No. _____

In the Supreme Court of the United States

HEIDI E. WASHINGTON, DIRECTOR OF THE MICHIGAN DEPARTMENT OF CORRECTIONS, PETITIONER

v.

JAMES HARRISON FOX; SCOTT DAVID PERREAULT

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Circuit failed to give adequate deference under *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005), to the Michigan Department of Corrections' compelling interest in avoiding racial unrest and violence, and in doing so, adopted a least-restrictive-means analysis that forced official recognition of a white supremacist religious organization that is seeking communal worship within prison walls.

PARTIES TO THE PROCEEDING

The petitioner is Heidi Washington, the Director of the Michigan Department of Corrections (MDOC). The respondents are James Fox and Scott Perreault, prisoners in the custody of the MDOC and adherents of the Christian Identity faith.

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The opinion of the Sixth Circuit Court of Appeals, App. 1a–11a, is reported at 71 F.4th 533. The opinion of the United States District Court for the Western District of Michigan, App. 12a–29a, is not reported but available at 2021 WL 5039740. The decision appealed was the second appeal to the Sixth Circuit in this case. The first opinion of the Sixth Circuit Court of Appeals, App. 30a–54a, is reported at 949 F.3d 270. The first opinion of the United States District Court for the Western District of Michigan, App. 56a–77a, is not reported but available at 2019 WL 1409375.

JURISDICTION

The district court had jurisdiction over this case because the amended complaint asserted claims under 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1, under which federal question jurisdiction exists, 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. This Court's jurisdiction is under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000cc-1

§ 2000cc-1. Protection of religious exercise of institutionalized persons

(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.

(b) Scope of application

This section applies in any case in which--

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

INTRODUCTION

The Sixth Circuit held that the decision to deny recognition to the Christian Identity faith, which is based on an ideology of white separatism, violated RLUIPA because the Michigan Department of Corrections (MDOC) did not use the least restrictive means to achieve its compelling interest. But in only deciding whether the least restrictive means were used, the court did not consider the MDOC's compelling interest in avoiding racial unrest and violence in order to maintain safe and secure correctional facilities.

Instead, the Sixth Circuit divorced the least-restrictive-means analysis from the compelling-interest analysis, and in doing so contravened this Court's decision in *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005), the plain language of RLUIPA, and decisions of the other circuit courts of appeal, as well as prior Sixth Circuit decisions. The least-restrictive-means analysis is inextricably enmeshed with the compelling governmental interest at issue, so a court cannot analyze the former without first analyzing, or at minimum recognizing, the latter. Accordingly, the Sixth Circuit failed to conduct a complete RLUIPA analysis.

Indeed, the Sixth Circuit neither factored in reasoned guidance for prison officials faced with ensuring both the religious liberty of prisoners and the safety of prisoners and staff nor considered the MDOC's compelling interest—yet with this incomplete analysis struck down a reasonable decision to deny recognition to Christian Identity. This amounted to throwing a match into the already racially charged tinderbox of prisons. The Court should grant this petition.

STATEMENT OF THE CASE

A. Background Facts

This appeal arises out of the efforts of two prisoners in the custody of the MDOC, Respondents James Fox and Scott Perreault, to obtain official recognition for their religion, Christian Identity, which is based on an ideology of white separatism. (Trial Tr., 8/13/18, R. 141, Page ID # 1171, 1191–92.) According to Fox and Perreault, this means that the different races should be separated, including while worshipping and cohabitating. (*Id.*, Page ID # 1190–92, 1210.) Fox testified at a bench trial that this "is [b]iblically commanded and ordained." (*Id.*, Page ID # 1210.) Perreault testified that he believes:

> [T]he white people are the Israelites of the Bible and are called to be the servant people of God. In this capacity, they have built the churches, translated the Bible, clothed the world and provided food for the world. But we do teach white separatism, black separatism, brown separatism and yellow separatism.

(*Id.*, Page ID # 1209.) In both their complaint and their amended complaint, Fox and Perreault state that "Christian Identity adherents must congregate for worship services." (Compl., Page ID # 3; Am. Compl., Page ID # 44.)

The MDOC denied recognition to Christian Identity because recognizing an expressly racist religion at correctional facilities, which already have tense race relations, would threaten security by provoking racial violence. In addition, Christian Identity has similar

beliefs and practices to other Christian groups recognized by the MDOC, which could meet their basic Christian requirements. Fox and Perreault filed suit, alleging that the MDOC violated the Free Exercise Clause of the First Amendment and RLUIPA, 42 U.S.C. § 2000cc *et seq*., in denying their request for formal recognition of the Christian Identity religion.

Pursuant to MDOC policy, group religious services and activities are offered only to recognized religious groups. (Mot. Summ. J. Br. Ex. A, Policy Directive, R. 119-2, Page ID # 785–86.) After receiving Fox and Perreault's request, Special Activities Coordinator (SAC) David Leach presented it to the MDOC's Chaplaincy Advisory Council (CAC), which is "comprised of representatives of various faiths and denominations" and "serves in an advisory capacity to the [MDOC] regarding religious policy and programming." (*Id*., Page ID # 783.) On August 3, 2017, Leach wrote a memorandum to Deputy Director of the Correctional Facilities Administration Kenneth McKee, who was charged with deciding whether to recognize Christian Identity, stating that the CAC advised "that the request for recognition be denied." (Mot. Summ. J. Ex. B, Leach Mem., R. 119-3, Page ID # 797.) App. 108a–109a.

Leach's memorandum noted that "although it would not factor into whether or not the Christian Identity religion should be recognized as a religious group, the Christian Identity movement is known to have extreme racist and anti-Semitic views with a history of violence in the United States." (*Id*.) Consequently, he explained that "practice of the Christian

Identi[t]y movement would pose a threat to the custody, and security of our correctional facilities." (*Id*.)

McKee, the ultimate decision-maker on the matter, reviewed Leach's memorandum on August 7, 2017. (*Id*.) On the bottom of the memorandum, he explained, "I approve that the recognition of the Christian Identity religious group be denied due to the threat to the custody and security at our correctional facilities." (*Id*.)

B. The First Trial

On August 13, 2018, a bench trial was held in the United States District Court for the Western District of Michigan. Perreault, Fox, and Kenneth Robinson testified on behalf of Respondents. The MDOC called McKee and Leach.

Perreault testified that the Christian Identity Church requires group worship. (Trial Tr., 8/13/18, R. 141, Page ID # 1168–69.) Fox and Perreault both testified that they could not attend group worship with members of another Christian denomination due to the Christian Identity Church's focus on racial separatism. (*Id*., Page ID # 1191–92, 1217.) Specifically, Fox testified that non-Christian-Identity worshippers do not "fit [in with] what it is . . . [he] believes" because "[t]hey don't practice racial separatism." (*Id*., Page ID # 1217.)

Both Leach and McKee testified regarding the MDOC's decision to deny formal recognition of the Christian Identity religion. Ultimately, after reviewing its religious tenets and beliefs, the CAC determined that the Christian Identity religion's needs

could be adequately met by an existing recognized religious group. (*Id.*, Page ID # 1254, 1266.)

In addition to this recommendation, Leach also explained that "the Christian Identity movement is known to have extreme racist and anti-Semitic views with a history of violence in the United States." (*Id.*) Specifically, Leach noted:

> It is a movement uniting many of the white supremacist groups in the United States, with the Ku Klux Klan reportedly the largest group within the Christian Identity movement. Interestingly, the Southern Poverty Law Center itself has stated that the Christian Identity movement has a "unique anti-Semitic and racist theology."

(*Id.*)

Consequently, Leach explained that he believed that "the practice of the Christian Identi[t]y movement would pose a threat to the custody, and security of . . . [the MDOC's] correctional facilities." (*Id.*)

At trial, Leach explained the steps he took to reach these conclusions. For example, he conducted research that showed that "the Christian Identity movement is on . . . the watch list of the FBI . . . as a group to be concerned about as far as violence and terrorism in the United States." (Trial Tr., 8/13/18, R. 141, Page ID # 1254.) He also testified that he read the FBI's Megiddo Report, an "article titled 'Religious Tolerance' by the Ontario Consultants on Religious Tolerance[,]" and articles from Newsweek and the Southern Poverty Law Center on the Christian

Identity faith. (*Id.*, Page ID # 1254–55, 1257.) After reviewing these documents, he concluded that the MDOC "needed to be very careful because there wa[s] . . . report after report[] of violent acts committed by . . . members of the Christian Identity" religion. (*Id.*, Page ID # 1256.) Leach also testified that he did not come across any documents in his research that led him to believe that the Christian Identity religion had changed its purported violent ways in recent years. (*Id.*, Page ID # 1257–58.)

McKee also testified about Leach's memorandum recommending that the MDOC deny Fox and Perreault's request to formally recognize the Christian Identity faith. (*Id.*, Page ID # 1237.) He noted that the memorandum contained two propositions: (1) that the Christian Identity faith's needs could be met by existing programming, and (2) that formal recognition presented a safety and security concern. (*Id.*, Page ID # 1237.) McKee explained that he took both concerns into consideration when making his final determination regarding Fox and Perreault's request for formal recognition. (*Id.*, Page ID # 1238.) McKee testified about both points:

> In prison, custody and security is first and foremost, so at the tail end of that memorandum, that's what I read. But I also took into consideration that the second paragraph of the memo also states that their . . . core beliefs could be recognized or done through other recognized religious groups that we already have in the Department of Corrections. So it was definitely two-fold.

(*Id.*)

Ultimately, given these concerns, McKee made the final decision to deny Fox and Perreault's request. (Def.'s Mot. Summ. J., Ex. B, R. 119-3, Page ID # 797.)

Following the bench trial, the district court found for the MDOC on all of Fox and Perreault's claims. App. 56a–57a. Specifically as to Fox and Perreault's RLUIPA claim, the district court determined that they "failed to meet their burden of establishing that the non-recognition of the Christian Identity faith substantially burdened their exercise of that religion." App. 72a–73a. Accordingly, the district court did not analyze whether the MDOC had a compelling interest or whether refusing to recognize Christian Identity as a religious group was the least restrictive means of furthering that compelling interest. Fox and Perreault appealed the dismissal of their RLUIPA claim, but not the dismissal of their First Amendment claim.

C. The First Appeal to the Sixth Circuit

On appeal, the Sixth Circuit recognized that RLUIPA requires a three-step analysis:

> Analysis under RLUIPA is a three-act play. First, the inmate must demonstrate that they seek to exercise religion out of a sincerely held religious belief. Second, the inmate must show that the government substantially burdened that religious exercise. Upon satisfaction of these two steps, the burden then shifts to the government for the third act: it must meet the daunting compelling-interest and least-restrictive-means test.

Fox v. *Washington*, 949 F.3d 270, 277 (6th Cir. 2020) (cleaned up) (*Fox I*). App. 40a–41a.

The Sixth Circuit reversed the district court's decision regarding the RLUIPA claim, concluding that MDOC placed "a substantial burden on plaintiffs' religious exercise." *Id*. at 281. App. 50a. It remanded the case "for consideration and a ruling on whether the [MDOC] satisfied the standard of strict scrutiny under RLUIPA's third step." *Id*. at 273. App. 32a.

On remand, the Sixth Circuit directed the district court "to take additional evidence as necessary, with the understanding that the [MDOC] will face a heavy burden at this step." *Id*. at 283. App. 53a. Further, the MDOC would:

> [b]e limited to raising the justifications it cited at the time it made the decision to deny plaintiffs' request for recognition of Christian Identity: (1) that the religious beliefs and practices of the Christian Identity religion can be adequately met by an existing recognized religious group; and (2) that it would threaten the custody and security at all correctional facilities.

Id. (internal citation omitted).

D. District Court Proceedings on Remand

On April 9, 2021, the district court conducted an evidentiary hearing, "limited to the issues of whether the MDOC's denial of recognition of the Christian Identity faith serves a compelling government interest and whether it is the least restrictive means of

furthering that compelling interest." App. 13a. The MDOC called two witnesses: Todd Bechler, a senior intelligence analyst with the MDOC (Hrg Tr., 4/9/21, pp. 8–41; R. 219, Page ID #2014–47); and Steve Adamson, a retired MDOC Special Activities Coordinator (Hrg Tr., 4/9/21, pp. 43–58; Page ID #2049–64). App. 14a. The MDOC also offered the deposition testimony of Leach, who had by that time retired. (*Id.* (citing Hrg. Tr., 4/9/21, R. 219, pp. 58–59, Page ID # 2064–65; 2/8/21 Leach Dep., R. 221).) Both Fox and Perreault testified on their own behalf. (Hrg. Tr., 4/9/21, R. 219, Perreault, pp. 60–70, Page ID # 2066–76; Fox, pp. 70–74, Page ID # 2076–80.) The district court "also considered the testimony of the August 13, 2018, bench trial as well as the parties' post-trial and post evidentiary hearing briefs." App. 14a.

Bechler testified "that he has a master's degree in homeland security, focusing on domestic terrorism, and that he has significant law enforcement experience concerning gangs and terrorist organizations." (Hrg Tr., 04/9/21, R. 219, Page ID # 2015–16.) Bechler's studies included information about the Christian Identity faith. (*Id.*, Page ID # 2016–17.) In 2017, he was "asked by the MDOC Deputy Director to opine on the [Christian Identity] faith as a religious group." (*Id.*, Page ID # 2016.) Bechler noted that the Christian Identity faith "tends to be more towards a white supremacist-type of ideological perspective," and that adherents believe that "the Caucasian race is part of the lost tribe of Israel." (*Id.*, Page ID # 2017.) Nonwhite people are perceived as "mud people or pre-Adamic people, individuals that were not present with [G]od's blessing in the Garden of Eden." (*Id.*)

According to Bechler, while "the [Christian Identity] faith itself did not advocate violence, leaders of some . . . white supremacist organizations involved in violence were adherents of that faith." (*Id.*, Page ID # 2018) In his key testimony, Bechler said, "It is already a tense situation. A prison is a microcosm of society and racial tensions always exist in the prison. And taking a certified step towards that would only worsen existing racial tensions." (*Id.*, Page ID # 2019.)

Bechler also testified that "[a]ll prisoners and all staff are entitled to [a] safe time in our facilities, and part of our mission is to eliminate whatever violence we can through the mechanisms, lawful mechanisms that we have to do so. And minimizing racial tensions would definitely be one of those." (*Id.*) Compounding these concerns is the fact that the prison population consists of individuals who have difficulty "following normal social rules." (*Id.*, Page ID # 2019–20.)

Adamson was an institutional chaplain with the MDOC in 2017 and served as a member of the CAC. (*Id.*, Page ID # 2049–50.) While on the CAC, he participated in the recommendation against recognition of the Christian Identity religion. (*Id.*, Page ID # 2050–51.) Adamson testified that, pursuant to MDOC policy, any prisoner can join a religious group, regardless of the prisoner's race. (*Id.*, Page ID # 2053.) Accordingly, Adamson testified that if the MDOC recognized the Christian Identity religion, the MDOC "could not exclude a non-white prisoner from attending the religious services of that group should the prisoner choose to attend." (*Id.*, Page ID # 2054.)

Perreault testified that, while he would not preclude non-white prisoners from attending services, he

would "advise any such person attending that 'this service has—have the emphasis on teaching the Caucasian history and heritage, Christian heritage." (*Id*., Page ID # 2068.) Fox stated that he would "give the non-white prisoner a warning similar to what Mr. Perreault described." (*Id*., Page ID # 2077.) In contrast to their initial testimony, in which they said that racial segregation "is [b]iblically commanded and ordained," (*id*., Page ID # 1190–92, 1210), they now testified that they would not exclude non-white prisoners from attending services, but would "advise any such person attending that this service has—have the emphasis on teaching the Caucasian history and heritage, Christian heritage," (*id*., Page ID # 2068, 2077).

The district court held "[t]hat the MDOC has a compelling interest in maintaining prison security is beyond debate." App. 25a (citing *Cutter*, 544 U.S. at 722). The court further noted that Fox and Perreault "seek formal recognition of a faith that believes and promotes beliefs regarding race and ethnicity that, by their own admission, require an explicit warning to non-adherents." App. 27a. The district court pointed out that "neither [Christian Identity] adherents nor the MDOC could prohibit non-whites from attending [Christian Identity] religious services." (*Id*.) Thus, the district court concluded, "That such a circumstance is a recipe (if not an outright guarantee) for racially motivated disruption and violence is obvious and cannot reasonably be disputed." App. 27a–28a. The district court held that the "MDOC has a compelling interest in creating within its prisons an environment that minimizes the likelihood of violence and disruption and ensures the safety and well-being of staff and inmates." App. 27a.

Having determined that the MDOC had a compelling interest in security and minimizing the likelihood of racial violence, the district court then held that denying recognition of Christian Identity was the least restrictive means of furthering this compelling state interest. App. 28a. Formal recognition of a faith group is a "binary question." (*Id*.) The district court stated that the "MDOC either extends formal recognition to the [Christian Identity] faith and permits group worship or it does not." (*Id*.)

E. The Second Appeal to the Sixth Circuit

Fox and Perreault appealed, and the Sixth Circuit again reversed, holding that because the district court "framed the [MDOC's] decision on whether to recognize Christian Identity as a binary choice: recognize Christian Identity and allow group worship, or not," the MDOC did not consider other, less restrictive means. *Fox* v. *Washington*, 71 F.4th 533, 538 (6th Cir. 2023) (*Fox II*). App. 7a. The Sixth Circuit further opined that the binary decision matrix was imposed by MDOC policy, holding that "[a] religious accommodation cannot be based solely on a policy." *Id*. App. 8a. Moreover, the court held that, although the MDOC presented evidence that Christian Identity was "a racist religion that posed a potential security threat," it failed to present evidence that Fox and Perreault had violent tendencies. *Id*. App. 9a.

The Sixth Circuit, however, did not apply the full RLUIPA test. Having previously found a substantial burden on Fox's and Perreault's religious exercise, the Sixth Circuit should have examined the compelling governmental interest asserted by the MDOC. *Fox I*,

949 F.3d at 277. App. 40a–41a. Instead, it declined to address this element, stating:

> Because the [MDOC] failed to show that it used the least restrictive means in deciding not to recognize Christian Identity, we do not address whether doing so furthered a compelling government interest.

Fox II, 71 F.4th at 540 n.1. App. 11a n.1. The Sixth Circuit found that the MDOC did not use the least restrictive means and remanded the case for entry of judgment in favor of Fox and Perreault. *Id*. at 540. App. 11a.

Following this decision, the MDOC moved to stay the mandate, which the Sixth Circuit denied. (Denial of Mot. for Stay of Mandate, 7/24/23, R. 47-2.)

REASONS FOR GRANTING THE PETITION

I. By not considering the MDOC's compelling governmental interest in avoiding racial unrest and violence in order to maintain secure and safe correctional facilities, the Sixth Circuit's analysis disregards this Court's decision in *Cutter* v. *Wilkinson*.

This Court should grant the petition to consider whether the Sixth Circuit's truncated analysis conflicts with its RLUIPA jurisprudence. As shown below, *Fox II* conflicts with this Court's analysis in *Cutter*, 544 U.S. at 723 n.11, which held that correctional systems and officials have a compelling governmental interest in prison security, including "not facilitating inflammatory racist activity that could imperil prison security and order."

Fox II also conflicts with this Court's decisions following *Cutter* and with the statutory language of RLUIPA. And the Sixth Circuit's decision is in tension with other circuits' analysis of RLUIPA, as well as the Sixth Circuit's own RLUIPA case law. Implicit in *Cutter* and its progeny is the notion that a court cannot consider whether a government official employed the least restrictive means without considering the nature of the compelling interest asserted by that government official. *Cutter* plainly held that "RLUIPA [does not] elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests." *Id.* at 722.

Had the Sixth Circuit considered each element of the RLUIPA test, it would have fully credited the compelling interests asserted by the MDOC—namely avoiding racial unrest and violence, a critical security matter in the racially tense and violent environment of a correctional system, which *Cutter* recognized as a compelling interest.

Consideration of the nature of the compelling governmental interest is both necessary and critical because that interest informs the least restrictive means of achieving that interest. A court cannot determine whether the MDOC's means are the least restrictive absent close scrutiny of the compelling interest the MDOC has asserted. Had it analyzed the MDOC's decision in light of the nature of this compelling interest, the Sixth Circuit would have concluded that the MDOC's "binary" decision was the least restrictive means (because it was the *only* means) of achieving the compelling governmental interest of avoiding racial unrest and violence in order to maintain safe and secure correctional facilities for prisoners, staff, and the public.

This case presents a question of considerable importance, and one that will recur. This Court's answer to that question will significantly impact the administration of prisons nationwide.

A. The least-restrictive-means element of a RLUIPA claim cannot be analyzed without first considering the nature of the compelling governmental interest.

The first step of the RLUIPA test places the initial burden on a prisoner to show that he seeks to exercise

a sincerely held religious belief. *Holt* v. *Hobbs*, 574 U.S. 352, 360–61 (2015). The burden on the prisoner is minimal: " 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief' " suffices. *Cutter*, 544 U.S. at 715 (quoting 42 U.S.C. § 2000cc-5(7)(A)). Under the second step, the prisoner must next demonstrate that prison officials substantially burdened his religious exercise. *Cutter*, 544 U.S. at 712; *Holt*, 574 U.S. at 361. Pursuant to *Fox I*, Fox and Perreault established both of these elements; neither are presently contested. 949 F.3d at 282–83. App. 51a–54a.

Once the prisoner has shown a substantial burden on a sincerely held religious belief, the burden shifts to prison officials, who must satisfy the compelling-interest inquiry. *Cutter*, 544 U.S. at 715. Under the third step of the test, prison officials must show two things. First, they must demonstrate that their policy furthered a compelling governmental interest. Second, they must demonstrate that they used the least restrictive means of furthering that compelling interest. *Id.*; *Holt*, 573 U.S. at 362.

In *Fox II*, however, the court declined to consider the MDOC's compelling interest in prison security by avoiding racial unrest and violence. *Fox II*, 71 F.4th at 540 n.1. App. 11a n.1. Courts cannot meaningfully discuss the least-restrictive-means prong of the test without considering the nature of the compelling-interest inquiry. This makes sense because the third step of the three-part RLUIPA test requires the government to show that it used the least restrictive means to achieve its asserted compelling interests. A court cannot analyze whether the government, here

the MDOC, used the least restrictive means of achieving its compelling interest without first analyzing the weight and scope of the compelling interest underlying the challenged action.

Other decisions of this Court have followed a similar approach, analyzing whether governmental officials employed the least restrictive means only after considering the asserted compelling governmental interest.

In *Holt*, 574 U.S. at 363–64, the Court analyzed the government's compelling interest in prison safety and security by looking at two arguments: (1) that the prisons system's no-beard policy prevented prisoners from hiding contraband; and (2) that it prevented prisoners from hiding their identities. Although this Court agreed that both of these constituted compelling governmental interests, it nonetheless found that banning prisoners from having beards was not the least restrictive means. *Id*. at 363–67. Like the lower court, this Court found it unlikely that contraband could be hidden in a short, one-half inch beard, particularly where prison officials did not require prisoners to have shaved heads or short hair cuts. *Id*. at 364. In a similar vein, there were less restrictive means of readily identifying prisoners than a blanket ban on beards. *Id*. at 365–66. Thus, although this Court held against the government, its least-restrictive-means analysis was tailored to the compelling interests asserted by prison officials.

Likewise, in *Ramirez* v. *Collier*, 595 U.S. 411; 142 S. Ct. 1264, 1272–74 (2022), this Court confronted a policy of the Texas Department of Criminal Justice that prohibited a prisoner's chosen spiritual advisor to

pray with, and lay hands on, the prisoner in the execution chamber. In particular, the prisoner requested audible prayer in the execution chamber. *Id*. at 1275. Prison officials asserted a "compelling interest in monitoring an execution and responding effectively during any potential emergency." *Id*. at 1279. Although this Court found that this constituted a compelling interest, it held that there were less restrictive means of achieving it. *Id*. at 1280. More specifically, Texas' refusal to allow audible prayer conflicted with the practices of Alabama and the federal government, but it offered no cogent reasons for its policy. *Id*. at 1279. Texas' rationale for not allowing the spiritual advisor to lay hands on the prisoner, because he could accidentally interfere with the execution, similarly failed to pass muster. *Id*. at 1281. For example, Texas could have allowed the spiritual advisor to touch a part of the body far removed from the IV lines carrying the lethal drugs. *Id*.

Similarly, in *Burwell* v. *Hobby Lobby Stores*, *Inc*., 573 U.S. 682, 688–90, 696–97, 708 (2014), this Court scrutinized regulations implementing the birth control mandate of the Affordable Care Act, 42 U.S.C. § 300gg-13(a)(4), under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*., which employs a similar analysis to RLUIPA, see *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006). In *Burwell*, the government asserted the compelling interests of "ensuring that all women have access to all FDA approved contraceptives without cost sharing." 573 U.S. at 727. This Court, however, found that the least restrictive means of ensuring such access would be for the federal government to directly provide the contraceptives. *Id*. at 729–30.

Furthermore, the government could have given closely held corporations the same religion-objection accommodation given to nonprofit organizations. *Id.* at 730–31. Either way, this Court based its discussion of the least restrictive means on the compelling government interest asserted.

The case law matches the plain language of RLUIPA. This Court has often reiterated that, absent an ambiguity, courts must interpret statutes according to their plain language. *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). Indeed, absent a clear indication to the contrary, this Court assumes that "legislative purpose is expressed in the 'ordinary meaning' " of the statutory language. *Jam* v. *Int'l Fin. Corp.*, __ U.S. __; 139 S. Ct. 759, 769 (2019) (quoting *Am. Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982)). The relevant language of RLUIPA contains no ambiguity.

RLUIPA plainly prohibits governments substantially burdening a prisoner's religious exercise unless it meets specified criteria:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--
>
> (1) is in furtherance of a compelling governmental interest; and

> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a). This language requires courts to analyze each factor of the test in order, stopping only where it concludes that the test is or is not satisfied.

To the extent a prisoner fails to establish a substantial burden on the exercise of sincerely held religious beliefs, a court need not proceed to the compelling interest test. *Holt*, 574 U.S. at 362. But, if a prisoner makes such a showing, the court must apply the compelling interest test. *Cutter*, 544 U.S. at 715.

Under the plain language of RLUIPA, courts must first determine whether the challenged policy furthers a compelling government interest. If the interest asserted by prison officials is not compelling, the plaintiff would prevail, and the court would not need to determine whether prison officials used the least restrictive means. But if prison officials asserted the compelling interest of prison security, as did the MDOC, the court would have to complete the analysis and determine whether the means used were the least restrictive in light of the interest asserted. The Sixth Circuit's decision in *Fox II* sidestepped the compelling-governmental-interest step of the test, leading to a faulty least-restrictive-means analysis.

B. Because MDOC's interest in avoiding racial violence for purposes of prison security constitutes a compelling governmental interest, a full analysis of all RLUIPA factors would have led to a different decision.

Contrary to the Sixth Circuit's decision, consideration of the compelling governmental interest is critical because the interest asserted necessarily determines the appropriate least restrictive means of achieving that interest. Absent that analysis, a court cannot determine whether the government's means are indeed the least restrictive means of achieving that interest.

In the present case, avoiding racial unrest and violence in order to maintain safe and secure correctional facilities constitutes a compelling interest. See *Cutter*, 544 U.S. at 723 n.11 ("Courts . . . may be expected to recognize the government's countervailing compelling interest in not facilitating inflammatory racist activity that could imperil prison security and order."); see also *Holt*, 574 U.S. at 362 (recognizing the Arkansas Department of Correction's "compelling interest in prison safety and security"). *Cutter* recognized the wisdom and necessity of first addressing the compelling governmental interest because that forms the foundation upon which the least restrictive means must be based. But the Sixth Circuit, by proceeding to the least-restrictive-means analysis before analyzing the compelling security interest asserted by the MDOC, turned *Cutter* on its head.

Courts have long recognized security as a compelling governmental interest because "[v]iolence is

unfortunately endemic to American prisons." *Murphy* v. *United States*, 653 F.2d 637, 642 (D.C. Cir. 1981). Similarly, this Court has recognized that prisons are places where violent people are housed involuntarily and, concomitantly, that prisons experience incidents of crime that far exceed the levels of the outside:

> Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others.

Hudson v. *Palmer*, 468 U.S. 517, 526 (1984). Prisons are a "volatile 'community,' [which requires] prison administrators . . . to take all necessary steps to ensure the safety of not only the prison staffs and administrative personnel, . . . visitors [and] the inmates themselves." *Id*. at 526–27.

Similarly, this Court has recognized the role played by prison gangs, *Turner* v. *Safley*, 482 U.S. 78, 91 (1987), including the "brutal reality" of prison gangs "fueled by race-based hostility, and committed to fear and violence" seeking to "control prison life" inside and outside of prison walls, *Wilkinson* v. *Austin*, 545 U.S. 209, 227 (2005). See also *Dawson* v. *Delaware*, 503 U.S. 159, 173 (1992) (Thomas, J., dissenting) (discussing dangers posed by expressly racist gangs, such as the Aryan Brotherhood, in prisons).

Under these circumstances, there can be no question that avoiding racial unrest and violence in order to maintain safe and secure correctional facilities constitutes a compelling governmental interest.

In the present case, the MDOC presented strong evidence in support of its compelling interest in institutional security and preventing racially motivated violence and disruption. This compelling interest is inextricably enmeshed with the least restrictive means of achieving it, which is to deny recognition to Christian Identity. The evidence, both before and after remand, supports this conclusion.

Fox and Perreault admitted that Christian Identity is based on segregation—different races must be kept separate, including while worshiping and cohabiting. (Trial Tr., 8/13/18, R. 141, Page ID # 1171, 1191–93, 1210.) Fox admitted that this forms an integral part of Christian Identity's beliefs and practices because segregation "is [b]iblically commanded and ordained." (*Id.*, Page ID # 1210.) The MDOC's evidence showed that Christian Identity has a history of violence and "extreme racist and anti-Semitic views," posing a security threat to MDOC facilities. (Leach Mem., Bench Trial Ex. A, R. 104-2, Page ID # 739, App. 108a–109a; Trial Tr., 8/13/18, R. 141, Page ID # 1254–57.) Based on this, McKee denied recognition to Christian Identity "due to the threat to the custody and security at our correctional facilities," which is "is first and foremost" in a correctional setting. (R. 104-2, Page ID # 739; Trial Tr., 8/13/18, R. 141, Page ID # 1238–39.)

Bechler, while corroborating these concerns, further emphasized that recognition of Christian

Identity would increase racial tensions in the prison and provoke violence, undermining the MDOC's ability to maintain security and to protect the safety of inmates and staff, particularly because MDOC facilities host "a tense situation. A prison is a microcosm of society and racial tensions always exist in the prison. And taking a certified step towards that would only worsen existing racial tensions." (Hrg. Tr., 4/9/21, R. 219, Page ID # 2018–19.) Because "[a]ll prisoners and all staff are entitled to safe time in our facilities," the MDOC has a compelling interest in "minimizing racial tensions." (*Id.*, Page ID # 2019.) Compounding these concerns is the fact that the prison population consists of individuals who have difficulty "following normal social rules." (*Id.*, Page ID # 2019–20.) Under these circumstances, the only way to further the MDOC's compelling interest was to deny recognition to Christian Identity.

Although the Sixth Circuit faults the MDOC for making a "binary" decision that did not take into account alternatives to recognizing Christian Identity, *Fox II*, 71 F.4th at 538–39, App. 9a–11a, that conclusion did not give due deference to the professional judgment of prison officials, see *Beard* v. *Banks*, 548 U.S. 521, 529–30 (2006). See also *Hoevenaar* v. *Lazaroff*, 422 F.3d 366, 370 (6th Cir. 2005) ("Courts must give due deference to the judgment of prison officials, given their expertise and the significant concerns implicated by prison regulations."). The alternatives available to the MDOC, as shown below, did not further its compelling interest in avoiding racial unrest and violence in order to maintain safe and secure correctional facilities.

One possible alternative would have been for the MDOC to both recognize Christian Identity and allow for group worship, which is what Fox and Perreault requested, arguing that group worship is part and parcel of their faith. But allowing a racist and segregationist group to openly hold worship services would invite racial violence, particularly because nonwhite prisoners could choose to attend Christian Identity services to disrupt or protest their views and practices causing either side to erupt into violence inside or outside of the service. Bechler testified that "racial . . . subterfuge, sabotage, things that can go on under the guise of religion" were likely if MDOC was "into a position where we are specifying only members of certain races can attend" services. (Hrg. Tr., 4/9/21, R. 219, Page ID # 2019.)

Based on this, the MDOC argued that, if it granted recognition to Christian Identity, it could not "prevent nonwhites from attending" group worship services "in bad faith to increase racial tensions." *Fox II*, 71 F.4th at 539. App. 10a. The Sixth Circuit rejected this fear because MDOC policy allows prisoners to attend only the services of their "actual religion," while limiting prisoners from changing religions more than twice per year, reasoning that prisoners would not change their religion merely to disrupt Christian Identity services. *Id*. Respectfully, this finding substitutes the court's speculation for the professional judgment and experience of prison officials, like Bechler, in contravention of *Beard*. Nothing in the policy referenced prevents nonwhite prisoners from joining Christian Identity or the resulting potential for unrest. But should violence occur—and it will—after-

the-fact actions by the MDOC[1] will not and cannot cure the damage done to prisoners and staff. Nor will those post hoc actions necessarily insulate the MDOC from liability for any resulting melee.

Alternatively, another option would have been for the MDOC to have recognized Christian Identity without allowing for group worship services. In light of Fox and Perreault's sincerely held religious convictions that their faith requires group worship, this approach would seem to punt the issue for later litigation. Regardless, however, the testimony showed that even mere recognition of Christian Identity, by taking a "certified step" towards recognizing a racist religious group, would "worsen existing racial tensions." (Hrg. Tr., 4/9/21, R. 219, Page ID # 2018–19.) In the words of the district court, recognizing Christian Identity would "provoke violence, undermining the MDOC's ability to maintain security and to protect the safety of inmates and staff." App. 19a. Even under the demanding standards of RLUIPA, however, "[p]rison officials need not endure assaults . . . before implementing policies designed to prevent such activities in an uneasy atmosphere. Nor do prison officials charged with managing such a volatile environment need present evidence of actual problems to justify security concerns." *Fowler* v. *Crawford*, 534 F.3d 931, 939 (8th Cir. 2008).

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[1] Fox and Perreault raised a similar argument in the Sixth Circuit, suggesting that the MDOC could recognize Christian Identity and allow group services and that any resulting violence could be dealt with afterwards by designating Christian Identity as a security threat group. (Appellants' Br., R. 19, p. 70.) For the reasons stated above, that argument fails.

Finally, the MDOC could have taken the middle ground by recognizing Christian Identity but allowing group worship only under conditions of heightened security. But even the presence of additional MDOC officers does not address the central problem that recognition itself would foment racial unrest and violence. Requiring additional security would also serve as a "drain on prison security's manpower" during group worship, *Fowler*, 534 F.3d 939, increasing security costs, contrary to *Cutter*, 544 U.S. at 723 (Congress "anticipated that courts would apply [RLUIPA's] standard . . . consistent with consideration of costs and limited resources.") (cleaned up).

Based on the evidence presented by the parties, the MDOC faced a stark choice: certify Christian Identity and throw a match into the tense racial tinderbox of its prisons, creating a clear and pressing risk of violence; or not recognize Christian Identity and preserve security and safety for prisoners, staff, and the public. Thus, the least restrictive means of achieving the compelling governmental interest of avoiding racial unrest and violence in order to maintain safe and secure correctional facilities for prisoners, staff and the public, was to deny recognition to Christian Identity.

And so, the district court's holding that recognition of Christian Identity was a binary choice was borne out as correct: no measure the MDOC could take could adequately mitigate the serious harm that would be caused by recognition. The *only* way to preserve MDOC security was to decline to recognize this explicitly racist religion.

The Sixth Circuit, however, did not consider the MDOC's compelling interest in prison security and avoiding racial violence. The court did not even define the compelling governmental interest at stake. So it follows that the court did not consider the record evidence regarding this compelling interest. As such, its analysis of the least restrictive means was necessarily flawed and its conclusion erroneous.

II. The Sixth Circuit's failure to adequately consider the MDOC's compelling interest and its impact on the least-restrictive-means analysis stands in tension with the other circuits.

The Sixth Circuit's decision to "not address . . . [the MDOC's] compelling government interest," 71 F.4th at 540 n.1 App. 11a n.1, not only contradicts this Court's RLUIPA analysis and the plain language of RLUIPA itself, but also stands in tension with the other circuit courts of appeal. No circuit has, once a prisoner shows a substantial burden on the exercise of a sincerely held religious belief, proceeded to analyze the least restrictive means without first analyzing the nature of the compelling interest asserted by prison officials. The *Fox II* decision even conflicts with the Sixth Circuit's RLUIPA case law. Thus, it is not an overstatement to say that the decision below conflicts with nearly every published authority that has analyzed the issue.

A. The other circuit courts of appeal analyze the compelling governmental interest before determining whether prison officials chose the least restrictive means of furthering that compelling interest.

Several circuits have expressly held that each step of the RLUIPA test must be analyzed in order, until it can be determined that the test is or is not satisfied. For instance, in *Al Saud* v. *Days*, 50 F.4th 705, 713 (9th Cir. 2022), the Ninth Circuit analyzed each step of the RLUIPA test. At the outset, the parties did not contest that the defendants substantially burdened his exercise of sincerely held religious beliefs, including that he only be housed with other members of the Islamic faith. *Id.* at 708–09. The burden then shifted to the defendants to show that the restrictions at issue furthered a compelling governmental interest and were the least restrictive means of doing so. *Id.* at 709.

The Ninth Circuit found that the defendants had a compelling interest in avoiding potential equal protection liability that could arise from "classifying and housing prisoners based on their religious beliefs and practices." *Id.* at 710–13. Only then did it analyze whether the means chosen by the defendants were the least restrictive means of achieving that compelling interest. *Id.* at 713. Although the defendants refused to exempt the plaintiff from their race-neutral housing policies—like in *Fox II*, a binary decision—this was nonetheless the least restrictive means because there was "no means of granting that accommodation that would not result in discriminating against others" and implicating equal protection liability. *Id.*

Like the Ninth Circuit, the other circuits that have analyzed RLUIPA claims, although often reaching different conclusions regarding whether prison officials chose the least restrictive means, first analyzed whether those officials articulated a compelling interest. *E.g.*, *Spratt* v. *R.I. Dep't of Corr.*, 482 F.3d 33, 38 (1st Cir. 2007); *Williams* v. *Annucci*, 895 F.3d 180, 188 (2d Cir. 2018); *Washington* v. *Klem*, 497 F.3d 272, 277, 284–85 (3d Cir. 2007); *Greenhill* v. *Clarke*, 944 F.3d 243, 249–50 (4th Cir. 2019); *Tucker* v. *Collier*, 906 F.3d 295, 301 (5th Cir. 2018); *Schlemm* v. *Wall*, 784 F.3d 362, 364–65 (7th Cir. 2015); *Fegans* v. *Norris*, 537 F.3d 897, 902, 907 (8th Cir. 2008); *Yellowbear* v. *Lampert*, 741 F.3d 48, 56, 61–63 (10th Cir. 2014); *Rich* v. *Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 532–34 (11th Cir. 2013).

Accordingly, to the extent plaintiffs show a substantial burden on the exercise of sincerely held religious beliefs, each circuit has first analyzed whether prison officials articulated a compelling governmental interest before determining whether those officials chose the least restrictive means of furthering that interest. It clearly emerges that each circuit considers the compelling governmental interest before analyzing whether prison officials used the least restrictive means to achieve that compelling governmental interest. The only outlier is the Sixth Circuit's decision in *Fox II*.

B. Other circuits have found security to be a compelling governmental interest and have analyzed the least restrictive means accordingly.

The Sixth Circuit's decision to forgo analyzing the MDOC's compelling governmental interest question regarding security within a prison also conflicts with the decisions of several other circuits. For example, *Jova* v. *Smith*, 582 F.3d 410, 415 (2d Cir. 2009), held that RLUIPA does not privilege "accommodation of religious observances" over a prison's "need to maintain order and safety." (Internal citations omitted.) In *Jova*, the Second Circuit affirmed the decision of prison officials to restrict the religious observances of two inmates to their cells rather than holding congregate services. *Id*. at 413, 417. The court found that this was the least restrictive means to prevent potential gang recruitment. *Id*. at 416–17.

In *Murphy* v. *Missouri Department of Corrections*, 372 F.3d 979, 988–89 (8th Cir. 2004), the Eighth Circuit held that prison security constitutes a compelling interest and the threat of racial violence is a "valid security concern." At issue was Missouri Department of Corrections' refusal to grant formal recognition of, and group worship rights to, Christian Separatist Society, which holds that white people are "uniquely blessed by god and must separate themselves from all non-[C]aucasian[s]." *Id*. at 981. According to the Court, RLUIPA "provide[s] as much protection as possible to prisoners' religious rights without undermining the security, discipline, and order of those institutions." *Id*. at 987. Prison officials must be given "a significant degree of deference" and RLUIPA is not intended to "overly burden prison operations." *Id*.

This holding is by no means restricted to the Eighth Circuit. See, *e.g.*, *Watson* v. *Christo*, 837 F. App'x 877, 880 (3d Cir. 2020) ("maintaining prison safety and security is a compelling interest."); *Allah* v. *Virginia*, 601 F. App'x 201, 204 (4th Cir. 2015) (prison security constitutes a compelling governmental interest); *DeMoss* v. *Crain*, 636 F.3d 145, 150 (5th Cir. 2011) (In determining whether the state had a compelling interest and used the least restrictive means of achieving that interest, courts must give "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.") (internal citations omitted); *Gooden* v. *Crain*, 353 F. App'x 885, 887–88 (5th Cir. 2009) (holding that prison had compelling interest in security); *Charles* v. *Frank*, 101 F. App'x 634, 635 (7th Cir. 2004) ("[S]uppressing gang activity to promote a secure and safe prison environment is indisputably a compelling interest."); *Van Wyhe* v. *Reisch*, 581 F.3d 639, 657 (8th Cir. 2009) (explaining that although a "prison must permit a reasonable opportunity for an inmate to engage in religious activities," it "need not provide unlimited opportunities"); *AlAmiin* v. *Morton*, 528 F. App'x 838, 843 (10th Cir. 2013) (stating that prison security is compelling governmental interest).

Based on this, the Sixth Circuit's decision failed to give due deference to, or even consider, the MDOC's compelling governmental interests in security, safety and avoiding racial violence. By failing to consider the compelling governmental interests at issue, its analysis of the least restrictive means was necessarily flawed and in contravention of this Court's precedent.

C. Other Sixth Circuit panels have analyzed the elements of RLUIPA claims in sequence.

Fox II's holding not only contrasts with those from this Court and the circuit courts of appeal, but also conflicts with the Sixth Circuit's own case law. See *Hoevenaar*, 422 F.3d at 370 (citing *Cutter*, among other cases, in holding that courts must give due deference to prison officials and cannot substitute their own judgment for them); *Coleman* v. *Governor of Mich.*, 413 F. App'x 866, 875 (6th Cir. 2011) (citing *Cutter* in holding that "[c]ourts entertaining complaints under § 3 should apply 'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources' " and quoting *Cutter*, 544 U.S. at 723). In fact, *Fox II* does not comport with the Sixth Circuit's analysis in *Fox I*. 949 F.3d at 277 (articulating each of the three steps of the RLUIPA analysis). App. 41a.

Fox II also conflicts with an earlier Sixth Circuit decision that presented facts similar to the present case, *Christian Separatist Church Society of Ohio* v. *Ohio Department of Rehabilitation & Corrections*, No. 18-3404, 2019 WL 1964307, at *1 (6th Cir. Feb. 13, 2019). In *Christian Separatist Church Society of Ohio*, the Sixth Circuit affirmed the district court's decision to allow a prison to deny the Christian Separatist Church Society from holding congregate worship services, recognizing the compelling interest that prison officials have in " 'safety and security and preventing violence.' " *Id*. at *3 (citing *Cutter*, 544 U.S. at 723).

In *Christian Separatist Church Society of Ohio*, the Sixth Circuit affirmed the prison's "effectively binary" decision because congregate worship services would "necessarily result in racial segregation due to the nature of the Christian Separatist faith," even though the prison had "not designated the Christian Separatist Church as a security threat group." *Id.* at *3. Moreover, and contrary to the *Fox II* decision, the Sixth Circuit held that "[t]he defendants did not deny their request because Christian Separatists themselves advocate violence; rather, they did so because, given the fundamental tenets of the faith, allowing for congregate worship would require segregation on the basis of race, and such segregation could fuel racial violence within a prison setting." *Id.*

The Sixth Circuit also found the plaintiffs' request for non-segregated services to be "disingenuous at best" in light of their expressly segregationist religious beliefs. *Id.* at *4. Accordingly, by examining the compelling interest at issue, it denied congregate worship services as "the least restrictive means available to further [the] compelling interest in preventing racially fueled violence." *Id.* It determined that doing so was "the only way to prevent the potential harm from such segregation was to deny the request." *Id.* at *3.

But the Sixth Circuit abandoned this reasoned approach in *Fox II*. The result is that the decision below conflicts with this Court's decisions, the plain language of RLUIPA, other circuits, and the Sixth Circuit's own decisions.

CONCLUSION

For these reasons, this Court should grant this petition.

Respectfully submitted,

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