No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Knight* v. *Thompson*, the Eleventh Circuit concluded—on remand following *Holt* v. *Hobbs*, 574 U.S. 352 (2015)—that the Religious Land Use and Institutionalized Persons Act allows denial of religious accommodations widely available in other jurisdictions whenever the prison makes a "calculated decision not to absorb [] added risks." 797 F.3d 934, 937 (11th Cir. 2015). Here, it extended that logic to reject a beard-length accommodation available to religious adherents in at least thirty-nine other prison systems. It excused Georgia from any obligation to address the demonstrated safety of such accommodations in dozens of other states, instead relying only on the speculation of Georgia prison officials who admitted that they had not even attempted to determine how other states accommodate inmates with beards.

The questions presented are:

1. Whether the Eleventh Circuit erred in applying RLUIPA when it held that Georgia need not grant a religious accommodation offered in 39 other prison systems.

2. Whether RLUIPA allows religious accommodations to be denied based on any plausible risk to penological interests, if the government merely asserts that it chooses to take no risks.

3. Whether RLUIPA prohibits courts from granting any religious accommodation short of the full accommodation sought by a plaintiff prisoner.

PARTIES TO THE PROCEEDINGS

Petitioner Lester Smith was plaintiff below in proceedings before both the U.S. Court of Appeals for the Eleventh Circuit and the U.S. District Court for the Middle District of Georgia.

This case was originally filed against Brian Owens, as Commissioner of the Georgia Department of Corrections. Subsequently Gregory Dozier was substituted when he assumed that office. Respondent Timothy Ward is currently the Commissioner of the Georgia Department of Corrections, and became the appropriate Defendant/Respondent in this action by operation of Rule 25(d) of the Federal Rules of Civil Procedure. The Eleventh Circuit's docket continues to list Mr. Dozier as an additional defendant, but that is a misnomer not affecting substantial rights that should be disregarded pursuant to Rule 25(d). Because there are no damages claims remaining in the case, Mr. Ward is sued only in his official capacity.

RELATED PROCEEDINGS

Smith v. *Owens*, No. 14-10981, 848 F.3d 975 (11th Cir. 2017) (judgment entered Feb. 17, 2017).

Smith v. *Owens,* No. 5:12-cv-26-WLS, 2014 WL 773678 (M.D. Ga. 2014) (judgment entered February 26, 2014).

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The district court's opinion is available at 2019 WL 3719400 and reproduced at App.46a.

JURISDICTION

The Eleventh Circuit's judgment was entered on September 22, 2021. App.1a. Rehearing was denied on December 29, 2021. App.73a. On March 21, 2022, Justice Thomas extended the time for filing. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Religious Land Use and Institutionalized Persons Act of 2000, codified at 42 U.S.C. 2000cc-2000cc-5, provides:

> (a) General rule
>
> 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 1997 of this title, 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.

INTRODUCTION

In *Holt* v. *Hobbs*, this Court held that the Religious Land Use and Institutionalized Persons Act does not permit "unquestioning deference" to prison officials. 574 U.S. 352, 364 (2015). The statute's "exceptionally demanding" standard instead puts the burden on defendants "to prove," with evidence, that actions substantially burdening a prisoner's sincere religious belief "constitute[] the least restrictive means of furthering a compelling governmental interest." *Id.* at 364. And when many other prison systems offer an accommodation, a defendant must provide "persuasive reasons" why it is "so different" from other systems that it must deny the same accommodations. *Id.* at 367, 369.

Georgia is not following *Holt*. For more than a decade, Lester Smith has been litigating his request to grow a full beard in accordance with his Muslim faith. After this lawsuit had been pending for several years, *Holt* was decided. But Georgia's response was grudging, following only the facts of *Holt*, not the law of *Holt*. The Georgia Department of Corrections allowed Smith to grow a half-inch beard like Holt's, but has doggedly refused anything more. Indeed, GDOC has intentionally maintained its ignorance of the practices of other prison systems.

The Eleventh Circuit blessed GDOC's intransigence, even though it is undisputed that 39 other prison systems nationwide, including the Federal Bureau of Prisons ("BOP"), accommodate untrimmed beards. The court reasoned that "[i]t is enough to show [a] risk" of danger and that GDOC was entitled to make "a calculated decision not to absorb the added risks that its fellow institutions

have chosen to tolerate." App.21a, 25a (cleaned up). In reaching these conclusions, the Eleventh Circuit relied heavily on its prior decision in *Knight* v. *Thompson*, 797 F.3d 934 (11th Cir. 2015)—an opinion that was written before *Holt* and vacated and remanded for reconsideration in light of *Holt*.

The Eleventh Circuit's reasoning presents two circuit splits meriting review.

First, the Eleventh Circuit's affirmation of GDOC's decision to ignore the practices of the many other jurisdictions that have successfully accommodated untrimmed beards splits from the decisions of seven other circuits and directly conflicts with *Holt*. The Eleventh Circuit is the only court of appeals in the country to adopt such an approach.

Second, the Eleventh Circuit deepened an existing 4-3 circuit split over the appropriate degree of deference to prison officials by holding that religious accommodations may be denied on the basis of any "plausible" "risk" to penological interests, if the government simply asserts that it chooses to take no risks.

The Eleventh Circuit also made an additional ruling that cannot survive *Ramirez* v. *Collier*, 142 S. Ct. 1264 (2022). Prior to appeal, the district court entered partial relief for Smith. It found that even under the deferential *Knight* standard, GDOC had not presented any "plausible" reason a three-inch beard could pose a risk. App.68. But the Eleventh Circuit held the district court could not consider accommodations outside of Smith's "final request for relief" at trial, even where Smith had identified the relief as religiously preferable, and so vacated the relief. App.14a n.6. As *Ramirez* explains—and earlier

precedents confirm—"suggesting that it is [the plaintiff's] burden to identify any less restrictive means * * * gets things backward." 142 S. Ct. at 1281 (internal quotation omitted). Indeed, even this narrower mistake draws from the same broader errors of the Eleventh Circuit's RLUIPA jurisprudence—lightening the state's strict scrutiny burden.

The consequences of the Eleventh Circuit panel's opinion are grave. As Judge Martin explained in dissent, the majority's reasoning "is inconsistent with *Holt*" and "renders the Supreme Court's command in *Holt* meaningless" in the Eleventh Circuit. App.37a, 38a. This Court should grant certiorari to resolve the splits, clarify the application of RLUIPA's strict scrutiny standard, and ensure that RLUIPA's protections are applied evenly nationwide.

STATEMENT OF THE CASE

A. Factual and Procedural Background

Lester Smith is a devout Muslim who wishes to grow a full-length beard—a tenet of Islam and one of Smith's sincerely held religious beliefs. He filed this lawsuit in 2012, initially *pro se*. At that time, GDOC prohibited inmates from growing beards of any length unless they had a medical exception to grow a beard between one-eighth and one-quarter inch in length. Prison officials denied Smith's requests for a religious exemption, and on at least three occasions they restrained Smith and shaved his beard against his will. App.49a.

After the district court granted GDOC's first motion for summary judgment in 2014, Smith appealed. *Smith* v. *Owens*, 848 F.3d 975, 977 (11th

Cir. 2017). While that appeal was pending, this Court decided *Holt*. *Ibid*. In response to *Holt*, GDOC modified its grooming policy to allow all inmates to grow half-inch beards, tracking the particular half-inch beard accommodation requested by the prisoner plaintiff in *Holt*. *Id.* at 978. GDOC then argued on appeal that Smith's claim was moot because he had previously noted that a quarter-inch beard policy was an "alternative, less restrictive option" to GDOC's flat ban. *Id*. at 977. The Eleventh Circuit rejected that argument, and remanded in light of *Holt*. *Id*. at 981.

Meanwhile, in a separate pending RLUIPA case out of Alabama, this Court granted certiorari, vacated the Eleventh Circuit's judgment, and remanded for further consideration in light of *Holt*. See *Knight* v. *Thompson*, 574 U.S. 1133 (2015). On remand, the Eleventh Circuit reissued its opinion in *Knight* with only two sentences changed. *Knight* held that there is no RLUIPA violation when a prison shows "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." 797 F.3d at 947. The Eleventh Circuit specifically rejected precedents from three other circuits that, even predating *Holt*, had held that the "efficacy of less restrictive measures" already in use must be considered. *Id.* at 946 (citing *Warsoldier* v. *Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); *Spratt* v. *Rhode Island Dep't of Corr.*, 482 F.3d 33, 41 (1st Cir. 2007) (adopting *Warsoldier*); *Washington* v. *Klem*, 497 F.3d 272, 284 (3d Cir. 2007) (same)).

On remand, Smith explained in his deposition that some Islamic teachings permit adherents to grow a fist-length beard if they cannot grow an untrimmed beard. App.49a. Smith also explained that under his understanding of Islam it is "preferable" to never trim one's beard but that, if forced to trim his beard, he must maintain "at least a fistful of beard hair." App.49a, 79a.

The district court denied both parties' motions for summary judgment, and the case proceeded to a two-day bench trial.

B. Proceedings in District Court

At trial, GDOC admitted that its policy places a substantial burden on Smith's religious exercise. App.10a. However, GDOC argued that it could not allow any religious exemption beyond its new policy of half-inch beards because of concerns over safety, security, uniformity, minimizing the flow of contraband, identification of inmates, hygiene, and cost. App.10a n.2.

After trial, the district court issued lengthy findings and conclusions. The district court found that "Georgia is among a small minority of states that restricts beards to one half-inch or less and does not allow any religious exemptions." App.50a. The trial court found that 37 states, the District of Columbia, and the BOP all permitted inmates to grow beards of any length, with some requiring that they first apply

for a religious exemption. App.37a.[1] The trial court found that an additional four states, while not allowing full untrimmed beards, allowed religious beards longer than GDOC's half-inch limit. App.61a. The district court found that "[n]otwithstanding 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 (citations omitted). GDOC also failed to identify any material difference between its operations and prison systems that accommodate longer beards. *Ibid.* (citing ECF No. 235 at 149-150). The district court concluded that GDOC "has not even attempted to determine how other states manage inmates with beards." App.66a (citation omitted).

Regarding GDOC's contraband concerns, the court noted that Smith's expert, John Clark, explained how a self-search method that takes "maybe three seconds" is used by prisons nationwide and "every time a police department or any other law enforcement agency arrests somebody or books somebody" with a beard. ECF No. 236 at 117-119; see also App.70a. The district court credited Clark's testimony that this method is safe, and found that "GDOC has offered no logical explanation as to why it could not use the method currently employed by BOP and other states for searching a beard." App.62a. The district court credited Clark's testimony that prison

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[1] Since the trial court made its findings, Virginia has changed its policy to allow prisoners to grow beards of any length unless they have used a beard to conceal contraband, promote gang identification, or disguise their identity. See *Greenhill* v. *Clarke*, 944 F.3d 243, 248 (4th Cir. 2019).

systems which permit longer beards have experienced no difficulties with violence or safety, finding that "it could very well be that GDOC's interests in prison safety and security would be furthered if it allows longer beards." App.67a. The district court also determined that GDOC's policy is underinclusive because "[b]eards do not appear to present any more of a problem than longer head hair or clothes." App.60a.

Relying on its factual findings, the district court held that GDOC's policy forbidding all beards longer than a half-inch was "inconsistent and underinclusive" and not the least restrictive means of pursuing any of the compelling interests GDOC had identified. App.52a. The court thus declared that GDOC's "policy limiting inmates' beard length to one-half inch without any religious exemptions violates [RLUIPA]." App.72a. The district concluded that GDOC's arguments were specifically "unpersuasive in the context of allowing a three-inch beard because GDOC has presented little evidence to show that a three-inch beard is a significant security concern, and it already allows three-inch head hair." App.68a.

The court also held that GDOC could address its concerns, at least as to three-inch beards, by "enforc[ing], and amend[ing] if necessary, the disciplinary policies it has for rule violations" in light of the court's finding, based on Clark's testimony, that "if prisoners violate rules with their facial hair, GDOC should not allow it." App.69a.

However, the district court did not extend its holding to Smith's request for an untrimmed beard, holding that *Knight*'s understanding of the deference due to prison officials was controlling. According to

the district court, "[w]hile three inches of head hair is manageable, it is plausible that a beard of unlimited length could be much more difficult for GDOC to manage." App.61a-62a. Based on this "plausible" concern, and "with due deference to the experience and expertise of prison and jail administrators," the court concluded that "GDOC has offered persuasive reasons why it cannot allow untrimmed beards at this time for which deference is due." App.61a, 62a. An untrimmed beard's "ability to be used to cause harm in the more violent male facilities, its ability to hide contraband more easily, the added difficulty in searching an untrimmed beard, and its ability to disguise a face" sufficed under the *Knight* standard to justify a ban on untrimmed beards, but not three-inch beards. *Ibid*.

GDOC appealed and Smith cross-appealed.

C. The Eleventh Circuit's Decision

The Eleventh Circuit panel majority purported to affirm in part and vacate in part, although the effect was to actually reverse the entire district court decision. Relying heavily on its prior opinion in *Knight*, the majority held that it was sufficient for the district court to identify "plausible" security concerns associated with untrimmed beards. App.20a. The panel reasoned that "it would be *actually* unmanageable to institute a grooming policy that may *plausibly* result in harm to inmates, staff, or the public," 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" given the deference that prison officials are entitled to. App.21a.

The Eleventh Circuit acknowledged the district court's finding that 37 states, the District of Columbia, and the federal Bureau of Prisons permit untrimmed beards. App.24a. But, quoting *Knight*, the panel restated that other jurisdictions' practices are "not controlling" as "RLUIPA does not pit institutions against one another in a race to the top of the risk-tolerance or cost-absorption ladder." App.25a (quoting *Knight*, 797 F.3d at 947). Rather, GDOC's burden was to show only "a calculated decision not to absorb the added risks that its fellow institutions have chosen to tolerate." *Ibid.* The panel majority held that GDOC did not have to investigate other prison systems' policies: "*Holt* does not require the GDOC to detail other jurisdictions' successes and failures with their grooming policies to satisfy a RLUIPA inquiry." *Ibid.*

The panel majority thus vacated the district court's holding that GDOC failed to justify its existing half-inch limit under RLUIPA, as well as its directive to permit a three-inch beard as a less restrictive alternative. Despite Smith's deposition testimony that a fist-length limit was religiously preferable to the half-inch limit, the court of appeals held that it was reversible error for the district court to consider any possible remedy other than the plaintiff's "final request for relief" at trial. App.14a n.6.

Judge Martin dissented. She explained that *Holt* required GDOC "to do more than articulate mere arguments for why Georgia is uniquely unable to manage untrimmed beards," and that on the actual evidence presented at trial, "the only permissible conclusion is that RLUIPA entitles Smith to grow an untrimmed beard." App.34a, 38a. Judge Martin recognized that the district court had "systematically

rejected" the key GDOC testimony. App.42a. And on GDOC's efforts to distinguish other jurisdictions, she noted that the district court held—and GDOC admitted—both that "GDOC had not even attempted to determine how other states manage inmates with beards" and that "GDOC provided no information," let alone admissible evidence, to support distinguishing their prison population from other states. App.36a (cleaned up).

Finally, Judge Martin concluded that "the majority opinion renders the Supreme Court's command in *Holt* meaningless, such that prisons in Alabama, Georgia, and Florida can unjustifiably deny prisoners religious freedoms they would enjoy almost everywhere else in the country." App.38a.

REASONS FOR GRANTING THE WRIT

This Court should grant review because the Eleventh Circuit's decision deepens two existing post-*Holt* circuit splits concerning the amount of deference owed to prison officials under RLUIPA.

Holt set a sensible balance for resolving prisoner religious liberty claims. Under *Holt*, courts are bound to "respect th[e] expertise" of prison officials on certain factual matters within that expertise. 574 U.S. at 364. But courts also retain a "responsibility, conferred by Congress, to apply RLUIPA's rigorous standard" in reaching an ultimate legal conclusion about whether strict scrutiny is satisfied. *Ibid.*

Holt provides two important points of guidance that have resulted in entrenched circuit splits.

First, where "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. *Holt,* 574 U.S. at 367. The prison "must, at a minimum, offer persuasive reasons" why it cannot provide the same accommodations. *Id.* at 369. This Court recently reaffirmed that obligation in *Ramirez*. See 142 S. Ct. at 1279 ("Respondents do not explain why."). This question has resulted in a 7-1 circuit split.

Second, the defendant bears the burden of proof to "establish" that it has a compelling interest and that its policies burdening religious exercise are the least restrictive means available to achieve those interests. *Holt*, 574 U.S. at 368. In making this determination, a court may not defer to "prison officials' mere say-so." *Id.* at 369; *Ramirez*, 142 S. Ct. at 1279 (rejecting prison officials' request that "we simply defer to their determination. That is not enough under RLUIPA."). This has resulted in a 4-3 circuit split.

The Eleventh Circuit is on the wrong side of both of these splits. It alone rejects a defendant's burden to distinguish other prison systems that have successfully implemented an accommodation, and it and two other circuits wrongly defer to prison officials' conclusory assertions about security concerns rather than subjecting them to meaningful factual scrutiny.

Finally, the Eleventh Circuit erred by reversing the district court's partial accommodation of a three-inch beard on the ground that Smith's "final request for relief" was an untrimmed beard. App.14a n.6. That created a direct conflict with the plain text of RLUIPA, which places the burden on *defendants* to prove that they are pursuing the least restrictive alternative. And it created direct conflicts with this Court's decision in *Ramirez*. There, this Court itself

proposed compromise positions that would both accommodate prisoner religious exercise and prison systems' interests in safety and security.

The Eleventh Circuit's decision in this case deepens long-existing circuit splits—one side of which denies inmates the ability to exercise their religion in a safe manner and threatens the religious rights of prisoners in a large portion of the country. Certiorari is warranted.

I. The Eleventh Circuit's decision deepens an existing, acknowledged, and intractable 7-1 circuit split over the weight given to the practices of other prison systems.

This Court held in *Holt* that when many other jurisdictions accommodate a religious practice a prison "must, at a minimum, offer persuasive reasons" explaining why it is "so different" from those other jurisdictions. 574 U.S. at 367, 369. That holding flows directly from RLUIPA's text, which puts the burden of proof on prison officials to "demonstrate[]" that policies substantially burdening sincere religious belief both further a compelling state interest and are "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000cc-1(a); see also 42 U.S.C. 2000cc-2(a); 2000cc-2(b).

The decision below deepens a longstanding split over the relevance and weight of evidence of religious accommodations granted to prisoners in other prison systems. On one side of the split stand seven circuits—the First, Second, Fourth, Fifth, Sixth, Ninth, and Tenth—which require prison officials to consider accommodations granted in other prison systems and explain why they cannot provide them. On the other side stands just one circuit that does not

require prison officials to make this showing—the Eleventh.

The split began before *Holt* was decided in 2015, but has become only more entrenched since then. Prior to *Holt*, five circuits interpreted the government's burden of proof under RLUIPA to require that government defendants consider less restrictive policies employed by other prison systems, and demonstrate why they would not be workable. See, *e.g., Warsoldier*, 418 F.3d at 1000 (holding that a state must "explain why another institution with the same compelling interests was able to accommodate the same religious practice" to carry its burden); *Spratt*, 482 F.3d at 41 (adopting *Warsoldier* and holding that state failed to explain why less restrictive alternative offered in another jurisdiction "would be unfeasible"); *Yellowbear* v. *Lampert*, 741 F.3d 48, 63 (10th Cir. 2014) (Gorsuch, J.) ("[T]he government's burden here isn't to *mull* the claimant's proposed alternatives, it is to *demonstrate* the claimant's alternatives are ineffective to achieve the government's stated goals."); *Couch* v. *Jabe*, 679 F.3d 197, 203 (4th Cir. 2012) (approving *Warsoldier* and requiring the government "acknowledge and give some consideration to less restrictive alternatives"); *Jova* v. *Smith*, 582 F.3d 410, 416 (2d Cir. 2009) (approvingly noting that "other circuits have observed that 'the failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices'" may defeat a strict scrutiny defense, citing *Warsoldier*).

Shortly before *Holt* was decided, the Eleventh Circuit expressly rejected these jurisdictions' "more

strict proof requirement[s]" in *Knight* v. *Thompson*, 723 F.3d 1275, 1285-1286 (11th Cir. 2013), *vacated*, 574 U.S. 1133 (2015). The *Knight* panel considered and rejected the holdings of "some of our sister courts" that "prison administrators must show that they 'actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.'" *Id.* at 1285-1286. It also criticized the plaintiff's "heavy fixation on the policies of other jurisdictions," holding that "RLUIPA does not pit institutions against one another in a race to the top of the risk-tolerance or cost-absorption ladder." *Id.* at 1286. The *Knight* panel held that prison officials may show that a "requested exemption poses actual security, discipline, hygiene, and safety risks" and then simply assert that they have not "elected to absorb those risks." *Ibid.* Under *Knight*, a prison need only demonstrate "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." *Ibid.*

This Court vacated that original *Knight* panel opinion and remanded for reconsideration in light of *Holt*. See *Knight*, 574 U.S. 1133. But on remand the Eleventh Circuit reinstated its opinion and changed only two sentences not relevant here. See *Knight,* 797 F.3d at 946-947. Thus, immediately after *Holt* was decided, the Eleventh Circuit doubled down on the preexisting split.

Other Circuits took a different approach post-*Holt*. Since *Holt* was decided, the Fifth and Sixth Circuits have joined the majority view that defendants "face[]

a steep uphill battle when other prison systems can accommodate a particular religious practice," and must show significant differences relevant to the compelling interest analysis. *Ackerman* v. *Washington*, 16 F.4th 170, 191 (6th Cir. 2021); see also *Tucker* v. *Collier*, 906 F.3d 295, 305 (5th Cir. 2018) (state failed to rebut feasibility of accommodation offered in "its neighboring state"); *Ware* v. *Louisiana Dep't of Corr.*, 866 F.3d 263, 273 (5th Cir. 2017) (state failed to sufficiently distinguish "the grooming policies of the prisons of 39 other jurisdictions"). And other circuits previously committed to that rule have reaffirmed it. See, *e.g.*, *Nance* v. *Miser*, 700 Fed. Appx. 629, 632-633 (9th Cir. 2017) (prison failed under *Holt* to distinguish "other well-run institutions permit[ting] the use of scented oils"); *Crawford* v. *Clarke*, 578 F.3d 39, 44 (1st Cir. 2009) (continuing to apply *Spratt* and finding state failed to "differentiate" other facilities "on the issues of compelling governmental interest or least restrictive means"); *Williams* v. *Annucci*, 895 F.3d 180, 193 (2d Cir. 2018).

The panel opinion below has made the split even more intractable. The Eleventh Circuit relied heavily on *Knight*, and in particular on *Knight*'s holding that accommodations granted in other jurisdictions can be ignored if the defendant merely claims to be more "risk-averse." 723 F.3d at 1286; App.25a.

The Eleventh Circuit's approach directly conflicts with *Holt*, in which the defendants also relied heavily on *Knight* to defend their position of not seriously considering the practices in other institutions. Brief for Respondents at 42, *Holt* v. *Hobbs*, 574 U.S. 352 (2015) (No. 13-6827). This Court rejected those

arguments and held that a state can deny religious accommodations that are commonly granted in other jurisdictions only after proving that it is "so different" that solutions employed elsewhere "cannot be employed at its institutions." *Holt*, 574 U.S. at 367. The fact "[t]hat so many other prisons allow inmates to grow beards while ensuring prison safety and security suggests that the Department could satisfy its security concerns through a means less restrictive than denying petitioner the exemption he seeks." *Holt*, 574 U.S. at 368-369. And RLUIPA requires a defendant to *prove*, with evidence, that less restrictive alternatives are unavailable. *Id.* at 364-365.

In *Ramirez*, this Court reaffirmed those principles, criticizing Texas's failure to "explore any relevant differences between Texas's execution chamber or process and those of other jurisdictions." *Ramirez*, 142 S. Ct. at 1279. Cf. *Mast* v. *Fillmore County*, 141 S. Ct 2430, 2431 (2021) (Gorsuch, J., concurring) ("lower courts failed to give sufficient weight to rules in other jurisdictions" and "[i]t is the government's burden to show [those] alternative[s] won't work").

The Eleventh Circuit thus stands entirely alone in stubbornly perpetuating an understanding of the defendant's burden of proof that renders unnecessary any serious consideration of practices in other jurisdictions.

GDOC did not provide evidence supporting any differences between its prison operations and those of the 38 other states (plus the BOP) that accommodate untrimmed beards. GDOC's claims about "more violent inmates" and lower "staff ratios" were pure conjecture. App.36a. In fact, "GDOC is staffed slightly better than the BOP" and "in the middle for prison

systems in the United States," "GDOC has no information on the percentage of violent inmates in other prison systems," and it "has not even attempted to determine how other states manage inmates with beards." App.65a-66a. GDOC's concerns about contraband were shown to be the product of not searching beards, and of not understanding that beards can be searched without any need for officers to be near inmates. App.32a, 54a-55a, 57a.

The Eleventh Circuit did note that at least some of the jurisdictions permitting untrimmed beards reserved the right to deny them to particular prisoners in light of individual security concerns, and speculated that Smith would be denied an untrimmed beard because of his disciplinary history. App.16a. But that confuses the burdens again; because Georgia was excused from addressing how other states handle beard accommodations in response to other disciplinary issues before the factfinder, this was mere appellate speculation. GDOC never made any individualized determination that granting Smith an untrimmed beard would pose any special dangers; GDOC simply applied its blanket policy that *no* prisoners can grow beards longer than a half-inch. The Eleventh Circuit was also mistaken. Smith's expert testified that—because untrimmed beards are *not* considered to pose meaningful risks when paired with best-practice search policies—many well-run institutions do not restrict religious grooming practices based on histories of discipline or violence unrelated to the beard itself. App.35a n.2. And this Court explained in *Holt* that, rather than denying an accommodation initially, "an institution might be entitled to withdraw an accommodation if the claimant abuses the exemption in a manner that

undermines the prison's compelling interests." *Holt*, 574 U.S. at 369. Other circuits agree that religious accommodations should be denied on disciplinary grounds only if they are specifically abused. See, *e.g.*, *Davis* v. *Davis*, 826 F.3d 258, 272 (5th Cir. 2016); *Greenhill*, 944 F.3d at 248. The district court's original injunction likewise permitted withdrawal for abuse. App.72a.

The Eleventh Circuit has had seven years and numerous opportunities to bring its RLUIPA jurisprudence in line with the plain text of the statute, this Court's decision in *Holt*, and the interpretations adopted by a majority of other circuits. Instead, it has doubled down on its erroneous *Knight* precedent and denied rehearing *en banc*. This Court should grant certiorari to resolve the question.

II. The decision below deepens an existing 4-3 split over what level of deference prison officials receive under RLUIPA's strict scrutiny standard.

Courts of appeal are split 4-3 over the correct legal standard to apply when analyzing the government's burden under RLUIPA. In *Cutter* v. *Wilkinson*, this Court suggested that courts should apply RLUIPA's text by employing its strict scrutiny standard, but with an extratextual "due deference to prison administrators' experience and expertise." 544 U.S. 709, 710 (2005). While dicta, that language spawned considerable confusion in the lower courts and created an acknowledged circuit split over how "deference" interacts with strict scrutiny in RLUIPA cases.

Following *Cutter*, scholars noted that, "[s]ince strict scrutiny and deference to the government are in a sense opposites," this Court's guidance threatened

"incoherence." David M. Shapiro, *To Seek A Newer World: Prisoners' Rights at the Frontier*, 114 Mich. L. Rev. First Impressions 124, 126 (2016). Lower courts were also unsure how to reconcile these contradictory commands, and the circuits split over "whether they should offer deference to prison officials or if they should take a 'harder look' at the explanations offered." Barrick Bollman, *Deference and Prisoner Accommodations Post-*Holt*: Moving RLUIPA Toward "Strict in Theory, Strict in Fact"*, 112 Nw. U. L. Rev. 839, 853 (2018). As the First Circuit explained in *Spratt*, "[t]he level of deference to be accorded to prison administrators under RLUIPA remains an open question." 482 F.3d at 42 n.14.

Holt attempted to bring order to this confusion. This Court explained that the lower courts "thought that they were bound to defer to the [government's] assertion that allowing petitioner to grow such a beard would undermine its interest in suppressing contraband." *Holt*, 574 U.S. at 864. Not so: "RLUIPA, like RFRA, 'makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress.'" *Ibid.* Accordingly, *Holt* explained, the government was required "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." *Ibid.* (emphasis added). This Court then went on to explain that prison administrators deserve "respect" as "experts in running prisons," but "that respect does not justify abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard." *Ibid.* Cf. Fed. R. Evid. 702(a)-(b) (to be admissible,

expert testimony must be based on "knowledge" and "sufficient facts or data").

When articulating the legal standard for prisoner RLUIPA claims, the *Holt* majority never once suggested that "deference" was appropriate, and conspicuously omitted any citation to *Cutter*'s troublesome dicta. Shapiro, 114 Mich. L. Rev. First Impressions at 127 ("[T]he omission of *Cutter* must have been deliberate.").

A. The Second, Fifth, Sixth, and Ninth Circuits apply strict scrutiny while respecting prison officials' relevant expertise.

At least four circuits take RLUIPA's text—and this Court's guidance in *Holt*—seriously, respecting the expertise of prison officials but holding the government to its burden of proof. In practice, these courts require prison officials to support their assertions with *probative evidence*, rather than deferring to otherwise conclusory, unsupported, or uninformed assertions.

Second Circuit. In *Williams* v. *Annucci*, the Second Circuit recognized the dispute over "the specificity" with which the government was required to support its alleged compelling interest, and reaffirmed its view that "*Holt* made it plain that courts need not accept the government's claim that its interest is compelling on its face," and that "courts abdicate their responsibility to 'apply RLUIPA's rigorous standard' by deferring to the government's 'mere say-so' without question." 895 F.3d at 189-190.

The government relied on "only one declaration that claims, in a conclusory manner," that the

government "met its burden to show that it had a compelling interest in cost-efficient food service." *Williams,* 895 F.3d at 191. The panel disagreed, explaining that the government failed to say "precisely how much" accommodating the religious diet "would cost," or how much it would cost "relative to the overall cost of feeding inmates." *Ibid.* "Nor has it shown the added cost, if any," of adopting the inmate's alternative suggestions. *Ibid.* In the end, the panel explained that the government "did not discuss, much less demonstrate, why it could not, at least," provide the alternate requested accommodation of removing offending foods from the meals it already prepares. *Id.* at 194. And because under RLUIPA the government "must prove that each of the inmate's proffered alternatives is too burdensome," *id.* at 193, the court vacated the decision below and remanded for further proceedings.

Fifth Circuit. The Fifth Circuit has also repeatedly affirmed that respect for the expertise of prison officials cannot devolve into blind deference to their office. See, *e.g., Ali* v. *Stephens*, 822 F.3d 776, 783 (5th Cir. 2016) ("Rather than deferring to the prison's general policy regarding a matter, we have consistently tested the prison's asserted interests with regard to the risks and costs of the specific accommodation being sought.") (alteration in original) (quoting *Chance* v. *Texas Dep't of Criminal Justice*, 730 F.3d 404, 418 (5th Cir. 2013)).

In *Ware* v. *Louisiana Department of Corrections*, for example, the panel was confronted with a request from a Rastafarian inmate to grow long, uncut hair in violation of the prison's grooming policy. 866 F.3d at 266. The panel noted that "respect" for the expertise of prison officials does not justify deference to "policies

grounded on mere speculation, exaggerated fears, or post-hoc rationalizations." *Id.* at 268 (quoting *Davis*, 826 F.3d at 265). Looking at the government's asserted compelling interest, the panel concluded that Louisiana had failed to adequately explain why its policies were so underinclusive, applying only to some Department of Corrections inmates and not others: "DOC offered no evidence to support its bare assertion that this difference resulted in dreadlocks among parish inmates presenting less of a risk to DOC's asserted interests than dreadlocks among DOC inmates would." *Id.* at 272. The court continued: "In the face of this absence of evidence on the risks posed by parish inmates, accepting DOC's assertion that parish inmates pose less of a security risk than DOC inmates would afford DOC and Secretary LeBlanc the sort of 'unquestioning deference' in our RLUIPA analysis that the Supreme Court has proscribed." *Ibid.*

The panel therefore concluded that "DOC failed to meet its burden under RLUIPA of showing both that its grooming policies serve a compelling interest and that they are the least restrictive means of serving any such interest." *Ware,* 866 F.3d at 274.

Sixth Circuit. The Sixth Circuit has also recognized that respect for prison officials' expertise is distinct from deference to the government's unsupported assertions. In *Ackerman* v. *Washington*, for example, the government argued that accommodating Jewish inmates' request for kosher meat and dairy would be too expensive. 16 F.4th at 190. The panel noted that prison officials are due "deference" when it comes to doing an "analysis" of the actual costs related to providing accommodations but

explained that the government failed to even engage in that analysis. *Id.* at 188. For example, the government didn't provide the court with any information about how many other accommodations would be needed (highly relevant to cost) and never explained why it was able to provide compliant kosher meals in the past. *Id.* at 190-191. Thus, although the government *articulated* a cost concern (and the requested accommodation certainly posed *plausible risks* to their budget), the Sixth Circuit concluded that the government failed "to 'show that it lack[ed] other means of achieving its desired goal[.]'" *Id.* at 191 (citing *Holt*, 574 U.S. at 364). This, the panel explained, was consistent with RLUIPA's "exceptionally demanding" legal standard, *id.* at 191, and with *Holt*.

Ninth Circuit. The Ninth Circuit has also repeatedly looked beyond the government's mere say-so, even before *Holt*. *E.g., Warsoldier*, 418 F.3d at 995. Since then, then Ninth Circuit has held that courts cannot "grant 'unquestioning deference' to the government's claim of a general security interest," and held that "prison officials cannot 'justify restrictions on religious exercise by simply citing to the need to maintain order and security in a prison.'" *Johnson* v. *Baker*, 23 F.4th 1209, 1217 (9th Cir. 2022). In *Johnson*, a Muslim prisoner sought permission to have a small vial of scented prayer oil in his cell for daily prayer. *Id.* at 1213. The government, however, offered the panel scant evidence to support its ban. Even though the prison's concern was that the smell could hide other contraband, the prison could not explain why prisoners were allowed to "keep many [other] scented products in their cells," and the government's witnesses failed to present any evidence

regarding the "quantity" of prayer oil needed to "cover the smell of contraband." *Id.* at 1217. The panel thus concluded that the government had not put forward the "detailed evidence, tailored to the situation before the court, that identifies the failings in the alternatives advanced by the prisoner." *Ibid.*

B. The Third, Fourth, and Eleventh Circuits inappropriately defer to prison officials' "mere say-so" when applying RLUIPA's strict scrutiny standard.

Despite the decisions of four other circuits and this Court's guidance in *Holt*, at least three circuits continue to inappropriately defer to prison officials' unsupported conclusory assertions, failing to hold the government to its burden to *prove* that its actions satisfy RLUIPA's strict scrutiny standard.

Third Circuit. The Third Circuit continues to defer to prison officials' unproven assertions. In *Watson* v. *Christo*, the majority deferred to the prison's assertion that it could not properly supervise an inmate while he was praying with *tefillin* (leather boxes and straps used in Jewish prayer). 837 Fed. Appx. 877, 879 (3d Cir. 2020). The majority relied almost exclusively on the "risky attributes" of *tefillin*—that they include long leather straps and small boxes which could be used to hide contraband—even though the government put on no evidence that these were anything more than theoretical concerns. *Id.* at 881.

As the dissent explained, the government failed to provide the court with information crucial to testing its arguments. *Watson,* 837 Fed. Appx. at 885 (Phipps, J., dissenting). The government did not "provide the details of its staffing model" to the court, preventing

the court from testing the assertion that it had inadequate staff to supervise the prayer. *Ibid.* The prison also failed to explain why paying overtime to guards to supervise the prayer would fail as a less restrictive means as the prison "already authorizes around 3,000 eight-hour overtime shifts per month." *Ibid.* Indeed, the government "fail[ed] to *prove* that denying Watson access to Tefillin is the least restrictive means of achieving its compelling interests[.]" *Id.* at 883 (emphasis added). Proof is what is needed, and "[w]ithout any such evidence, the prison has not met its burden." *Id.* at 885.

Fourth Circuit. The Fourth Circuit also relies on *Cutter*'s deference dicta to deny accommodations without holding the government to its statutory burden of proof. In *Faver* v. *Clarke*, the panel deferred to the government's assertion that excluding all but a single outside vendor from its facilities was the least restrictive means of advancing its compelling interest in safety and security, as contracting with a vendor for repeated business gives the prison better assurance that the products received are not contraband. 24 F.4th 954, 957-958 (4th Cir. 2022). To justify this exclusion of an Islamic prayer oil vendor, the panel relied on testimony from the government that in the past, having many different vendors caused safety and security issues. *Ibid.*

Judge Motz dissented, pointing out that the government conceded it "had not considered contracting with an Islamic vendor of prayer oils," even though VDOC had acknowledged that it was "'the contractual obligations and the fiduciary responsibility' that a contract with the vendor provides" that "'gives [the VDOC] the confidence' in

the safety and security promoted by its current single-vendor policy." *Faver,* 24 F.4th at 964 (Motz, J., dissenting) (emphasis added). In fact, the government "offered no reason why entering into a contract with an Islamic vendor would fail to provide the VDOC with exactly the same 'confidence'" it had in its existing single vendor. *Ibid.* The dissent aptly characterized the majority's analysis: "we cannot simply 'rubber stamp or mechanically accept the judgments of prison administrators.'" *Id.* at 965.

Eleventh Circuit. The Eleventh Circuit has repeatedly insisted on deference to even the most uninformed prison officials, first in *Knight* and again here. App.19a. The panel below relied primarily on two "findings" from the district court, that it was "'*plausible* that a beard of unlimited length could be much more difficult for GDOC to manage'" and that "it was '*plausible* that allowing a close security inmate like Smith an untrimmed beard could be dangerous for prison security.'" App.20a. The panel then upcycled these plausible concerns into enough "risk" to satisfy *Knight*'s minimal burden, suggesting that "it would be *actually* unmanageable to institute a grooming policy that may *plausibly* result in harm to inmates, staff, or the public." App.21a. Therefore, according to the panel, the government satisfied RLUIPA's strict scrutiny standard because "[i]t is enough to show the risk" of potential "adverse effects." App.21a. (citing *Knight*, 797 F.3d at 947).

But "plausible" proof that an accommodation "could be dangerous" falls far short of what RLUIPA and *Holt* demand. As the dissent explained in detail, GDOC's factual claims rested on little more than *ipse dixit* assertions. The district court found GDOC's

testimony about contraband hidden in beards unpersuasive given both GDOC's lack of experience with beards and the undisputed evidence that inmates hide contraband anywhere that is not searched. App.56a-57a. The district court also found that GDOC "failed to demonstrate why beards would pose a contraband problem if they were searched along with head hair, mouths, and clothes," App.57a, and found that the record "persuasively indicates that officers do not have to put themselves in danger to effectively search a beard as implied by GDOC," but instead can use a straightforward self-search protocol that the BOP has used since it "began allowing full beards and long hair for inmates in the late 1970s." App.54a, 55a.

GDOC also "offered no meaningful evidence to support [its] factual assertion" that it could not accommodate untrimmed beards due to staffing problems or a supposedly higher ratio of violent offenders. App.36a (Martin, J. dissenting). And GDOC's concerns about inmates disguising their appearance by shaving simply reprised an argument that this Court rejected in *Holt*, and that the district court found "could be addressed by enforcing the policy that GDOC already has and making improvements." App.64a.

* * *

As these cases illustrate, the disagreements among the lower courts below stem from *Cutter* and *Holt*. On one side, courts are willing to accept conclusory, uninformed testimony of prison officials as sufficient to satisfy the government's burden of proof under RLUIPA's strict scrutiny standard. These courts rely heavily on *Cutter*'s deference dicta. On the

other side, courts emphasize respect for prison officials' knowledge, but nevertheless hold governments accountable for *proving* (with probative evidence) that they have satisfied both elements of RLUIPA's demanding legal standard. Only this Court can resolve the split.

III. The Eleventh Circuit's denial of a partial accommodation conflicts with this Court's decision in *Ramirez*.

The Eleventh Circuit also made a ruling on remedies that directly conflicts with this Court's decision in *Ramirez*. The panel majority held that once the district court had rejected Smith's preferred relief of an untrimmed beard, it was not permitted to order a partial accommodation of Smith's request in the form of a three-inch beard. The panel majority held that Georgia's burden was solely to "prov[e] that the *untrimmed* beard option would not sufficiently serve its security interests," and that the district court could not consider "compromise[s]." App.12a, 15a (emphasis in original).

Although the opinion contains language suggesting the three-inch possibility was not raised below, App.13a-14a, that suggestion is plainly inconsistent with the record and the district court's specific findings. The district court acknowledged Smith's testimony and sincere belief that Islam requires "that he not trim his beard and, that if he must trim it, to maintain at least a fistful of beard hair." App.15a, 49a. Like this Court in *Holt*, the district court recognized that GDOC's own policies about head hair raised obvious questions about why GDOC could not accommodate beards of a similar length—questions GDOC was unable to answer.

The Eleventh Circuit's actual holding on this point can be found in footnote 6: that because "[i]t is not always clear what a plaintiff's final request for relief will be before, or even during, trial," Smith's deposition testimony about a fist-length alternative, and even the questions that GDOC asked its own witnesses about that alternative, must be entirely disregarded. App.14a n.6.

This see-no-evil holding is in direct conflict with *Ramirez*, where this Court itself proposed several possible ways that Texas might "reasonably address[]" its interests "by means short of banning *all* touch in the execution chamber." *Ramirez*, 142 S. Ct. at 1281. Yet Texas had "do[ne] nothing to rebut these obvious alternatives," and instead "suggest[ed] that it is Ramirez's burden to 'identify any less restrictive means.'" *Ibid*. That "gets things backward": "[o]nce a plaintiff has made out his initial case under RLUIPA, it is the government that must show its policy 'is the least restrictive means of furthering [a] compelling governmental interest.'" *Ibid.* (quoting 42 U.S.C. 2000cc-1(a)(2)).

So too here. The Eleventh Circuit's holding that obvious less restrictive alternatives can be ignored if the plaintiff did not specifically request them (or did not specifically request them in his final request for relief) "gets things backward," effectively shifting to plaintiffs a burden RLUIPA assigns to defendants and preventing compromises RLUIPA was designed to foster. The Eleventh Circuit relied on a body of lower court jurisprudence positing that Congress, despite putting the burden of proof on defendants, could not have intended for defendants to prove a negative. See*, e.g., United States* v. *Wilgus*, 638 F.3d

1274, 1288-1289 (10th Cir. 2011) (collecting cases). Perhaps defendants and courts need not speculate about alternatives that were never suggested and might not serve the plaintiff's religious needs at all. See *Hamilton* v. *Schriro*, 74 F.3d 1545, 1556 (8th Cir. 1996) (plaintiff actively disclaimed any alternatives to the sweat lodge ceremony he desired). But here the Eleventh Circuit has weaponized that principle to deny obviously lesser-included relief that Smith specifically testified would be better than nothing. The Eleventh Circuit even vacated the district court's declaration that GDOC failed to justify its existing half-inch policy under RLUIPA. Smith requested that relief throughout these proceedings and RLUIPA permits him to challenge GDOC's existing policies, whether he is entitled to his preferred alternative or not.

While correcting this error in isolation would not give Smith the full relief to which he is entitled, clarity on this issue in the lower courts is much needed and could be provided in the course of resolving the additional questions presented by this petition.

IV. This petition presents an excellent vehicle for addressing recurring questions of nationwide importance.

This petition offers the Court an excellent vehicle for resolving two entrenched circuit splits and providing significant, meaningful relief to religious

prisoners in three of the Nation's largest prison systems.[2]

With respect to prison grooming policies alone, the *Knight* rule has prevented prisoners of numerous faiths from complying with religious mandates, even as 39 other prison systems have safely accommodated long beards for Jews, Muslims, Sikhs, and adherents of other religions. Yet the Eleventh Circuit's overly deferential interpretation of RLUIPA's strict scrutiny command, and similar holdings in the Fourth and Third Circuits, restrict inmates' rights to religious diets, prayer, worship services, consumption of religious materials, and a host of other religious activities.

Reining in the errant decision in *Knight* will not only ensure justice for the thousands of incarcerated religious adherents who are being wrongfully deprived of religious exercise. It will also draw a clear line between due respect for actual expertise rooted in knowledge and data and blind deference to the mere say-so of prison officials just because they are prison officials.

This case also presents an excellent vehicle for addressing these important and recurring questions. The issues were squarely presented to the courts below, and there are no procedural obstacles to reaching the questions presented. Moreover, this case presents a unique opportunity to consider these issues after a full bench trial, including significant

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[2] As of 2019, Georgia, Alabama, and Florida had a combined prison and jail inmate population of 277,449 inmates. *State Statistics Information*, National Institute of Corrections, https://perma.cc/AHY2-ZDHZ.

expert testimony on both sides, rather than in the context of purely legal preliminary motions.

The key facts are also undisputed. The record shows that a strong majority of other jurisdictions accommodate untrimmed beards. App.24a. GDOC's witnesses acknowledged that they had no experience with beards, had no knowledge about how other states accommodate them, and made no investigations into those issues. App.52a-60a. And the district court made detailed findings that make clear that GDOC's reasons for opposing full beards rested on assumptions that were admittedly speculative. App.61a, 68a.

* * *

The decision below "renders the Supreme Court's command in *Holt* meaningless" in the Eleventh Circuit. App.38a. The Eleventh Circuit has directly acknowledged that it has split from other circuits and, with this decision, entrenched and deepened the acknowledged splits. This Court should protect the rights of religious inmates and clarify the proper level of deference due to prison officials.

CONCLUSION

For all these reasons, the Court should grant the petition.

Respectfully submitted.

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