No. 21-1405

In the Supreme Court of the United States

LESTER J. SMITH, PETITIONER,

v.

TIMOTHY C. WARD, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS

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

BRIEF OF CHRISTIAN LEGAL SOCIETY AND NATIONAL ASSOCIATION OF EVANGELICALS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

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

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

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

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INTEREST OF *AMICI CURIAE*[1]

This brief is submitted on behalf of *amici curiae* Christian Legal Society and National Association of Evangelicals.

Christian Legal Society (CLS) is a nondenominational association of Christian attorneys, law students, and law professors. CLS's legal advocacy division, the Center for Law & Religious Freedom, works to protect all Americans' right to be free to exercise their religious beliefs. CLS was instrumental in passage of both the Religious Land Use and Institutionalized Persons Act (RLUIPA) and its sister statute, the Religious Freedom Restoration Act (RFRA). CLS has a longstanding interest in defending RLUIPA's constitutionality and proper application in the courts. In passing RFRA and RLUIPA, Congress honored our nation's historic, bipartisan tradition of respecting religious conscience. Ensuring prisoners' religious exercise accords with that tradition of respecting religious conscience.

The National Association of Evangelicals (NAE) is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions, and individuals that includes more than 50,000 local churches from 74 different denominations and serves a constituency of over 20 million people.

In 2000, after conducting extensive hearings and finding that various State prison systems were imposing "frivolous or arbitrary" restrictions on prisoners' practice of their religions, 146 Cong. Rec. 16699 (2000) (joint

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation of or submission of this brief. No one other than the *amici curiae* or his counsel made a monetary contribution to the preparation or submission of this brief. The parties were given timely notice and consented to this filing.

statement of Sens. Orrin Hatch and Edward Kennedy), a *unanimous* Congress enacted RLUIPA, which provided financial incentives to States to provide rigorous protection for the free exercise rights of prisoners. Nonetheless, various State agencies and some courts have adopted interpretations of RLUIPA's requirements that ignore the statutorily mandated "strict scrutiny" review of any abridgments of prisoners' free exercise rights, and have effectively read RLUIPA's free exercise safeguards out of existence.

These decisions, if allowed to stand, will have corrosive implications far beyond prison walls. Because RLUIPA expressly incorporates the traditional constitutional strict scrutiny analysis, any effort to "tone down" strict scrutiny in this context could weaken strict scrutiny across the board. As this Court has previously warned, the "watering . . . down" of strict scrutiny in one context will inevitably "subvert its rigor in the other fields where it is applied." *Emp't Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 888 (1990). The Court must continue—as it always has—to "start[] with a heavy presumption against a state law that infringes the constitutional or statutory right in question" and allow "state infringement on that right only when the State has a sufficiently 'compelling' interest." *Ramirez* v. *Collier*, 142 S. Ct. 1264, 1287 (2022) (Kavanaugh, J, concurring).

INTRODUCTION AND SUMMARY OF ARGUMENT

Nearly forty other prison systems permit beards without a length limit, yet Georgia prohibits beard lengths of more than half an inch. Seven years ago, in *Holt* v. *Hobbs*, 574 U.S. 352 (2015), this Court recognized that it would inevitably need to answer the question at the heart of this case: whether prison officials can deny religious prisoners the right to grow full beards without violating

the Religious Land Use and Institutionalized Persons Act. Tr. of Oral Argument at 4–8, Holt v. Hobbs, 573 U.S. 352 (2015) (No. 13-6827). *Holt* did not require the Court to go that far, because Arkansas did not allow for even half-inch beards, and a half inch was all that the petitioner there sought before this Court. *Ibid.* This case finally presents the Court with the question whether there is really any legal difference between denying a full beard and denying a beard of any length at all.

The answer is no. Cases like this one are why we need RLUIPA. Prisons cannot infringe on the religious rights of prisoners so cavalierly. They must meet the requirements of strict scrutiny. They must identify a compelling interest, and they must carry their burden to show that a policy that infringes on religious exercise is the least restrictive means of achieving that interest. Georgia emphatically failed to make that showing in this case, and its restriction on full-length beards cannot stand.

Georgia's interest is not compelling. Georgia's stated interest—which reduces to the claim that there is some incremental gain to prison security from prohibiting full-length beards—cannot possibly be enough to justify a significant infringement on religious exercise. Accepting Georgia's interest as a compelling interest threatens the entire framework of strict scrutiny. Small risk is not enough. A compelling state interest has to be more than a *de minimis* gain to prison security—denying an accommodation must be necessary to prevent a *significant* or *material* effect on the security situation.

To be sure, "a State's understandable goal of avoiding a higher risk of great harm does not easily map onto the compelling interest/least restrictive means standards," *Ramirez* v. *Collier*, 142 S. Ct. 1264, 1288 (2022) (Kavanaugh, J., concurring), but requiring less than a

significant effect or a material effect essentially grants the government a free pass through the compelling interest prong, Tr. of Oral Argument at 12, Holt v. Hobbs, 573 U.S. 352 (2015) (No. 13-6827), which is inconsistent with this Court's historical approach to strict scrutiny, *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) ("Rather than rely on 'broadly formulated interests,' courts must 'scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants.'" (quoting *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006))).

Georgia's policy also is not the least restrictive means of achieving its interest. Measured along every dimension of least restrictive means analysis, Georgia's beard policy comes up short. Does Georgia give real-world examples of specific harms from full-length beards? No. Does Georgia treat similar risks the same way? No. Did Georgia take account of solutions that had been found to work in other jurisdictions? No.

The last error is especially egregious and should doom Georgia's beard policy. It is virtually self-evident that "experience matters in assessing whether less restrictive alternatives could still satisfy the State's compelling interest." *Ramirez*, 142 S. Ct. at 1288 (Kavanaugh, J., concurring). The "experience in other States" can be "informative in analyzing whether the State . . . has employed the least restrictive means." *Id.* at 1288 n.2. RLUIPA and strict scrutiny require prison officials to make accommodations whenever such accommodations are feasible. But if a prison refuses even to look at how other prisons have accommodated a religious practice, that prison clearly has *not* satisfied that obligation. See *Holt*, 574 U.S. at 368–369.

Prison is a context where the State's interests and religious exercise often collide, but it is not unique in that

regard. The State's interests are constantly colliding with religious exercise. See, *e.g.*, *Does 1-3* v. *Mills*, 142 S. Ct. 17, 18 (2021) (Gorsuch, J., dissenting). The degree of deference afforded to prison officials cannot be so great as to negate the statutory standard, which Congress enacted precisely to eliminate the "frivolous or arbitrary" restrictions on prisoners' practice of their religions that preceded its enactment. 146 Cong. Rec. 16699 (2000) (joint statement of Sens. Orrin Hatch and Edward Kennedy). To the degree the Court defers to prison officials, it must defer *within* the statutory standard, not substitute deference for the standard. And that statutory standard still requires the State to show the policy furthers a compelling interest and represents the least restrictive means.

The Court should grant certiorari and reverse.

ARGUMENT

I. RLUIPA REQUIRES THE THOROUGHGOING APPLICATION OF THE TRADITIONAL "STRICT SCRUTINY" TEST

A. The Elements of the "Strict Scrutiny" Test

The demands of strict scrutiny safeguard this country's most important civil rights. They apply to race-based discrimination, *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995), regulation of free speech, *United States* v. *Playboy Entm't Grp.*, 529 U.S. 803, 813–814 (2000), and the protection of "fundamental rights," *Washington* v. *Glucksberg*, 521 U.S. 702, 720–721 (1997). Watering down strict scrutiny's requirements in one context erodes its protections in all. *Emp't Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 888 (1990).

Strict scrutiny requires the government to demonstrate that its action is the least restrictive means to accomplish a compelling interest. *Playboy Entm't*, 529 U.S. at 813. Each of these elements is important, and each

is demanding. *Miller* v. *Johnson*, 515 U.S. 900, 920 (1995) (describing "strict scrutiny" as "our most rigorous and exacting standard of constitutional review").

The government's interest must be compelling. Its means must be the least restrictive ones. And it must *demonstrate*, not merely assert, that these conditions are met. *Burson* v. *Freeman*, 504 U.S. 191, 199 (1992). In the RLUIPA context, it must do so with particularity—as applied to the individual whose rights are restricted. 42 U.S.C. § 2000cc-1(a) (prisons cannot "impose a substantial burden on the religious exercise of a person residing in . . . an institution . . . even if the burden results from a rule of general applicability" unless the burden satisfies strict scrutiny); accord *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430–431 (2006) (interpreting equivalent language from RLUIPA's sister statute RFRA to require individualized review); *Washington* v. *Klem*, 497 F.3d 272, 285 (3d Cir. 2007) (inquiring whether the restriction was the least restrictive means available "either facially or as applied to [the plaintiff]").

This much the Court already knows. But unfortunately for petitioner Lester Smith, his ability to serve his sentence without violating the dictates of his conscience hangs on whether the Court will state again that traditional strict scrutiny applies in the Eleventh Circuit.

When the Eleventh Circuit held, over a dissent, that the nearly identical case of *Holt* v. *Hobbs* did not require the Georgia Department of Corrections to allow petitioner Smith to grow a beard as he believes his faith requires, it did not apply strict scrutiny. When it deferred to the Department's unsubstantiated claims that a full-length beard was a security risk, it did not apply strict scrutiny. And when it failed to consider the less restrictive

means already applied by thirty-nine other prison systems in furtherance of the same interest, it did not apply strict scrutiny.

The religious exercise rights of Georgia prisoners require more protection than this. And Congress said so—unanimously—when it passed RLUIPA.

B. The RLUIPA Statutory Test and "Strict Scrutiny" Are One and the Same

RLUIPA's text embodies the strict scrutiny standard, nearly verbatim:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that imposition of the burden on that person-- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1. Compare *ibid.*, with *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.")

This was no mere coincidence. The unanimous Congress that passed RLUIPA deliberately imported the highest protection legislation can grant. See, *e.g.*, 146 Cong. Rec. 19123 (2000) (statement of Rep. Charles T. Canady) (explaining that RLUIPA was "intended to codify the traditional compelling interest test"); 146 Cong. Rec. 16702 (2000) (statement of Sen. Reid) (describing the strict scrutiny test to be applied under RLUIPA, which is "the highest standard the courts apply to actions on the part of government").

Congress granted these protections for situations just like this one: to protect the free exercise rights of

religious prisoners like Smith from the "frivolous or arbitrary" decisions of State prison systems like Georgia's. 146 Cong. Rec. 16699 (2000) (joint statement of Sens. Orrin Hatch and Edward Kennedy).

Numerous courts—including this one—have acknowledged that RLUIPA applies the protections of strict scrutiny to the free exercise rights of prisoners. See, *e.g.*, *Holt* v. *Hobbs*, 574 U.S. 352 (2015); *Benning* v. *Georgia*, 391 F.3d 1299, 1304 (11th Cir. 2004); *Lovelace* v. *Lee*, 472 F.3d 174, 186 (4th Cir. 2006); *Spratt* v. *R.I. Dep't of Corr.*, 482 F.3d 33, 38–39 (1st Cir. 2007); *Couch* v. *Jabe*, 679 F.3d 197, 203 (4th Cir. 2012); *Gladson* v. *Iowa Dep't of Corr.*, 551 F.3d 825, 833 (8th Cir. 2009); cf. *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430 (2006) (applying strict scrutiny based on identical language in RFRA).

In *Holt*, a nearly identical case concerning a Muslim prisoner in Arkansas, this Court applied strict scrutiny under RLUIPA to strike down the Arkansas Department of Correction's restriction on a Muslim prisoner's ability to grow his beard. *Holt*, 574 U.S. at 356 (2015). RLUIPA's protections apply with equal force here, and *Holt*, for its factual and legal similarities, should be dispositive. But as the dissent below recognized, the Eleventh Circuit majority "render[ed] the Supreme Court's command in *Holt* meaningless" when it ruled against Smith below. Pet. App. 38a.

The Georgia Department of Corrections relied heavily on *Knight* v. *Thompson*, an Eleventh Circuit case decided before *Holt* that was vacated and remanded by the Supreme Court in light of *Holt*, and which the Eleventh Circuit largely rubber-stamped when it reinstated its original opinion with a minor revision. *Knight* v. *Thompson*, 796 F.3d 1289, 1291 (11th Cir. 2015) ("We reinstate our prior *Knight I* opinion with revisions

only to Part III.B.ii, which we set forth below, and we add, with this opinion in *Knight II*, a discussion of the Supreme Court's decision in *Holt* and why it does not affect the outcome in our prior decision."). Indeed, in this case, the Department retained as an expert the same former director of the Virginia Department of Corrections, Ronald Angelone, who the Eleventh Circuit had found "provided the most thorough defense" in *Knight*. 797 F.3d 934, 939 (11th Cir. 2015).

But *Knight* should not be followed here for at least two reasons. First, to the extent it is interpreted to require anything less than strict scrutiny for violations of RLUIPA, it does not comport with *Holt* and should be overturned. Second, it is factually distinguishable. The practice in *Knight* was about head hair, not beard hair, and the court on remand justified its decision by noting a "detailed record" of more than "speculation, exaggerated fears . . . post hoc rationalizations . . . and unquestioning deference." *Knight*, 796 F.3d at 1292 (cleaned up); cf. *Ali* v. *Stephens*, 822 F.3d 776, 789 n.10, 794 n.14 (5th Cir. 2016) (distinguishing *Knight* and allowing Muslim prisoner to grow four-inch beard and rejecting testimony of same expert Angelone).

Judge Martin lamented the import of the Eleventh Circuit's unique approach in her dissent below:

> Mr. Smith is sentenced to spend the rest of his life behind bars. As a result of today's decision, he will live out his life in a manner that fundamentally violates the tenets of his religious beliefs. This profoundly flawed outcome is all the more tragic because it relies on little more than speculation offered by his jailers about the problems untrimmed beards could cause. *If he were in almost any other facility in our country*, Mr. Smith would not be forced to live this way.

> But *because he is incarcerated within our Circuit*, he has no relief for this egregious violation of his religious rights.

Pet. App. 44a–45a (emphases added). If Georgia believes that petitioner's untrimmed beard will create a security problem, then RLUIPA demands that Georgia *demonstrate* that forcibly shaving the prisoner is the means that is *least restrictive* of his religious exercise rights. This it did not do. See Pet. App. 40a. And to require less is to water down the protections of strict scrutiny, to the detriment of every context to which strict scrutiny applies.

II. THE COURT BELOW ERRED BECAUSE IT FAILED TO APPLY AN APPROPRIATE "LEAST RESTRICTIVE MEANS" ANALYSIS

The Courts below erred by failing to appropriately apply the least restrictive means analysis required by strict scrutiny. Correct application of that standard shows that Georgia's policy cannot be sustained.

A. Preliminary Elements

As this Court has repeatedly made clear, the least-restrictive-means test is "exceptionally demanding," *Holt*, 574 U.S. at 364 (quoting *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014)), and "imposes a heavy burden on the State." *Bd. of Trustees of the State Univ. of New York* v. *Fox*, 492 U.S. 469, 477 (1989). It "requires the government to sho[w] 'that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y].'" *Holt*, 574 U.S. at 364–365 (quoting *Hobby Lobby*, 574 U.S. at 728). Put differently, the test requires the "elimination of all less restrictive alternatives," that "there be no conceivable alternative" to the government's present policy. *Fox*, 492 U.S. at 478. "[I]f a less restrictive means is available for the Government to achieve its goals,

the Government must use it." *Playboy Entm't,* 529 U.S. at 815.

Governments have spent many pages and hours attempting to convince this Court that the test means something other than what its name plainly requires, but all these efforts have been to no avail. This Court has instead stressed, time and again, that "[c]ourts must hold prisons to their statutory burden, and they must not 'assume a plausible, less restrictive alternative would be ineffective.'" *Holt*, 574 U.S. at 369 (quoting *Playboy Entm't*, 529 U.S. at 824). "[C]onclusory defense[s] of [a] policy's tailoring" must come to naught, *Ramirez*, 142 S. Ct. at 1279, as must governments' "conjecture" and "speculation" about worst-case scenarios that might follow from less restrictive policies, *id.* at 1280 (quoting *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021)).

Indeed, this Court has recognized that the least-restrictive-means test will often require governments to affirmatively expend time, resources, and energy accommodating prisoners' religious beliefs. This Court has required the government to explain its reasoning whenever it fails to implement more religiously tolerant policies followed by other prison institutions. *Holt*, 574 U.S. at 369 ("[W]hen 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 . . . ."). This Court has also observed that, while "cost may be an important factor in the least-restrictive-means analysis," RLUIPA "may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs." *Hobby Lobby*, 573 U.S. at 730 (citing 42 U.S.C. § 2000cc-3(c)). This Court has also rejected a government's argument that the test cannot provide "an exemption from a legal obligation requiring the plaintiff

to confer benefits on third parties." *Id.* at 729 n.37. And this Court has rejected government arguments that the least-restrictive-means test cannot be use "to require creation of entirely new programs." *Id.* at 729; see, *e.g.*, *Holt*, 574 U.S. at 366 (identifying a new photography program as an alternative means).

B. The Georgia Department of Corrections Has Not Met Its Burden of Demonstrating that Available Less Restrictive Alternatives Are Inadequate

The Georgia Department of Corrections gave three reasons for its beard policy. Beards, according to the Department, "could be used to cause injury, hide contraband, and disguise an inmate." Pet. App. 18a; see *id.* at 17a. None of those are more than *de minimis* concerns.

Injury. The Department's first claim, that untrimmed beards could be used to "cause injury," is fanciful. As anyone who has even seen a beard can attest, beards are typically difficult to use as weapons. But according to the Department, "a beard can be grabbed with resulting injury to a prisoner." Pet. App. 32a; see also, *e.g.*, *id.* at 7a. This claim is speculative, applicable at most to a vanishingly small number of beards, and the Department "provided no basis for this opinion" that the prison considers beards a real injury risk. Pet. App. 32. More importantly, Georgia prisons do not require all Georgia inmates to shave their *heads*,[2] *Holt*, 574 U.S. at 364, even though head hair can of course be grabbed, resulting in injury. The Department bore the burden to establish "why the risk" of injury from beard pulling "is so great that … beards cannot be allowed, even though prisoners

[2] Pet. App. 8a n.1 ("GDOC's grooming policy allows male inmates to grow their head hair up to three inches long and allows female inmates to grow their head hair to any length.").

are allowed … head hair . . . .” *Holt*, 574 U.S. at 367. It did not remotely meet that burden.

Contraband. The Department’s next claim is that untrimmed beards could be used to hide contraband. Pet. App. 25a. Again, as anyone familiar with beards can explain, the argument that the interest in preventing the introduction of contraband “would be seriously compromised by allowing an inmate to grow” a beard “is hard to take seriously.” *Holt*, 574 U.S. at 363. “An item of contraband would have to be very small indeed to be concealed by” a beard “and a prisoner seeking to hide an item in” a beard “would have to find a way to prevent the item from falling out.” *Id.* at 363–364. And again—head hair and beard hair—it is all still hair, and it can all conceal, but Georgia prisons let prisoners keep up to three inches of their head hair. And it also lets them keep their shirts, pants, socks, and shoes, all far easier places to conceal contraband than virtually any beard.

More importantly, the Department “failed to establish that it could not satisfy its security concerns by simply searching petitioner’s beard.” *Holt*, 574 U.S. at 365. The obvious “less restrictive alternative” to prohibiting beards is to have “the prisoner run a comb through his beard.” *Ibid.* Such a self-search takes “maybe three seconds” and is used by prisons nationwide, including “every time a police department or any other law enforcement agency arrests somebody or books somebody” with a beard. ECF No. 236 at 117–119; see also App.70a. As with the Department’s other explanations for its beard policy, “GDOC has offered no logical explanation as to why it could not use the method currently employed by BOP and other states for searching a beard.” App.62a.

Disguise. The Department’s final claim is that untrimmed beards could be used to disguise faces. See Pet. App. 18a, 20a, 25a. Not by quickly growing a beard

but rather by quickly shaving one off. This justification for the beards policy is outlandish. "[T]he Department could largely solve this problem by requiring that all inmates be photographed without beards when first admitted to the facility and, if necessary, periodically thereafter." *Holt*, 574 U.S. at 366. "Prison guards would then have a bearded and clean-shaven photo to use in making identifications." *Ibid.* Indeed, merely by tracking the prisoners with special dispensation to grow beards, the Department should have no problem determining when someone has suddenly and unexpectedly shaved it off. And, again, it is totally unclear why the same issues of disguise and identification do not arise with respect to head hear, which is also a key tool of identification, or with respect to half inch beards which the Department *already allows prisoners to grow*. See Pet. App. 2a, 72a.

Given how readily—and how obviously—religious beards can be accommodated, it is small wonder that the vast majority of States, and the federal system, *do* provide such accommodations to observant Muslim prisoners and others who wish to grow beards, apparently believing that they can do so without sacrificing necessary security. See D. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 964–972 (2005) (reviewing prison grooming policies and finding that thirty-nine States, the Federal Bureau of Prisons, and the District of Columbia allow beards for religious or other reasons). Georgia could—and by law under RLUIPA *must*—accommodate it as well.

C. The Court Below Erred in Applying a Standard that Did Not Even Approximate "Strict Scrutiny"

The court of appeals failed to hold the Department to even the most minimal requirements of strict scrutiny's least restrictive means requirement. It should be common ground—black-letter law—that the practices of other

jurisdictions that make a religious accommodation must be "actually considered and rejected" before a government refuses to make an accommodation. *Knight* v. *Thompson*, 797 F.3d 934, 946 (11th Cir. 2015) (quoting *Warsoldier* v. *Woodford*, 418 F.3d 989, 999 (9th Cir. 2005)). That was this Court's holding in *Holt* when the Court explained 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. Yet, even though that is the law this Court announced in *Holt*, that "is not the law in th[e Eleventh] circuit." *Knight*, 797 F.3d at 946. And the panel below doubled down on that erroneous holding. See Pet. App. 25a ("Contrary to the dissent's view, *Holt* does not require the GDOC to detail other jurisdictions' successes and failures with their grooming policies to satisfy a RLUIPA inquiry.")

It is of course true that courts must defer to the expertise and judgment of prison officials on matters of security and discipline. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 723 (2005). It is *not* true, however, that this deference amounts to a free pass on the "least restrictive means" test, and permits prison officials to prevail based on mere say-so; purely "speculative testimony cannot satisfy [the State's] burden." *Garner* v. *Kennedy*, 713 F.3d 237, 246 (5th Cir. 2013) (finding that the State had not carried its burden of proving that its grooming policy was the least restrictive means available, where the State offered "no studies" or "concrete evidence" in support of its witnesses' testimony); see also *Yellowbear* v. *Lampert*, 741 F.3d 48, 59 (10th Cir. 2014) ("[T]he deference this court must extend to the experience and expertise of prison administrators does not extend so far that prison officials may declare a compelling governmental interest by fiat.").

In permitting the Department *not even to look* at how other jurisdictions have managed to make a basic humane

accommodation for an important religious practice, the court of appeals cut the legs out of the statutorily required strict scrutiny. It permitted Georgia to refuse a religious accommodation that nearly every other State and the federal government have made without meeting even a modest burden. And in permitting it to do so—to declare that its prisons are too insecure to make religious accommodations without even considering how numerous *other* prisons make their accommodations—the court of appeals created the perverse result that the less effort a prison puts into making a religious accommodation, the stronger its defense to a religious accommodation claim. The prison that does not even consider other jurisdiction's practices perversely has the strongest defense because prison officials simply will not even know how those other prisons manage to make the accommodations that they do. "RLUIPA, however, demands much more." *Holt*, 574 U.S. at 369; see also *Ramirez* v. *Collier*, 142 S. Ct. 1264, 1279 (2022) ("That is not enough under RLUIPA.").

Before refusing petitioner's accommodation, Georgia officials were obligated to determine *how* all these other State and federal prison systems—which necessarily have similar security interests to Georgia's—allow prisoners to grow beards in accordance with their religious convictions without triggering the security problems that Georgia predicts. See *Warsoldier* v. *Woodford*, 418 F.3d 989, 999–1000 (9th Cir. 2005) ("[F]ailure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means.").

The Department admitted both that "GDOC had not even attempted to determine how other states manage inmates with beards" and that "GDOC provided no information," let alone admissible evidence, to support distinguishing their prison population from other states.

Pet. App. 36a (cleaned up). Given the State's failure to consider *any* alternatives to a prison rule prohibiting what many Muslims, Sikhs, Jews, and members of other faiths believe to be a religious mandate, Georgia could not possibly meet the test of strict scrutiny that RLUIPA and this Court's precedents require.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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