No. 21-1405

IN THE

Supreme Court of the United States

LESTER SMITH,

Petitioner,

v.

TIMOTHY WARD, COMMISSIONER,
GEORGIA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CONSTITUTIONAL LAW CENTER FOR MUSLIMS IN AMERICA IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit erred in failing to require that the State of Georgia meet its burden, under the Religious Land Use and Institutionalized Persons Act and this Court's precedents of *Holt v. Hobbs* and *Ramirez v. Collier*, to show that its half-inch beard limitation represents the least restrictive means available to accomplish its stated compelling interests, without unconstitutionally burdening the religious expression of affected inmates like Lester Smith, whose sincerely held religious beliefs mandate longer beards; and

   a. Whether, in meeting its burden to show that its half-inch beard limitation represents the least restrictive means available to accomplish its stated compelling interests without unconstitutionally burdening the religious freedom of affected inmates, the State of Georgia must demonstrate more than stubborn refusal and conclusory statements to explain why the less restrictive policies of 37 other states fully could not meet its needs.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page(s)

CASES

Cited Authorities

Page(s)

Page(s)

OTHER AUTHORITIES

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

BRIEF OF THE CONSTITUTIONAL LAW CENTER FOR MUSLIMS IN AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

The Constitutional Law Center for Muslims in America ("CLCMA") operates a nonprofit law center dedicated to protecting individuals' constitutional rights that are impacted by national security and immigration policies, as well as civil rights harmed by discrimination on the basis of religion, race, or national origin. Institutionalized Muslims similar to Petitioner Lester Smith seek CLCMA's help in protecting their rights to religious expression so that they may observe the tenets of their sincerely held religious beliefs, free from unnecessarily restrictive interference.

If the Eleventh Circuit's decision stands, CLCMA's clients and other inmates will suffer greatly. CLCMA's demonstrated experience in this field makes it well-positioned to enhance this Court's understanding of the relevant issues. CLCMA files this Brief in Support of Petitioner Smith, who seeks a writ of certiorari and the right to practice his chosen religion in accordance with his sincerely held religious beliefs, without restrictive burdens.

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1. Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than amicus made a monetary contribution intended to fund the preparation or submission of this brief. All parties to the petition for writ of certiorari consent to amicus filing this brief. All parties were informed of amicus' intent to file this amicus brief more than ten days before filing.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Free Exercise Clause of the First Amendment to the United States Constitution guarantees the right of religious expression, even for those within prison walls. Congress took that right further. In enacting the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), Congress specifically broadened the definition of "exercise of religion" to exceed that of the preceding Religious Freedom Restoration Act ("RFRA"). Congress moved from defining "exercise of religion" as "the exercise of religion under the First Amendment"[2] to defining it as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[3] This Court recognizes that expansion. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014). So does the Eleventh Circuit. *Mays v. Joseph*, No. 21-10919, 2022 U.S. App. LEXIS 87, at *4 (11th Cir. Jan. 3, 2022) (recognizing, in an inmate's beard accommodation case challenging the Georgia Department of Corrections, that "RLUIPA provides greater protection of religious expression to prisoners than the First Amendment" and "[a]s a result, a RLUIPA claim is wholly separate from a First Amendment claim and RLUIPA is construed in favor of broad protection of religious exercise") (citing *Burwell*, 573 U.S. at 695–96). And yet, in this case the Eleventh Circuit reversed a district court ruling in 2021 that recognized how the Georgia Department of Corrections' policy limiting inmates' beards to a half-inch and denying them religious accommodations violated RLUIPA. Instead, the Eleventh Circuit accepted

2. 42 U.S.C. § 2000bb–2(4).

3. 42 U.S.C. § 2000cc–5(7)(A).

Georgia's intentional disregard of available less restrictive policies to protect its same interests, simply accepting at face value Georgia's "calculated decision" to brush off the less restrictive policies "that its fellow institutions have chosen to tolerate." Pet. of Lester Smith at 2–3.

Muslim inmates like Petitioner Smith and many clients of amicus view maintaining untrimmed or at least fist-length beards as a required tenet of their sincerely held religious beliefs, and therefore a necessary part of their religious expression. Inmates who practice other religions do as well. And dozens of state institutional systems across the country recognize ways to accommodate these religious beliefs without substantially burdening the inmates' religious expression. But not Georgia. As explained more fully and aptly by Petitioner (and therefore not duplicated here), the Georgia Department of Corrections did not even explore other potential options to its narrow policy, nor did it consider what impact (if any) those options would have on security concerns it identified as motivating its decision. It just said no. Yet the 37 other states that did take on this exploration, as well as the Bureau of Prisons at the federal level, all find a way to meet both their statutory burdens and the religious needs of their inmates. Georgia can do the same. The Eleventh Circuit knows the law requires that. Allowing the current decision to stand grants other institutions cover to revert back to the days before Congress passed RLUIPA, when "[w]hether through indifference, ignorance, bigotry, or lack of resources, some institutions restrict[ed] religious liberty in egregious and unnecessary ways."[4] And that

4. *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005) (citing 146 Cong. Rec. S7774, S7775 (July 27, 2000) (Joint Statement of Sens. Hatch and Kennedy)).

runs directly counter to the intent Congress clearly expressed.

ARGUMENT

America itself exists because it provided early settlers with refuge from religious persecution. Religious freedoms formed a cornerstone of American values from day one; they still do today. The right to religious freedom does not end at the prison gates.[5] Policies and actions of prison officials, like those by Georgia's state officials, infringe on precisely the same protected right to religious expression that first necessitated America's existence.

Inmates' rights to religious expression in prisons directly correlate with lowered recidivism rates and disciplinary infractions.[6] Even setting aside those benefits, inmates nonetheless retain the rights guaranteed by the First Amendment to the United States Constitution and as further extended by Congress in RLUIPA.

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5. *See generally Turner v. Safley,* 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution"); *see also Bell v. Wolfish,* 441 U.S. 520, 545 (1979) (holding that prisoners do not forfeit constitutional protections because of their imprisonment); *Wolff v. McDonnell,* 418 U.S. 539, 555–56 (1974) (observing that "there is no iron curtain" between the Constitution and prisons).

6. *See, e.g.,* Samantha Collins, *Religious Identity and the Long-Term Effects of Religious Involvement, Orientation, And Coping in Prison*, Transforming Corrections (Oct. 3, 2018), https://transformingcorrections.com/religious-identity-and-the-long-term-effects-of-religious-involvement-orientation-and-coping-in-prison/.

Petitioner Lester Smith, a devout Muslim in the care of the Georgia Department of Corrections ("GDOC"), seeks the right to grow an untrimmed beard in accordance with his sincerely held religious beliefs. An institutionalized person, he values the exercise of his faith as one of the few freedoms he retains. The policies and actions of GDOC infringe upon that right, without seeking the least restrictive means available to protect its compelling interests.

I. GDOC's Ban on Untrimmed Beards Infringes on Muslim and Other Inmates' Rights to Religious Expression

RLUIPA is a bipartisan law passed in relevant part to protect the religious rights of institutionalized persons. The actions of GDOC curtail the religious practices of Muslim and other inmates, thereby violating RLUIPA. GDOC's refusal to amend its antiquated beard length policies infringes on the equal rights of Muslim and other inmates.

A. Maintaining an Untrimmed Beard Constitutes a Core Tenet of Islam and Other Faiths

Islam, the third of the Abrahamic faiths, builds upon many Judaic and Christian teachings. Nearly two billion people in the world identify as Muslim.[7] In the United

7. *See, e.g.,* Michael Lipka, *Muslims and Islam: Key Findings in the U.S. and Around the World*, Pew Research Center (Aug. 9, 2017), https://www.pewresearch.org/fact-tank/2017/08/09/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world/.

States alone, between three and six million people self-identify as Muslim, representing between one to two percent of the population.[8] While Muslims make up about one percent of the U.S. population, they disproportionately represent almost nine percent of state prisoners.[9] In Georgia, between 6% and 8% of inmates self-identify as Muslim at entry.[10] No information suggests this trend will reduce, and it remains likely to rise as the percentage of incarcerated Muslims increases in many other states.[11]

The comprehensive religion of Islam instructs its followers on nearly all aspects of life. Islamic practice contains many compulsory acts for sane adult Muslims.[12]

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8. *See, e.g.,* Besheer Mohamed, *New Estimates Show U.S. Muslim Population Continues to Grow*, Pew Research Center (Jan. 3, 2018), https://www.pewresearch.org/fact-tank/2018/01/03/new-estimates-show-u-s-muslim-population-continues-to-grow/; *The 2020 Census of American Religion*, PRRI (July 8, 2021), https://www.prri.org/research/2020-census-of-american-religion/.

9. *Fulfilling the Promise of Free Exercise for All: Muslim Prisoner Accommodation in State Prisons,* Muslim Advocates, 38 (July 2019), https://muslimadvocates.org/wp-content/uploads/2019/07/FULFILLING-THE-PROMISE-OF-FREE-EXERCISE-FOR-ALL-Muslim-Prisoner-Accommodation-In-State-Prisons-for-distribution-7_23-1.pdf ("*Fulfilling the Promise*").

10. Inmate Statistical Profile, Ga. Dep't of Corrs., 8 (June 1, 2021), http://www.dcor.state.ga.us/sites/all/themes/gdc/pdf/Profile_all_inmates_2019_02.pdf; for the purposes of this figure, those who identify as Nation of Islam were included in the total percentage of Muslims in GDOC; cf. *Fulfilling the Promise*, *supra* n.9.

11. *Fulfilling the Promise,* at 39–45.

12. This distinction acknowledges the belief in Islam that

These include praying five times daily, abstaining from eating pork, and fasting during Ramadan. Some other acts qualify as highly recommended, or *sunnah*.[13] Some *sunnah* acts do rise to the level of *wajib*, or "required," and therefore have *de facto* mandatory status.[14] Many schools of Islamic thought regard the obligation of Muslim men to maintain untrimmed beards as mandatory. This belief derives from the *hadith*,[15] a narration of events or actions done by the Prophet Muhammad.[16] The *hadith* instructs Muslim men to trim mustaches, yet leave beards untrimmed.[17] Common interpretations include

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those not capable of controlling their bodies or minds shall not be held culpable for their actions. *Compare* Sunan an-Nasa'I, Vol. 4, Book 27, No. 3462 ("The pen has been lifted from three: From the sleeper until he wakes up, from the minor until he grows up, and from the insane until he comes back to his senses or recovers") *with* Model Penal Code § 4.01(1) test (explaining that a legally insane defendant cannot be held accountable for crimes which occur as a result of the condition). By contrast, a young child or someone with significant mental delays need not adhere to the same religious standards expected of a neurotypical adult in Islam.

13. Sunan Abu Dawood, No. 2356.

14. *Wajib*, Oxford Reference (last visited June 2, 2022), https://www.oxfordreference.com/view/10.1093/oi/authority.20110803120346473 (explaining that *wajib* acts are obligatory acts in Islamic jurisprudence).

15. *Hadith* constitute the primary source of *sunnah* practices. *Sunnah*, Britannica (last visited June 2, 2022), https://www.britannica.com/topic/Sunnah.

16. The practice of Islam also requires that its adherents follow references to the Prophet Muhammad with the blessing that "peace be upon him." *See, e.g.,* Quran 33:56 (instructing Muslims to confer prayers and well wishes upon the Prophet Muhammad).

17. Sahih Bukhari, Vol. 7, Book 72, No. 781.

maintaining a fist-length beard; others interpret this to mean beards of four or five inches.[18]

Beards bear significant religious meaning beyond just Islam. Certain Jewish denominations hold the maintenance of beards as holy. Some Jewish scholars believe the religion "prohibit[s] any removal and even trimming of the beard."[19] Historic accounts show that nearly all Jewish men maintained beards until the end of the 19th century, when clean-shaven men became the secular cultural norm.[20] The Chofetz Chaim, "the undisputed leader and halachic authority of non-Chassidic Jewry," published a booklet that "systematically and vigorously refute[s] all the justifications being advanced to defend removing the beard . . . declaring these justifications were against the Torah."[21] Many Jewish inmates maintain beards for religious reasons. Per a 2021 report, 122 Georgia inmates self-identify as Jewish or Messianic Jewish.[22]

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18. Offender Orientation Handbook, Tex. Dep't of Corrs., (A)(5) (Feb. 2017), https://www.tdcj.texas.gov/documents/Offender_Orientation_Handbook_English.pdf (requiring that religious beards shall be no more than fist length and cannot exceed four inches outward from the face).

19. Rabbi Moshe Wiener, *The Beard: Where Chassidim and Misnagdim Agree,* 5 (2020), https://www.koshershaver.info/publications/files/theBeard.pdf.

20. *Id.* at 8.

21. *Id.*

22. *Inmate Statistical Profile*, Ga. Dep't of Corrs., 8 (June 1, 2021), http://www.dcor.state.ga.us/sites/all/themes/gdc/pdf/Profile_all_inmates_2019_02.pdf.

The Sikh religion also requires facial hair be unshorn.[23] Restrictive grooming policies in prisons arise around the country, with courts ruling to trim those policies instead of the beards. For example, the Arizona Department of Corrections forcibly shaved an inmate's beard in 2020, which he had *never* cut previously.[24] While the focus of Petitioner Smith's action centers on his own religious need to maintain a beard, other inmates also suffer harm under GDOC's arbitrary and unduly restrictive policy that remain in effect.[25]

B. The Armed Forces Recognize and Accommodate Religious Beards

Much like GDOC does now, the U.S. Army previously maintained a uniform policy with no room to deviate for religious purposes. That changed. Major Kamal Kalsi, a Sikh man observing beard and turban requirements, and a fellow Sikh soldier ultimately won the right to keep their beards and turbans.[26] Since then, the Army

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23. *See, e.g., The Five Ks*, BBC (Sept. 9, 2009), https://www.bbc.co.uk/religion/religions/sikhism/customs/fiveks.shtml.

24. A copy of this Department of Justice complaint is available at https://www.aclu.org/sites/default/files/field_document/2021-05-24_doj_complaint.pdf.

25. Per a 2021 report published by Georgia, there were no known Sikh inmates at that time; nonetheless, there may be today, or at any point in the future. *Inmate Statistical Profile*, Ga. Dep't of Corrs., 8 (June 1, 2021), http://www.dcor.state.ga.us/sites/all/themes/gdc/pdf/Profile_all_inmates_2019_02.pdf

26. *See, e.g.,* Elizabeth Kuhr, *American Sikhs Push to End Army Ban on Beards,* TIME (Jan. 10, 2014), https://time.com/306/american-sikhs-push-to-end-army-ban-on-beards/; *see also Singh v. Carter*, 168 F. Supp. 3d 216 (D.C. Cir. 2016).

revised its policies and now allows people of faith to wear their religious garb and maintain beards in most circumstances.[27, 28]

II. The Eleventh Circuit's Holding Gives States Too Much Deference, Contradicting Both RLUIPA and This Court's Precedent

The Eleventh Circuit's holding provides states with a degree of deference that violates both RLUIPA and this Court's precedent. That level of deference negates the requirement that institutions demonstrate that, no matter how compelling their interest, they employ the least restrictive means available to protect that interest.

A. The Eleventh Circuit's Holding Takes the Teeth out of Binding Precedent, Giving States the Unfettered Deference This Court Already Rejected

The Eleventh Circuit's holding erroneously strips both *Holt v. Hobbs*[29] and RLUIPA of any impact, as correctly noted by the dissent. *Smith v. Owens,* 13 F.4th 1319,

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27. *See, e.g.,* Army Directive 2017-03, Policy for Brigade-Level Approval of Certain Requests for Religious Accommodations, Secretary of the Army (3) (Jan. 3, 2017), https://api.army.mil/e2/c/downloads/463407.pdf.

28. Amicus counsel previously represented Army SPC. Ehsan Azzami, a Muslim service member who gained approval in 2017 to maintain his beard in accordance with his religious beliefs. *See* Jeannine Sherman, *MLFA on Memorial Day*, Mlfa (May 27, 2022), https://mlfa.org/mlfa-memorial-day/.

29. 574 U.S. 352 (2015).

1338–39 (11th Cir. 2021) (Martin, dissenting) (critiquing the majority approach as "inconsistent with *Holt*" and "render[ing] the Supreme Court's command in *Holt* meaningless"). RLUIPA recognizes that power imbalance rests with institutions and not the institutionalized. Congress enacted RLUIPA to recalibrate that imbalance and protect individuals' religious rights. The Eleventh Circuit's holding tips the scales back to pre-RLUIPA status, with faulted reasoning providing the appearance of this Court's and Congress' blessing.

This Court made clear in *Holt* that "when so many prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course." *Holt,* 574 U.S. at 369. Similarly, this Court in *Ramirez* ruled that Texas erroneously failed to rebut "obvious alternatives," much like Georgia does here. *Ramirez v. Collier,* 142 S. Ct. 1264, 1281 (2022); *see also id.* at n.2 (Kavanaugh, J., concurring) ("recent experience in other States can be informative in analyzing whether the State has a sufficiently compelling interest and has employed the least restrictive means"). Despite this clear precedent, the Eleventh Circuit accepted GDOC's unsupported assertions at face value and ignored directly comparable policies and practices from other states' institutions.[30] The Eleventh Circuit's holding contrasts with RLUIPA and governing case law, with no evidence in the record to justify this divergence. But RLUIPA "does not permit such unquestioning deference." *Holt*, 574 U.S. at 364.

30. *Smith*, 13 F.4th at 1337.

B. Risk Aversion Alone Fails to Satisfy Institutions' Burdens

Before this Court's ruling in *Holt*, many state prison systems did not allow beards at all based on safety, security, and hygiene concerns. Post-*Holt*, every state now allows beards of some length, and most states' institutions allow beards longer than the half-inch length of Georgia's policies, particularly to accommodate religious beliefs.[31]

Many states allow inmates to grow facial hair in any style they want, with only the caveat that inmates trim their hair if length or cleanliness become a safety, health, or sanitation problem. The district court acknowledged this fact. *Smith v. Dozier,* 5:12-cv-26, 2019 U.S. Dist. LEXIS 132234, at *19 (M.D. Ga. Aug. 7, 2019) (explaining that 37 states and the Bureau of Prisons allow untrimmed beards). *See, e.g.,* Colorado (allowing beards "provided they are kept neat and clean" and when length or style is a sanitation of safety problem, corrective measures such as

31. The district court correctly noted that 37 states allow untrimmed beards. *See, e.g., Smith v. Dozier,* 5:12-cv-26, 2019 U.S. Dist. LEXIS 132234, at *19 (M.D. Ga. Aug. 7, 2019) (citing Plaintiff's Doc. 236 at 162–63; Doc. 176 at 2; Doc. 213 at 13). Since the district court's opinion, Virginia also changed its policy and now allows inmates to grow beards of any length. *Greenhill v. Clarke,* 944 F.3d 243, 248 (4th Cir. 2019). But GDOC grants itself exactly the type of categorical exception prohibited by RLUIPA and *Holt*, merely asserting general safety and security concerns without examining the viability of other less restrictive options. That does not comply with the law. Cf. *Ramirez v. Collier,* 142 S. Ct. 1264, 1280 (2022) (holding that "[c]onjecture alone fails to satisfy the sort of case-by-case analysis that RLUIPA requires").

wearing hair nets or job reassignment will be enforced);[32] Indiana ("Facial hair, mustaches, goatees and beards shall be clean and neatly trimmed at all times");[33] Iowa (allowing beards and implementing alternative measures where length or style presents a health or sanitation problem);[34] Michigan ("Prisoners shall be permitted to maintain head and facial hair in accordance with their personal beliefs provided that reasonable hygiene is maintained");[35] Minnesota ("Hair, including facial hair and eyebrows, must be kept clean and may not be styled or cut to contain lettering, signs, or symbols);[36] Missouri ("Hair and beards will be clean and neatly groomed");[37] Nevada (allowing

32. Administrative Regulation 850-11, Colo. Dep't of Corrs., J(2)(c)–(d) (Feb. 1, 2022), https://drive.google.com/file/d/1wwmyNFcnBgHHh_pmpbZZhxZqgCOSoMDc/view.

33. Offender Grooming, Clothing, and Personal Hygiene 02-01-104, Ind. Dep't of Corrs., X (May 1, 2019) ("Facial hair, mustaches, goatees and beards shall be clean and neatly trimmed at all times"), https://www.in.gov/idoc/files/02-01-104-Offender-Grooming-5-1-2019-.pdf.

34. Incarcerated Individual Hygiene/Grooming IS-SH-01, Iowa Dep't of Corrs., C(3) (Feb. 2021), https://doc.iowa.gov/sites/default/files/is-sh-01_incarcerated_individual_hygiene_grooming.pdf.

35. Humane Treatment and Living Conditions for Prisoners, Mich. Dep't of Corrs., D (Feb. 23, 2009), https://www.michigan.gov/-/media/Project/Websites/corrections/publications/Folder3/03_03_130.pdf?rev=ee4aee31e7ff469db657eb92d87acc11.

36. Offender/Resident Dress/Linen Exchange/Hygiene/Hair Care Policy, Minn. Dep't of Corrs., C(1) (July 21, 2020), https://policy.doc.mn.gov/docpolicy/PolicyDoc.aspx?name=303.020.pdf.

37. Offender Handbook, Miss. E. Corr. Ctr., 14 (Sept. 2010), https://www.law.umich.edu/special/policyclearinghouse/

inmates personal freedom in personal grooming as long as that does not conflict with safety, security, identification, and hygiene);[38] North Dakota (allowing beards that are trimmed and clean);[39] Ohio (allowing facial hair that is neatly trimmed and identifying search methods);[40] Oklahoma (specifying that inmates may grow facial hair that does not conflict with security, sanitation, safety, or health requirements of the agency after initial shaving at intake);[41] Oregon (requiring that facial hair be maintained cleanly and neatly, and specifying search methods);[42] and Pennsylvania (allowing inmates to maintain hair at any length).[43] And, one year after *Holt*, Arkansas removed

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Documents/MO%20-%20Eastern%20Correctional%20Center%20Offender%20Handbook.pdf; note that this policy comes from the handbook of a specific facility.

38. Inmate Grooming and Personal Hygiene, Nev. Dep't of Corrs., 705.01(1)–(1)(A) (Aug. 13, 2010), https://doc.nv.gov/uploadedFiles/docnvgov/content/About/Administrative_Regulations/AR%20705%20-%20No%20Changes.pdf.

39. Facility Handbook, N. D. Corrs. & Rehab., Haircuts and Facial Hair (Aug. 2021), https://www.docr.nd.gov/sites/www/files/documents/friends_family/Facility%20Handbook.pdf.

40. Ohio Admin. Code 5120-9-25(D) (2022).

41. Personal Hygiene and Appearance Code, Okla. Dep't of Corrs., A(2) (Dec. 6, 2021), https://oklahoma.gov/content/dam/ok/en/doc/documents/policy/section-03/op030501.pdf.

42. Hygiene, Grooming and Sanitation (AIC), Dep't of Corrs., 291-123-0015 (2)(a)–(e) (Apr. 30, 2020), https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=956.

43. Inmate Grooming and Barber/Cosmetology Programs, Pa. Dep't of Corrs., DC-ADM 807 (July 1, 2016), https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/807%20Inmate%20Hygiene%20and%20Grooming.pdf.

all beard length restrictions.[44] Several states, including Ohio, Colorado, and Iowa, incorporate language requiring inmates with beards who work in kitchens or other jobs presenting specific sanitation and safety concerns to wear hair nets or be reassigned to different jobs.[45] And Ohio requires that all hair, including facial hair, must remain readily searchable.[46]

Each of these policies represents a less restrictive means to further the same compelling government interest espoused by GDOC, yet Georgia will not implement these alternatives. GDOC asserts that its facilities somehow differ from those in the dozens of other states identified above. *Smith v. Dozier,* No. 5:12-cv-26, 2019 U.S. Dist. LEXIS 132234, at *26 (M.D. Ga. Aug. 7, 2019) (claiming GDOC's needs differ due to its numbers and staff ratios). GDOC relies only on self-serving and conclusory testimony from its own officials. *See, e.g., Smith,* 13 F.4th at 1323–26. These threadbare and unsupported assertions fall flat when compared to Texas, which successfully maintains 99 facilities with less restrictive policies.[47] Texas

44. Inmate Handbook, Ark. Dep't of Corrs., 8 (Mar. 2020), https://doc.arkansas.gov/wp-content/uploads/2020/09/Inmate_Handbook_Updated_March_2020_Final_02_28_2020_pdf.pdf ("If an inmate chooses to maintain facial hair, it must be worn loose, clean and neatly combed").

45. *See* nn. 25, 27, and 33, *supra.*

46. Ohio Admin. Code 5120-9-25(D) (2022).

47. This number includes correctional institutions, developmental disability programs, and substance abuse felony punishment facilities. This figure also encompasses both privately run institutions and those run by the applicable governmental entities. Unit Directory, Tex. Dep't of Crim. J. https://www.tdcj.texas.gov/unit_directory/index.html (last visited June 1, 2022).

facilities allow inmates to grow up to four-inch beards for religious reasons.[48] Comparably, GDOC encompasses 92 facilities.[49] Texas has 251,000 institutionalized persons, compared to Georgia's 102,000 institutionalized persons.[50] And yet a risk-averse state like Texas manages to both respect inmates' religious needs more than Georgia, and simultaneously uphold its safety and security interests. Georgia views this task as impossible, expecting the courts to excuse it from this requirement entirely.

As the fourth highest incarceration rate titleholder, Georgia relies on its numbers to justify its comparatively draconian policy. As of 2019, between 6% and 8% of Georgia's inmates self-identify as Muslim.[51] That number represents the sixteenth-highest Muslim prisoner percentage across all state prison systems, much lower than its fourth place overall incarceration rank. *Id.* Of the fourteen states and D.C. which rank higher in Muslim percentages, nine employ more lenient beard policies allowing beards of any length or allowing beards longer

48. Offender Orientation Handbook, Tex. Dep't of Crim. J., III(A)(5)(a) (Feb. 2017), https://www.tdcj.texas.gov/documents/Offender_Orientation_Handbook_English.pdf ("Religious beards shall be no more than fist length and not exceed four inches outward from the face").

49. Facilities Division, Ga. Dep't of Corrs., http://www.dcor.state.ga.us/Divisions/Facilities/Corrections.

50. Texas Profile, Prison Policy Initiative, https://www.prisonpolicy.org/profiles/TX.html (last visited June 2, 2022); Georgia Profile, Prison Policy Initiative, https://www.prisonpolicy.org/profiles/GA.html (last visited June 2, 2022).

51. *Fulfilling the Promise,* 38; cf. Inmate Statistical Profile, *supra* n. 10.

than GDOC's half-inch restriction.[52] GDOC's policies impose a disproportionate restriction on its Muslim population compared to states with higher percentages of Muslim inmates.

Much like Texas initially did in *Ramirez,* GDOC fails to demonstrate how its ban on beards longer than a half-inch constitutes the least restrictive means of furthering its compelling government interests. "Instead, they ask that we simply defer to their determination." *Ramirez*, 142 S. Ct. at 1279; cf. *Smith v. Owens,* 13 F.4th at 1323-24

52. *Fulfilling the Promise,* 37–38; Inmate Handbook, Ark. Dep't of Corrs., 8 (Mar. 2020), https://doc.arkansas.gov/wpcontent/uploads/2020/09/Inmate_Handbook_Updated_March_2020_Final_02_28_2020_pdf.pdf; Standards for Offender Grooming and Attire, Del. Dep't of Corrs. (June 22, 2015), https://doc.delaware.gov/assets/documents/policies/policy_5-3.pdf; Md. Code Regs. 12.14.03.06(K) (2022); Humane Treatment and Living Conditions for Prisoners, Mich. Dep't Of Corrs., D (Feb. 23, 2009) https://www.michigan.gov/- /media/Project/Websites/corrections/publications/Folder3/03_03_130.pdf?rev=ee4aee31e7ff469db657eb92d87acc11; Offender Handbook, Miss. E. Corr. Center, 14 (Sept. 2010), https://www.law.umich.edu/special/policyclearinghouse/Documents/MO%20- %20Eastern%20Correctional%20Center%20Offender%20Handbook.pdf; Inmate Grooming and Barber/Cosmetology Programs, Pa. Dep't Of Corrs., Dc-Adm 807 (July 1, 2016), https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/807%20Inmate%20Hygiene%20and%20Grooming.pdf; 3 Ohio Admin. Code 5120-9-25(D) (2022); Inmate Handbook, Conn. Dept of Corrs., D(2) (Mar. 2014), https://www.law.umich.edu/special/policyclearinghouse/Documents/CT%20-%20Osborne%20Handbook.pdf; Administrative Close Supervision Unit Administrative Segregation Inmate Handbook, N.J., Personal Hygiene, https://www.law.umich.edu/special/policyclearinghouse/Documents/New%20Jersey%20Inmate%20Handbook.pdf.

(speculating about contraband and risks of untrimmed beards). Even in the face of contrary testimony, GDOC maintains it cannot safely accommodate untrimmed or fist-length beards. *See, e.g., Smith*, 13 F.4th at 1323–25 (explaining the types of contraband GDOC experts have witnessed, and the dangers presented by contraband and ease in altering appearances); *see also id.* at Doc. 236, at 117–119; Doc. 236 (explaining BOP's self-search methodology). GDOC asserts that allowing untrimmed beards would allow contraband into its facilities, causing logistical and safety difficulties. But GDOC merely speculates about this impact; it has *never* allowed inmates to grow longer beards.[53] *See, e.g., Ramirez*, 142 S. Ct. at 1280 (rejecting an argument that "comes down to conjecture regarding what a hypothetical spiritual advisor might do in some future case" as "'insufficient to satisfy' respondents' burden") (quoting *Fulton v. Philadelphia*, 141 S. Ct. 1868, 1882 (2021)). RLUIPA requires that GDOC engage in a case-by-case factual analysis, considering all viable religious accommodations. It refuses. *Id.* at 15. GDOC's fears of contraband find no factual foundation since it simultaneously permits inmates to grow head hair up to three inches on top, six times longer than the beards it permits. Yet GDOC does not articulate how hair on inmates' heads and hair on inmates' faces meaningfully differ; if contraband hides in one, it can hide in the other. If GDOC safely checks for contraband in head hair, it can safely check for contraband in beards of three inches.

53. GDOC's experts testified that inmates smuggle contraband on their person, in their clothes, and everywhere else possible. *Smith v. Owens*, 13 F.4th at 1323–24 (11th Cir. 2021). And the former director of the Virginia Department of Corrections testified that contraband that could be hidden in beards does not differ from contraband hidden elsewhere. *Id.*

Justice Kavanaugh's concurrence in *Ramirez* addresses the level of risk of disruption that states must accept. *Ramirez,* 142 S. Ct. at 1285-90 (Kavanaugh, J., concurring). That analysis proves instructive here. This Court may look to other states' practices to determine whether GDOC violated RLUIPA in refusing to permit longer beards as religious accommodations. Several states allow beards of any length, and several more allow beards significantly longer than Georgia does. *Ramirez*, 142 S. Ct. at n.2. Comparisons to other states' policies show that GDOC could employ less restrictive means. "Although the compelling interest and least restrictive means standards are necessarily imprecise, history and state practice can at least help structure the inquiry and focus the Court's assessment of the State's arguments." *Id.* at 1288.

This Court unanimously held that RLUIPA's test "is exceptionally demanding on states" and "requires the [State] to show that it lacks other means of achieving its desired goal." *Holt,* 574 U.S at 364 (citing *Burwell,* 573 U.S. at 728). GDOC cannot make this showing. Because other states' "well-run institutions" achieve the same relevant interest with less burden on inmates' religious exercise, GDOC must "at a minimum offer persuasive reasons why it believes that it must take a different course." *Id.* at 368–69; *see also Dunn v. Smith*, 141 S. Ct. 725, 725 (2021) (Kagan, J., concurring) (recognizing that "past practice, in Alabama and elsewhere" demonstrates how to accommodate the requested religious practice). In rejecting other states' practices, GDOC bears the burden. *See Mast v. Fillmore Cnty.,* 141 S. Ct. 2430, 2433 (2021) (Gorsuch, J., concurring) (recognizing that "lower courts failed to give sufficient weight to rules in other jurisdictions"). And this Court held that failure to address other jurisdictions' practices fails even under

intermediate scrutiny. *McCullen v. Coakley*, 573 U.S. 464, 490 (2014) (holding the failure to identify comparable approaches "raise[s] concern that the Commonwealth has too readily foregone options that could serve its interests just as well").

III. Existing Frameworks Provide Relevant Guidance

This Court need not approach the question of balancing the relevant concerns in the dark. The Court's own prior holdings, as well as closely analogous statutes, provide a sufficient framework for allocating burdens that comports with Congress' intent for RLUIPA.

A. Religious Freedom Restoration Act, RLUIPA's Older Sibling

This Court knows RLUIPA's origin story well. First encompassed within the RFRA, Congress enacted RLUIPA as its "second attempt to guarantee by statute the broad protection of religious exercise" by institutionalized persons. *Sossoman v. Texas*, 563 U.S. 277, 303 (2011) (Sotomayor, J., dissenting) (internal citations omitted). After this Court deemed the inclusion of these concepts in RFRA unconstitutional as applied to state and local governments,[54] "Congress responded by enacting RLUIPA[,]" which "borrows important elements from RFRA[.]" *Sossoman*, 563 U.S. at 281 (Thomas, J., writing for the majority); *see also Cutter*, 544 U.S. at 715. When creating RLUIPA, "Congress carried over from RFRA the 'compelling interest'/'least restrictive means' standard." *Cutter*, 544 U.S. at 717; *see also Gonzales v. O*

54. *See City of Boerne v. Flores*, 521 U.S. 507 (1997); *Employment Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990).

Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006) (recognizing that RLUIPA allows "state prisoners to seek religious accommodations pursuant to the same standard as set forth in RFRA"). Since its inception, Congress, this Court, and even the Department of Justice have viewed the standards in RLUIPA as parallel to those in RFRA: "We do not believe RLUIPA would have an unreasonable impact on prison operations. RFRA has been in effect in the Federal prison system for ... years and compliance with that statute has not been an unreasonable burden to the Federal prison system." *Id.* at 725–26 (quoting 146 Cong. Rec. S7776 (July 27, 2000) (Letter from Department of Justice to Senator Hatch)); *see also Holt*, 574 U.S. at 358 (holding that RLUIPA allows prisoners "to seek religious accommodations pursuant to the same standard as set forth in RFRA"); *Burwell*, 573 U.S. at 696 n. 5 (holding that "the 'exercise of religion' under RFRA must be given the same broad meaning that applies under RLUIPA"); *see also Mays,* 2022 U.S. App. LEXIS 87, at *4 (recognizing that Congress broadened the definition in RLUIPA for "exercise of religion") (citing *Burwell*, 573 U.S. at 695–96). Georgia bears no heavier compliance burden than does the Federal Bureau of Prisons. And it provides no reason it should bear less.

Once individuals demonstrate that a government policy substantially burdens religious exercise, "the action is valid only if the government shows that the burden is (1) in furtherance of a compelling governmental interest and (2) the least restrictive means of furthering that interest. This standard is high, but not impossible, for the government to meet."[55] Georgia here seeks to bypass the

55. "The Religious Freedom Restoration Act: A Primer," Congressional Research Service (Apr. 3, 2020), https://

second prong entirely. The Eleventh Circuit's ruling lets it do just that. But the law does not.

B. Guidance by the Federal Government Clarifies Any Doubt

Federal government guidance as referenced above clarifies and eliminates any lingering doubts as to the burdens states bear to justify policies burdening inmates' religious exercise. The strict scrutiny standard imposed, while "a high bar," is "not impossible" to meet.[56] Here, Georgia doesn't even try. Federal policy requires that "to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity."[57] State policies have no less burden. In fact, "[r]equiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law."[58]

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crsreports.congress.gov/product/pdf/IF/IF11490; *see also Dunn*, 141 S. Ct. at 725 (recognizing the "high bar" and "exceptionally demanding" standard institutions must clear to justify any policy which imposes a substantial burden on a prisoner's religious exercise) (Kagan, J., concurring and joined by Justices Breyer, Sotomayor and Barrett).

56. *See* note 55, *supra*.

57. Federal Law Protections for Religious Liberties, 82 FR 49668 (Oct. 6, 2017), https://www.federalregister.gov/documents/2017/10/26/2017-23269/federal-law-protections-for-religious-liberty.

58. *Id*. (quoting *Flores*, 521 U.S. at 534).

And "[e]ven if the federal government could show the necessary interest, it would also have to show that its chosen restriction on free exercise is the least restrictive means of achieving that interest. That analysis requires the government to show that it cannot accommodate the religious adherent while achieving its interest through a viable alternative."[59] This is the part Georgia ignores. But the law does not, addressing this through statute, this Court's precedent, and the referenced federal guidance.

C. Congress' Intent is Clear

As discussed above, Congress persisted in enacting RLUIPA after more than one try, determined to preclude by statute the "frivolous or arbitrary barriers" it documented over three years of hearings as "imped[ing] institutionalized persons' religious exercise." *Cutter*, 544 U.S. at 716 (citing 146 Cong. Rec. S7774, S7775 (July 27, 2000) (Joint Statement of Sens. Hatch and Kennedy)). Congress recognized that "[w]hether through indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." *Id.* It further recognized that "[i]nstitutionalized residents' right to practice their faith is at the mercy of those running the institution." *Cutter*, 544 U.S. at 721 (quoting Joint Statement at S7775).

And Congress never negated operational security concerns with RLUIPA. Congress recognized the need for "due deference to the experience and expertise of prison and jail administrators," drafting RLUIPA to incorporate that. *Cutter*, 544 at 717, 723 (quoting Joint

59. *Id.*

Statement at S7775). But while "state prison officials make the first judgment about whether to provide a particular accommodation," theirs is not the only judgment considered. *Cutter*, 544 U.S. at n. 12. Total deference to state prison officials created the exact situation necessitating three years of Congress' time in hearings and two versions of the statute. The Eleventh Circuit and the Georgia Department of Corrections completely negate the clearly expressed intent of a bipartisan Congress to rein in states' unfettered judgment. The "due deference" given by Congress to state prison officials does not require capitulation; it requires factual analysis, and a showing that any less restrictive means of accommodating the religious exercise would be "factually impossible" without compromising prison security. *Id*. If this Court accepted the position set forth by Georgia and sanctioned by the Eleventh Circuit, "all manner of religious accommodations would fall." *Cutter*, 544 U.S. at 724. The Bureau of Prisons for decades now "has managed the largest system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security" or public safety.[60] Surely Georgia's burdens are not more extensive.

60. *Cutter*, 544 U.S. at 725 (quoting the Br. for Amicus United States, at 24).

CONCLUSION

"Except in the narrowest circumstances, no one should be forced to choose between living out his or her faith and complying with the law."[61] The Constitution protects this foundation principle of religious expression. Congress codified it with RFRA, then expanded it further with RLUIPA. This Court has protected it in *Cutter v. Wilkinson*, *Burwell v. Hobby Lobby*, *Holt v. Hobbs*, and *Ramirez v. Collier*, to name just a few. Muslim, Jewish and all other inmates deserve and receive the same protection under our law. The Eleventh Circuit's holding as to Petitioner Smith ignores that cornerstone protection. Allowing that holding to stand risks eroding decades of law and practice protecting it. And no burden which the Georgia Department of Corrections may speculate it could hypothetically face outweighs the substantial burden its existing policy places on Petitioner Smith and others like him. For these reasons, the Constitutional Law Center for Muslims in America respectfully requests this Court grant the Petition of Lester Smith.

Respectfully submitted,

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61. Federal Law Protections for Religious Liberties, *supra* n. 57 (citing James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785)).