On initial processing for a DOC prison at the Elayn Hunt Correctional Center (the main intake facility for male inmates) Ware would be required to “receive – forcibly, if necessary – a closely-cropped haircut with clippers, commonly known as a ‘buzz cut.’” App. 26; ROA.2802. And while in DOC’s physical custody, Ware would have to abide by DOC’s grooming policies which require (for male inmates) that:

Hair length in the front shall not extend lower than the top of the eyebrow. In the back, hair length shall not extend lower than the top of the shirt collar and on the sides, shall not extend lower than the top of the ear.

ROA.2677. DOC allows no religious exemption from that rule.

In anticipation of being subject to DOC's grooming requirements, Ware filed the present RLUIPA lawsuit shortly before entering his guilty plea. App. 3. Ware sought declaratory and injunctive relief preventing DOC from applying its grooming policies to him. Pending resolution of this case, Ware has remained in sheriff-operated parish detention facilities – now the Bossier Medium Security Jail in Bossier Parish – where his dreadlocks are permitted. App. 3, n.1.

2. District Court Proceedings

The district court held a bench trial from February 1-3, 2013. DOC did not dispute that Ware's dreadlocks constitute an act of religious exercise, nor that compulsory application of DOC's grooming requirements would substantially burden that exercise within the meaning of RLUIPA. App. 10. Trial therefore focused on the other prongs of RLUIPA: DOC's interests in requiring that male prisoners keep their hair short, and whether DOC could further those interests by less-restrictive means. *See* App. 31.

On September 12, 2016, the district court entered judgment for DOC. The court analyzed DOC's asserted interests one at a time, and rejected some. App. 32-34 (monitoring prison security threats), App. 34-36 (promoting a "positive image" of prison inmates). However, the court found that four DOC interests – contraband control, inmate identification, hygiene, and preventing prisoner-on-prisoner violence – were compelling and that DOC's policies were the least restrictive means of

pursuing them. App. 36-45. The district court acknowledged that RLUIPA did not permit it to “merely defer to those who manage the DOC prisons with unquestioning deference,” App. 45, but concluded that DOC’s legitimate interests justified compelling male inmates to maintain short hair generally but also, more specifically, to restrict dreadlocks. The district court dismissed Ware’s complaint with prejudice. App. 54.

3. The Fifth Circuit’s Opinion

A panel of the Fifth Circuit reversed on July 28, 2017. The panel expressed little disagreement with most of the district court’s factual findings. Yet the panel held, contrary to the district court, that DOC had shown neither that its interests in requiring short hair were compelling, nor that it could not pursue those interests by less restrictive means.

As for DOC’s interests, the panel found that DOC’s hair-length policies were “underinclusive” because they do not apply to the subset of inmates in DOC’s legal custody who – unlike Ware – never move from parish facilities to DOC prisons, but remain physically in parish custody pursuant to agreements between DOC and local sheriffs. App. 12. It placed the burden on DOC to explain that underinclusiveness. *Id.*

The panel did not credit DOC’s several uncontroverted explanations for its decision not to apply its grooming policy to DOC inmates held in parish facilities. Louisiana sheriffs had requested that the grooming policy not apply to their parish facilities, App. 14;

DOC expected that it would be difficult to apply different grooming policies to different inmates under the same roof, App. 15; and DOC considered parish inmates – who are confined to dormitories rather than allowed to roam freely and who are either held pre-trial or convicted of less serious offenses – to pose lesser security risks than those in DOC facilities, App. 15-16. The panel considered those explanations inadequate, and held that “[t]he grooming policies’ underinclusiveness, unrebutted by adequate explanation, gives rise to the inference that they do not serve a compelling interest.” App. 17.

The panel also held that requiring short hair is not the least restrictive means of furthering DOC’s interests. That conclusion was based on the panel’s own survey of grooming policies in other jurisdictions, 39 of which (the panel believed) “would either outright allow [Ware] to have dreadlocks or afford him the opportunity to apply for a religious accommodation that would allow dreadlocks.” App. 17. The panel identified six jurisdictions, besides DOC, that maintained categorical bans on dreadlocks. App. 17. The panel rejected DOC’s argument that recent budgeting issues justified a no-dreadlocks policy as the most cost-effective way of pursuing its interests under the circumstances. App. 18-19. Explaining that DOC was obligated to “offer persuasive reasons for the disparity” between its policies and those of other States, and finding that “DOC failed to offer any such reasons,” the panel held that DOC “has failed to demonstrate that its grooming

policies are the least restrictive means of achieving its compelling interests.” App. 20.

The panel reversed the district court and rendered judgment “granting Ware’s request for a declaration that the grooming policies, as applied to him, violate RLUIPA and enjoining DOC from enforcing the grooming policies against him.” App. 21. Consequently, Ware now has a categorical exemption that permits him to grow dreadlocks of indefinite size, thickness, and length for the remainder of a 40-year prison sentence.

This petition follows.



REASONS FOR GRANTING THE PETITION

I. Federal Circuits Have Split Over Religious Exemptions For Prison Hair-Length Policies.

The Fifth Circuit’s holding is irreconcilable with a recent decision by the Eleventh Circuit, which addressed an indistinguishable question based on a similar factual record. *See Knight v. Thompson*, 796 F.3d 934 (11th Cir. 2015), cert. denied, 136 S.Ct. 1824 (2016), reh’g denied, 136 S.Ct. 2534 (2016) (explaining substitution and modification of the panel opinion post-*Holt*); *Knight*, 723 F.3d 1275 (11th Cir. 2013) (original panel opinion). This Court should grant review to resolve that conflict.

Knight involved a RLUIPA claim brought by Native American inmates of the Alabama prison system. The plaintiffs in that case “wish[ed] to wear their hair

unshorn in accordance with the dictates of their Native American religion.” 797 F.3d at 937. However, the Alabama prison system (like DOC) requires male prisoners to have short hair and “does not grant any exemptions to this policy, religious or otherwise.” *Id.* In *Knight*, as here, it was undisputed that the grooming policy would substantially burden the prisoner’s sincere religious exercise. *Id.* at 938, 944. Both cases turned on whether the government interest in requiring short hair was compelling and whether it could be pursued by less restrictive means. The interests that Alabama asserted, and the evidence Alabama presented, were essentially the same as DOC’s here. *Id.* at 939 (describing basis for Alabama’s interests in “prevention of contraband, facilitation of inmate identification . . . , maintenance of good hygiene and health, and facilitation of prison discipline through uniformity”).

Yet the courts reached irreconcilable holdings. The *Knight* court held that requiring male inmates to cut their hair short furthers compelling interests, *id.* at 944-45, and is the least restrictive means of furthering that interest, *id.* at 945-47. It concluded that Alabama can justifiably further its compelling interests by requiring inmates to have short hair even when their religion calls for unshorn hair. The Fifth Circuit panel’s conclusion – that the State does not have a compelling interest in requiring Ware to abide by its grooming policy, that its grooming policy is not the least restrictive means of pursuing that interest even if the interest were compelling, and that it cannot prohibit Ware from

growing dreadlocks of unlimited size, thickness, and length – directly conflicts with the Eleventh Circuit’s.

The conflict cannot be attributed to differences in the factual records. Both States relied on the same interests in security, discipline, hygiene, and safety, supported by prison officials who “offer[ed] elucidating expert opinions, lay testimony, and anecdotal evidence based on their decades of combined experience as corrections officers.” *Knight*, 797 F.3d at 939. In *Knight*, Alabama – like Louisiana here – argued that short-hair policies address risks of contraband, difficulties identifying prisoners within the prison and in case of escape, and potential risks of prisoners to each other in fights. Alabama also pointed to issues of prison hygiene arising from longer hair – including an incident in another prison where an inmate’s uncut hair was found to contain the nest of a black widow spider. *Knight*, 797 F.3d at 940. Even the plaintiffs in the two cases appear to have relied on similar evidence, including evidence of purportedly less-restrictive grooming policies in other jurisdictions. *Id.* at 947. The result is that in two RLUIPA cases involving similar grooming policies, similar claims for religious exemptions, similar prison justifications for those policies, and similar evidence allegedly rebutting those policies, two circuits reached opposite conclusions.

The Eleventh Circuit’s holding better fits with the weight of circuit authority. At least three other circuits held pre-*Holt* that prison prohibitions on dreadlocks (or long hair) are the least restrictive means of furthering a compelling purpose. *Smith v. Ozmint*, 396 F.

App'x 944 (4th Cir. 2010); *Williams v. Snyder*, 367 F. App'x 679 (7th Cir. 2010); *Fegans v. Norris*, 537 F.3d 897, 904 (8th Cir. 2008). *Knight* joined that consensus, while the Fifth Circuit departed from it. The Fifth Circuit's creation of a split after this Court's decision in *Holt* indicates that where courts had previously agreed about the treatment of religious exemptions for prison grooming policies, *Holt* has caused new disagreement.

The developing post-*Holt* split has serious consequences for prison administration in the Fifth Circuit and elsewhere. The three States of the Fifth Circuit house more than 150,000 prisoners in their respective prison systems,¹ and as Congress and courts have recognized, prison administration is an area of particular interest for States. *Cutter*, 544 U.S. at 723. Growing circuit disagreement about whether inmates merit religious exemptions when they seek to grow their hair indefinitely will create intolerable disorder in prison systems across the nation.

This Court's decision in *Holt* did not dictate this result. *Holt* also involved a prison grooming policy, but the exemption requested was much more limited: in a prison that already permitted ¼-inch beards to some inmates, the petitioner sought a ½-inch beard as a matter of religious exercise. 135 S.Ct. at 860-61. That case hinged on whether the inmate could be denied an extra quarter-inch of growth. But this case (like

¹ <https://www.texastribune.org/library/data/texas-prisons/units/>; <http://www.doc.la.gov/media/1/Briefing%20Book/Oct%2017/population.trends.oct.17.pdf>.

Knight) involves something far more serious: a prisoner who wants unfettered discretion to grow his hair as long as he wants, and to form and reform it into locks in whatever shape and thickness he wants, over decades of incarceration.

The circuit disagreement clearly presented by this case cries out for resolution.

II. The Circuit Split Presents Conflicts Of Legal Reasoning With Implications Beyond The Specific Facts.

The divergent holdings of the Fifth and Eleventh Circuits, based on similar factual records, is reason enough to grant review. But those conflicting holdings reflect deeper disagreements over how to apply RLUIPA. Those methodological differences – which flow from differing interpretations of *Holt* – threaten to multiply splits over innumerable RLUIPA issues. The Court should prevent them by granting review now.

A. The Fifth Circuit has split with other circuits on the “compelling interest” analysis.

The sole justification for the Fifth Circuit’s holding that DOC’s grooming policy does not serve a compelling interest was that the policy is underinclusive as to DOC inmates in parish facilities, and that DOC had not adequately explained the underinclusiveness. The panel’s approach conflicts with the reasoning of other courts.

1. The panel’s “underinclusiveness” analysis conflicts with the Eleventh Circuit.

The *Knight* panel illustrates the proper analysis of a state prison system’s asserted interests. According to *Knight*, the State identifies a compelling interest by offering “a reasoned and fairly detailed explanation of how the . . . short-hair policy addresses genuine security, discipline, hygiene, and safety concerns,” as opposed to “simply ‘speculation, exaggerated fears, or post-hoc rationalizations.’” 797 F.3d at 945. If a policy “addresses genuine . . . concerns,” under *Knight*’s analysis, it should pass muster.

DOC presented such explanations here, and the district court credited them. App. 54 (finding DOC had adequately demonstrated several compelling interests furthered by its grooming policy). The panel did not disturb those findings directly, and that should have ended the matter.

The panel took a different approach. Instead of considering whether the grooming policy “addresses genuine . . . concerns,” it took a shortcut, holding that because the grooming policy applied to state prisons but not parish facilities, it “do[es] not serve a compelling interest.” App. 14, 17 (“the interests served by the grooming policies are not truly compelling”).

That standard is *far* more exacting than and inconsistent with the Eleventh Circuit’s, because it implies that “a reasoned and fairly detailed explanation” of the relationship between a grooming policy and a government interest is not enough. *Knight*, 796 F.3d at

945. By relying on underinclusiveness alone, the panel instead held that because DOC could do more to address legitimate security, discipline, hygiene, and safety by extending its grooming policy to other facilities, the measures it does take are not important in the first place and are therefore invalid when challenged under RLUIPA. Such a rule is deeply troubling, for it implies that RLUIPA litigants can essentially weaponize decisions by prison administrators to apply sensible security rules in some circumstances but not others.

Such a rule flies in the face not only of the Eleventh Circuit’s approach, but of decades of this Court’s and other federal jurisprudence holding that states may address a compelling interest by solving one part of a problem, leaving other parts unaddressed, without having their partial efforts invalidated. *See, e.g., McDonald v. Bd. of Election Comm’rs of Chicago*, 394 U.S. 802, 809 (1969) (“[A] legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.”); *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 316 (1993) (observing that because “Congress had to draw the line somewhere,” the “resulting legislative judgment [was] virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally”).

Circumstances may arise where underinclusiveness is critical. For example, it might be relevant where (unlike here) religious practices are disfavored relative

to comparable secular practices. *See Yellowbear v. Lampert*, 741 F.3d 48, 60 (10th Cir. 2014) (Gorsuch, J.) (reasoning that underinclusiveness suggests a state interest is not compelling where prison lockdowns occurred for medical reasons but not religious reasons); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993). Underinclusiveness might also mean that a policy does not further a compelling interest. *See Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656, 1668 (2015). But whatever relevance underinclusiveness might have in other circumstances, it should not be fatal to a policy that addresses genuine concerns of prison administration, even when it does not solve those concerns completely. The Fifth Circuit’s contrary holding deserves review to clarify the proper standard applicable to the underinclusiveness analysis.

2. The panel’s analysis of DOC’s explanations for its policies conflicts with the Eighth and Tenth Circuits.

Even if underinclusiveness matters, DOC’s burden to explain it should not have been a heavy one. The Tenth Circuit, addressing a similar argument from underinclusiveness in a RLUIPA claim, explained that “[a] government can rebut an underinclusion argument by showing that it hasn’t acted in a logically inconsistent way – by (say) identifying a qualitative or quantitative difference between the particular religious exemption requested and other secular exceptions already tolerated, and then explaining how such differential treatment furthers some distinct

compelling governmental concern.” *Yellowbear*, 741 F.3d at 61. For example, the government can explain underinclusiveness by pointing out that it addressed the part of a problem that was easiest to solve. *Id.* (noting that different treatment would be logically consistent if it would be “enormously more difficult” to further the government’s interest for one group than it would for another) (citing *United States v. Friday*, 525 F.3d 938, 958-59 (10th Cir. 2008)).

Under that standard, all DOC needed – at most – was a “logical[]” connection to some “difference” in circumstances and a “compelling governmental concern” justifying “differential treatment.” *Id.*; see also *Fegans v. Norris*, 537 F.3d 897, 904-05 (8th Cir. 2008) (rejecting underinclusiveness challenge based on different treatment of male and female prison inmates). But that is not the analysis the panel undertook. Instead, the panel rejected several reasonable explanations which (individually and in combination) logically distinguish DOC from parish facilities and which should have resolved the underinclusiveness issue. By looking for more than a “logical[] connection” between DOC’s policies and the differences between parish and DOC facilities, the Fifth Circuit’s analysis splits from the Tenth Circuit and further distorts the requirement of RLUIPA.

By putting such razor sharp teeth into its underinclusiveness inquiry, the panel heightened the problems created by focusing on that issue. Generally, prison officials are entitled to substantial deference on questions of prison administration, both under

RLUIPA, *see Cutter*, 544 U.S. at 723, and in other contexts, *see, e.g., Block v. Rutherford*, 468 U.S. 576, 584 (1984). Demanding more from DOC invites precisely the same judicial second-guessing that Congress (and this Court) long sought to avoid.

B. The Fifth and Eleventh Circuits disagree on the legal significance of less-restrictive policies of other jurisdictions.

Both the Fifth Circuit here and the Eleventh Circuit in *Knight* addressed evidence that other States have more permissive policies for prisoner grooming. Compare App. 9, 17-20, 29, 53. Considering such evidence is not inappropriate in principle: Under *Holt*, courts in RLUIPA cases may note differences between a challenged policy and the policies that prevail in other jurisdictions, if the other jurisdictions would grant the “particular religious exemption” at issue. *Holt*, 135 S.Ct. at 866 (noting that “the vast majority of States and the Federal Government permit inmates to grow ½-inch beards”). The Fifth and Eleventh Circuits were obligated to consider evidence that inmates would have been able to grow hair of indefinite length (or dreadlocks) in other states’ prisons. But *Knight* and the Fifth Circuit panel approached that analysis in completely different ways.

The Fifth Circuit counted six jurisdictions with policies similar to Louisiana’s and 39 that “would either outright allow [Ware] to have dreadlocks or afford him the opportunity to apply for a religious

accommodation that would allow dreadlocks.” App. 17. It relied on the 39-state figure in demanding that DOC explain its more restrictive policy. That reasoning errs – and conflicts with the Eleventh Circuit’s – in two serious ways.

First, the 39-state figure itself betrays error in the panel’s RLUIPA analysis. As shown by the *Knight* panel’s review of other state policies (apparently the same ones), that figure does not reflect a count of jurisdictions that would grant Ware the “particular religious exemption” he seeks. *See Holt*, 135 S.Ct. at 866. Many of the 39 supposedly more lenient jurisdictions “make clear that the chosen hair length cannot pose risks for health, safety, hygiene, order, or security. Thus, it is not clear that these policies would allow for entirely unshorn hair,” 796 F.3d at 1293 – or, by the same token, dreadlocks of unlimited size, thickness, and length.² Nor is it evident why “the opportunity to apply for a religious accommodation” (*see* App. 17) matters if a prison system would ultimately deny a prisoner the opportunity to grow his dreadlocks uncut. Some jurisdictions may grant Ware carte blanche to grow his dreadlocks for 40 years, but whether Ware could do so anywhere – and just how many jurisdictions, if any, would allow him such a privilege – is unknown from the record here.

² The record of prison policies relied upon by Ware accords with the Eleventh Circuit’s observation. *See, e.g.*, ROA.3512 (“The Bureau of Prisons permits an inmate to select the hair style of personal choice, and expects personal cleanliness and dress in keeping with standards of good grooming and the security, good order, and discipline of the institution.”) (U.S. Bureau of Prisons).

That the Fifth Circuit relied nonetheless on its 39-jurisdiction figure shows it was asking the wrong question in the first place, *i.e.*, whether Ware could “have dreadlocks” or “apply for a religious accommodation,” App. 17, rather than whether the other jurisdictions would grant him the “particular religious exemption” he demands. *Holt*, 135 S.Ct. at 866. This is more than a disagreement over interpretation of facts; it is a legal error about how to evaluate evidence of other jurisdictions’ policies. It conflicts with both this Court’s reasoning in *Holt* and the Eleventh Circuit’s in *Knight* and imposes a legal standard never contemplated by *Holt*.

Second, and even more fundamentally, the Fifth Circuit and the Eleventh Circuit split over what it means when other jurisdictions offer the religious accommodation that a RLUIPA plaintiff seeks. According to the Fifth Circuit, the supposedly lopsided policies of other jurisdictions put the burden on Louisiana to justify its minority position: “[W]hen so many prisons offer an accommodation, a prison must, at minimum, offer persuasive reasons why it believes that it must take a different course.” App. 29 (quoting *Holt*). At least superficially, that comports with *Holt*.

But the Eleventh Circuit took a more nuanced approach that, at bottom, is faithful to *Holt*:

That other jurisdictions choose to allow male inmates to wear long hair shows only that they have elected to absorb those risks. The RLUIPA does not force institutions to follow the practices of their less risk-averse neighbors, so

long as they can prove that they have employed the least restrictive means of furthering the compelling interests that they have chosen to address. The [Alabama Department of Corrections] has shown 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.

Knight, 797 F.3d at 947. The fact that other jurisdictions have less restrictive policies does not mean that a state’s policy is not the least restrictive approach. It can mean that the state has adopted the least restrictive approach that addresses the issue, while other jurisdictions opt not to address it at all. *See also Hamilton v. Schriro*, 74 F.3d 1545, 1556 n.15 (8th Cir. 1996) (“Although prison policies from other jurisdictions provide some evidence as to the feasibility of implementing a less restrictive means of achieving prison safety and security, it does not outweigh the deference owed to the expert judgment of prison officials who are infinitely more familiar with their own institutions than outside observers.”).

Both the Fifth and Eleventh Circuits claim fidelity to *Holt*, but the Fifth Circuit imposes a standard never contemplated by *Holt* and which cannot be reconciled with *Knight*. A state can explain its minority status in terms of a decision whether to absorb a risk or not; *Holt* suggests nothing to the contrary. The Fifth Circuit’s analysis forces prison systems into a virtual “race to the bottom” that overrides the decisions of states that

reasonably prioritize security and other interests. The Court should grant review in order to correct the Fifth Circuit's misunderstanding of *Holt*, which conflicts with the Eleventh Circuit's correct interpretation.



CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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