No. 14-41165

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DAVID R. ALI,

Plaintiff-Appellee

v.

WILLIAM B. STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE

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INTEREST OF THE UNITED STATES

This case concerns the Religious Land Use and Institutionalized Persons Act's (RLUIPA) requirement that a State's imposition of a substantial burden on prisoners' exercise of religion must be the "least restrictive means" of furthering a compelling governmental interest. 42 U.S.C. 2000cc-1(a)(2). The Department of Justice is charged with enforcing RLUIPA, see 42 U.S.C. 2000cc-2(f), and

therefore has an interest in how courts construe the statute. The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES

1. Whether, particularly in light of the intervening decision in *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015), the district court afforded the proper deference due to prison officials under RLUIPA, 42 U.S.C. 2000cc-1(a), where it found many of their factual assertions "grossly exaggerated" and chose, after making extensive findings of fact, to credit plaintiff's evidence on several contested issues.

2. Whether the prison's ban on hats and beards, including plaintiff's four-inch beard and his kufi cap, both worn for religious reasons, is the least restrictive means of ensuring effective prison administration and security.

STATEMENT OF THE CASE

1. Plaintiff, a prisoner in the custody of the Texas Department of Criminal Justice, sought permission to wear a four-inch beard and a kufi (a white knit cap) in observance of his Muslim religion. ROA.41, 44, 47.[1] Texas prison rules require inmates to shave, and allow Muslim inmates to wear a kufi only in a cell or during religious services. ROA.585, 2601-2603, 3874-3876, 4064, 6110. Plaintiff is housed at a maximum security prison, but lives in the "trusty camp" outside the

[1] "ROA" refers to the record on appeal using the pagination provided by this Court.

prison gates. ROA.6325, 6341, 6363. "Trustys" have the lowest level of security classification. ROA.6449, 6457-6458.

The prison officials denied his request, citing security concerns and stating that a beard and a cap would be difficult to search and would hinder inmate identification. *Ali* v. *Quarterman*, 434 F. App'x 322, 325 (5th Cir. 2011) (per curiam). Plaintiff claimed that procedures used for hair would suffice to search his beard and that the prison's hand-held metal detectors could be used to search both his beard and his kufi. *Ibid.* He suggested the prison keep two pictures of him, one with a beard and one without, to help with identification. *Ibid.* Plaintiff also pointed out that inmates in Texas prisons are permitted to grow short beards, of a quarter inch, for medical reasons, and that women are permitted to wear religious head coverings. *Ibid.* The district court dismissed plaintiff's claim as frivolous under 28 U.S.C. 1915A(b)(1). *Id*. at 324.

This Court reversed, holding that the district court erred in dismissing the RLUIPA claim. *Ali*, 434 F. App'x at 327. This Court stated that the prison had failed to "respond to the alternatives proposed by Ali and explain why same would be unfeasible or less effective in maintaining institutional security." *Id.* at 325.

2. On remand, the district court conducted a five-day bench trial in July 2014 and made extensive findings of fact. ROA.2185-2196, 5413-7176. It reviewed expert testimony from both sides, exhibits describing the prison's

grooming rules and barber facilities, the prison's budget, depositions from the federal Bureau of Prisons (BOP) on its grooming and headwear standards, and other evidence. ROA.2186, 2203-2206, 4006-4032, 4218-4219, 4894, 5213, 5253-5354. The court first held that plaintiff had shown that the prison rules substantially burdened his religious exercise. ROA.2200.

The court then held that defendants had not carried their burden of showing that banning a beard and a kufi furthered the prison's compelling interests in ensuring security, containing costs, and maintaining orderly operation of the prisons. ROA.2200-2207, 2209-2216. The court found that restricting plaintiff's kufi did not further the prison's interest in helping to identify prisoners because prisoners are allowed to change their appearance in other ways, such as by shaving the head or otherwise changing hairstyles. ROA.2201; see also ROA.3467-3474 (showing changes in inmate hairstyles and hair color); ROA.6719. The court also found that prisoners, in certain jobs, are permitted to wear hats or hoods. ROA.2201, 4182-4185, 5205. Women are allowed a variety of hairstyles and may wear religious head coverings including hijabs. ROA.3900, 4318, 6008, 6017. The court held that these practices have not interfered with identification or prison security. ROA.2201; see also ROA.6025, 6043-6044.

The court further found that a kufi did not present a significant smuggling risk because it can be searched and because there are many other places, including

other articles of clothing, in which to hide contraband. ROA.2202. There were no examples in the record of contraband being hidden in a hat. ROA.2203. The court stated that none of the prison's experts had experience with prison systems that allow kufis to be worn throughout the facility, and that the prison's experts' descriptions of potential problems amounted to "speculation." ROA.2203. The court stated that plaintiff's experts, in contrast, had worked in prisons where kufis are allowed and testified that permitting kufis did not adversely affect security. ROA.2203, 4190, 4220-4221, 6205-6206. Forty-one States and the federal Bureau of Prisons, the court pointed out, allow kufis. ROA.2204, 6223. Allowing kufis would not impose significant costs to the prison, the court held, because it would take only a few seconds to search a kufi. ROA.2205-2207, 4371, 6516, 7098-7099.

Additionally, the district court held that barring plaintiff from wearing a four-inch beard did not further the prison's compelling state interest. ROA.2209-2216. The court found that the no-beard rule did not further interests in identifying escaped prisoners, because of the many other ways a prisoner could change his appearance. ROA.2209-2210. An escapee could dye his hair, wear glasses or a hat, or grow facial hair. ROA.2210, 3467-3473. The court also found that the prison had "exaggerated" concerns about contraband smuggling in beards. ROA.2211. The court stated that contraband has not commonly been found in hair

and beards in federal prisons or in California state prisons, two large prison systems that allow beards and long hair. ROA.2211. The court found plaintiffs' experts, who testified that beards do not present a risk for contraband, more persuasive than the prison's experts, who testified otherwise. ROA.2211-2212.

The court also rejected the prison's arguments that it could not permit any prisoner to have a special benefit, such as the ability to wear a beard, that was unavailable to other prisoners. ROA.2212-2213. The court held that RLUIPA specifically requires exceptions to prison rules for certain religious practices. ROA.2212. The shaving exemption for plaintiff and other Muslims would be no harder to administer, the court pointed out, than the medical shaving exemption currently given to more than 6000 inmates. ROA.2214.

The district court stated that many of the possible cost increases the prison officials said would occur were exaggerated, including their claims that the prison may need to install lethal electrified fencing because of increased security risks and that all kitchen workers would need to be supplied with beard nets. ROA.2214-2215; see also ROA.6312-6313. The court found that "it would take 50 seconds each day to search the Plaintiff's beard, at a cost of $0.23. If 40 percent of Muslim inmates choose to grow a beard, it would take 34 minutes each day to search their beards, at a cost of $9.52 each day." ROA.2216 (footnote omitted). The court concluded that the prison's suggestion that about 125,000 inmates would request a

religious exemption to the shaving requirement was "simply a worst-case scenario based on nothing but speculation." ROA.2214. The prison had submitted figures and, the court said, and had not conducted any surveys or studies to determine "how many inmates realistically would request to wear a beard." ROA.2214; see also ROA.6309-6311.

The court found that there were less restrictive means of addressing prison officials' legitimate concerns about safety and prison security. ROA.2207-2208, 2216-2217. Administrative problems with keeping track of which inmates were permitted to have a kufi, the court held, could be solved by issuing a Muslim inmate a property pass for the headwear. ROA.2208. An inmate could remove the kufi for identification or searches, and the prison could revoke the privilege if he misused the kufi. ROA.2218. The court stated that for beards, the prison could maintain two pictures of the prisoner, one clean-shaven and one with a beard, to aid identification. ROA.2210-2211; see also ROA.6223-6235, 6347. The prison could issue a pass for a beard, thereby documenting the prison's permission for the inmate to wear it, as is done for inmates permitted to grow a beard for medical reasons. ROA.2214. Searches, the court held, could be done by requiring an inmate to run his fingers through his beard. ROA.2219.

The court also held that the prison permits some long hair. ROA.6017. For these inmates, the prison requires them to shake their hair out with their fingers

during a search. ROA.6171, 6470. Grooming rules require men to cut their hair above the ear and at the neck, but do not specify a length for hair permitted on the top of the head. ROA.2597; Appellant Br. 13. Women may grow long hair. ROA.2598, 6017.

The court issued a permanent injunction to allow plaintiff to wear a kufi and four-inch beard. ROA.2221-2222. Prison officials appealed and moved to stay the appeal pending revision of their grooming policy after the Supreme Court's decision in *Holt*. ROA.2223-2227, 2242-2243. This Court denied the motion. R. 419-3 at 2.

SUMMARY OF ARGUMENT

The extensive record in this case easily supports the district court's findings that RLUIPA allows plaintiff to grow a four-inch beard and wear a kufi cap.[2] Furthermore, the Supreme Court's recent decision in *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015), reinforces the court's analysis in several important respects. The *Holt* Court curtailed the broad deference that some lower courts have afforded prison officials when assessing both security risks and the availability of less restrictive

[2] The prison claims that the plaintiff may not press his claim about the kufi because it was not among the claims remanded by this Court in a prior appeal. However, this Court held only that his claim for a preliminary injunction to wear the kufi had been waived, and remanded his request for a permanent injunction. *Ali* v. *Quarterman*, 434 F. App'x 322, 326-327 (5th Cir. 2011); see also *Ali* v. *Quarterman*, 505 F. App'x 369, 370 (5th Cir. 2013) (per curiam); ROA.518.

alternatives under RLUIPA. *Holt* also held that a court must, as the district court did here, consider any exemptions or less restrictive rules that a prison uses for practices similar to those the prisoner requests in determining if absolute bans are permissible. Furthermore, *Holt* held that if most other prisons would accommodate the religious practice the plaintiff has requested and has been denied, prison officials must show why they cannot allow that practice at their prison. These underlying principles of *Holt* require close scrutiny of the prison's actions here, and support the district court's decision.

ARGUMENT

I

THE DISTRICT COURT AFFORDED PROPER DEFERENCE TO PRISON OFFICIALS

In administering RLUIPA, courts should "apply the Act's standard with due deference to the experience and expertise of prison and jail administrators." *Cutter* v. *Wilkinson*, 544 U.S. 709, 723 (2005) (citation and internal quotation marks omitted). This does not, however, preclude a court from rejecting a prison's policy and justifications in appropriate circumstances, nor does it mean that a court cannot weigh evidence, determine credibility, or resolve disputed issues of fact against prison officials. Congress passed RLUIPA because prisons sometimes imposed "'frivolous or arbitrary' barriers" on religious exercise. *Id*. at 716 (quoting 146

Cong. Rec. 16,698, 16,699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA)).

Before *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015) some courts had given overly broad deference to prisons officials' assertions that their policies were the least restrictive means of ensuring security. *Holt* requires a more rigorous analysis. *Holt* held that under RLUIPA a prison may not "merely * * * explain why it denied the exemption." *Id.* at 864. The Court explained that RLUIPA does not permit a court to give "unquestioning deference" to prisons officials' evidence. *Ibid.* The court held that it is "the obligation of the courts to consider whether exceptions are required under the test set forth by Congress." *Ibid*. (quoting *Gonzales* v. *O Centro Espírita Beneficente Uniõ do Vegetal*, 546 U.S. 418, 434 (2006)). The Court described the deference due prison officials as "respect" for their "expertise," but cautioned that such respect "does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's *rigorous standard*." *Ibid.* (emphasis added). *Holt* held that RLUIPA's test "is exceptionally demanding" and "requires the [State] to show that it lacks other means of achieving its desired goal." *Id.* at 864 (alterations, citation, and internal quotation marks omitted). If "a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Ibid.* (citation omitted).

In this case, the district court properly carried out its obligation to assess the evidence critically and apply RLUIPA's standard. In doing so, the court evaluated contradictory evidence and chose which evidence to credit. ROA.2196. At a bench trial, a court properly makes findings of fact after resolving conflicting evidence. *Childrey* v. *Bennett*, 997 F.2d 830, 834 (11th Cir. 1993). It may discount a witness's testimony, just as a jury would. *Ibid.* It "is the exclusive province of the judge in non-jury trials to assess the credibility of witnesses and to assign weight to their testimony." *Ibid.*

Deference to prison authorities does not require a court to accept implausible assertions. In *Holt*, for example, the Court pointed out that the magistrate, as fact finder, considered it "almost preposterous to think that" the inmate could conceal contraband in his half-inch beard, but that the magistrate "emphasized that the prison officials are entitled to deference." 135 S. Ct. at 861, 863 (citation and internal quotation marks omitted). The Supreme Court held that the magistrate, the district court, and the Eighth Circuit erred when they "thought that they were bound to defer to the [prison's] assertion" that permitting such a beard threatened efforts to suppress contraband. *Id.* at 864. Deference is not required where the prison's arguments are "hard to take seriously." *Id.* at 863.

Here, the court was called upon to resolve conflicting expert opinions, and it made reasoned decisions about which evidence was more persuasive. This Court

has "consistently left to trial courts the choice as to which set of experts will be credited." *Dufrene* v. *Indemity Ins. Co. of N. Am.*, 303 F.2d 788, 789 (5th Cir.), cert. denied, 371 U.S. 868 (1962). Where there are opposing experts, the factfinder must "decide which of the experts was more credible, which used the more reliable data, and whose opinion—if any" to accept. *Grenada Steel Indus., Inc.* v. *Alabama Oxygen Co*., 695 F.2d 883, 889 (5th Cir. 1983). Indeed, "such testimony is ordinarily not conclusive even where it is uncontradicted." *Mims* v. *United States*, 375 F.2d 135, 140 (5th Cir. 1967). Simply because the issue was prison security does not mean the district court was obliged to credit the prison's experts over others. See *Orduna S.A.* v. *Zen-Noh Grain Corp.*, 913 F.2d 1149, 1154 (5th Cir. 1990) (rejecting defendant's argument that "the district court was compelled to accept its expert's testimony on this theory because of his prominence in the field"). And in this case the prison officials' evidence was hardly "uncontroverted" (Appellant Br. 19) as both sides presented extensive testimony about the effect, or the lack of an effect, that beards and kufis would have on prison security. See ROA.4218-4219.

For example, the court found a prison Warden's concerns about problems with lice in beards "not persuasive" because an expert with medical expertise testified otherwise. ROA.2212 n.19, 6545-6547, 6811. In addition, the court rejected evidence that 125,000 inmates could request religious exemptions to the

prison grooming policies. ROA.2214, 6309-6312, 6563-6566. The court first pointed out that this figure was not based on any objective evidence; there were no "studies or surveys of inmates" and so the estimate was "a worst-case scenario based on nothing but speculation." ROA.2214. An estimate based on the "assumption, unsupported by the evidence, that all inmates would grow a beard" was, in the court's view, "grossly exaggerated." ROA.2214. The court also rejected statistics the prison submitted suggesting that large numbers of inmates and perhaps all Muslim inmates would choose to wear a kufi or other headcovering. ROA.2205, 5366, 6310-6311; Appellant Br. 77 (suggesting that all 6446 Muslim inmates and 25% of all inmates would wear a religious cap).

A court need not accept such speculative conjectures particularly when, as here, there are better ways to ascertain the possible scope of the exemption. Here, the court turned to facts in the record to estimate how many inmates might ask for accommodations like those the prisoner seeks. The court used evidence about Texas's female prisoners who wear hijabs and about religious practices of Muslim federal BOP prisoners to determine the percentage of Muslim inmates who would

likely request a kufi and beard in Texas prisons. ROA.2205-2206, 2213, 6008-6009, 6022, 6206, 6311-6312.[3]

Furthermore, the court properly concluded, based on evidence at trial, that the prison had exaggerated the time and money needed to search kufis and beards. Given conflicting evidence on how long it would take to search a beard and a kufi, the court had to weigh the evidence and make findings, rather than simply accept the prison's estimate. ROA.2205, 2216. The court reviewed evidence about the prison's existing search procedures for clothing and hair (ROA.2195, 6170-6171, 6959, 6961) and did not clearly err when it found, based on a demonstration in court, that it would take only a few seconds to search a kufi. ROA.2195, 7131. Searching a beard would take up to five seconds. ROA.2195, 6957-6958. As in *Holt*, the prison here "failed to establish that it could not satisfy its security

[3] The court also noted there were 96 pending lawsuits seeking grooming exemptions since one was granted in *Garner* v. *Kennedy*, 713 F.3d 237 (5th Cir. 2013). ROA.2195, 2214, 4866-4868, 6584. However, concerns about other prisoners' possible requests for a beard or headcovering do not control the inquiry. *Holt* requires the court to assess application of the challenged rule to "the particular claimant whose sincere exercise of religion is being substantially burdened." 135 S. Ct. at 863 (citation omitted). In a similar situation, applying *Holt*, the Seventh Circuit recently decided that a court need not take into account all prisoners who might request a religious meal in considering the cost of providing a yearly Navajo religious feast. *Schlemm* v. *Wall*, 784 F.3d 362 (2015). "On this record the cost of accommodating Navajo inmates appears to be slight," the court said, "and the costs of accommodating other inmates' requests (should any be made) can be left to future litigation." *Id.* at 366.

concerns by simply searching petitioner's beard" as it "already searches prisoners' hair and clothing." 135 S. Ct. at 864.

The district court quite properly did not credit the prison's factual assertions in several other instances. For example, the court rejected certain statistics about other prisons, taken from Wikipedia, as unreliable. ROA.883, 2204 n.9, 5213. In another instance, it did not accept the prison's claim that allowing beards and kufis would require "additional security equipment," such as $117 million worth of lethal electrified fencing. ROA.2214-2215, 4176-4179; Appellant Br. 39. The court found this an "egregious example of over-inflating costs" because there was no testimony that the prison would actually install the fences if plaintiff was permitted to grow a beard, and the figures included fencing for women's prisons. ROA.2214-2215 & n.22, 4948, 6305-6307

The court also rejected the prison's unlikely arguments about the importance of head tattoos in inmate identification. ROA.2201. The prison argued that kufis are a problem because they can cover up a head tattoo. (Plaintiff has no head tattoos). See ROA.2201, 5410-5412. The prison officials could ask an inmate to take off his kufi in order to inspect head tattoos, just as it could ask him to remove his shirt to show chest and arm tattoos. ROA.6763, 6765. The prison does not require inmates to go shirtless or short-sleeved to ensure their tattoos are always in full view. See ROA.6762-6763, 6773-6774. In fact, the court reviewed an exhibit

of 35 photographs of head tattoos and concluded that each inmate could be identified even if he wore a kufi. ROA.2201, 2750-2753, 2767-2768, 2782-2783, 2797-2798, 2812-2813, 2827-2828, 2842-2843, 2857-2858, 2872-2873, 2887-2888, 2902-2903, 2917-2918, 2946-2947, 3092-3093, 3356-3358; see also ROA.1773. Deference does not require a court to accept factual claims that, on their face, are so "hard to swallow." *Holt*, 135 S. Ct. at 864.

The prison here argues that the court was obligated to accept prison officials' arguments because "discrediting officials' appraisals in matters of security, safety and costs crosses the permissible boundaries of separation of powers." Appellant Br. 19 (citing *Lewis* v. *Casey*, 518 U.S. 343, 364 (1996) (Thomas, J. concurring)). This assertion is simply incorrect. Congress properly invoked its powers under the Spending and Commerce Clauses in enacting the obligations RLUIPA places on state prisons, and the Supreme Court has rejected a constitutional challenge to the statute. *Cutter*, 544 U.S. at 715-716, 721. And *Holt* requires courts to "discredit[] officials' appraisals" (Appellant Br. 19) where they are based on faulty evidence, rely on speculation, or are contradicted on the record. 135 S. Ct. at 864-865 (noting the prison did not offer "sound reason[s]" for its policies and rejecting its arguments "in the face of petitioner's evidence"). The analysis RLUIPA requires of prisons hardly exceeds Congress' authority.

II

THE DISTRICT COURT PROPERLY CONCLUDED THAT THE PRISON'S BAN ON PLAINTIFF'S FOUR-INCH BEARD AND HIS KUFI CAP IS NOT THE LEAST RESTRICTIVE MEANS OF PURSUING A COMPELLING STATE INTEREST

After resolving the disputed factual issues, the district court found that plaintiff's beard and kufi were not significant risks to prison security, administration, and cost control. These findings are amply supported in the record and accord with applicable precedent. Given RLUIPA's case-specific analysis and the intervening decision in *Holt*, this Circuit's case law upholding other, similar grooming limits in prison does not categorically preclude plaintiff's claim. See Appellant's Br. 9-10. In addition, the court did not err in considering existing prison rules allowing other inmates to wear head coverings as evidence of less restrictive alternatives Texas could apply to plaintiff. Finally, when it rejected Texas' ban on beards and kufis the court appropriately relied on the fact that the vast majority of prisons throughout the country would allow plaintiff's religious practices. *Holt* very firmly established that evidence of other prisons' practices is particularly significant in a RLUIPA case. The prison here, as in *Holt*, failed to prove that it could not provide accommodations similar to those afforded in many other state prison systems, as well as the federal BOP.

A. This Court's Precedent Adjudicating Other Challenges To Texas's Grooming Rules Does Not Bar Plaintiff's Claim

RLUIPA claims are highly individualized. As *Holt* explained, the statute "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the person—the particular claimant whose sincere exercise of religion is being substantially burdened." *Holt* v. *Hobbs*, 135 S. Ct. 853, 863 (2015) (citation and internal quotation marks omitted). Therefore, precedent upholding a grooming restriction applied to another inmate would not prevent a plaintiff from making a RLUIPA claim on a somewhat different restriction. Even before *Holt*, this Court recognized that RLUIPA "suggests a fact-specific inquiry that takes into account the special circumstances of the individual prisoner and prison." *Chance* v. *Texas Dep't of Crim. Justice*, 730 F.3d 404, 411 (5th Cir. 2013). A court must "test[] the prison's asserted interests with regard to the risks and costs of the specific accommodation being sought." *Id.* at 418; see also *Koger* v. *Bryan*, 523 F.3d 789, 800 (7th Cir. 2008) ("[T]he governmental interest should be considered in light of the prisoner's request and circumstances at the detention facility.").

Here, the prison wrongly reasons that, "[b]ecause a four-inch beard presents the same, if not more security concerns than long hair on the head," this Court's prior cases upholding a prison's hair-length rules bar any challenge to the shaving rule at issue here. Appellant Br. 8-9 (citing *Longoria* v. *Dretke*, 507 F.3d 898 (5th

Cir. 2007) and *Diaz* v. *Collins*, 114 F.3d 69 (5th Cir. 1997)). But, as this Court acknowledged in a case involving Texas prisons' shaving requirement, a single case cannot establish a "broad holding that the grooming policy * * * will always be upheld." *Gooden* v. *Crain*, 353 F. App'x 885, 889 n.3 (5th Cir. 2009) (per curiam). Indeed, this Court ruled that RLUIPA required a prisoner be allowed to wear a beard where he proposed "different alternatives to the no-beard policy than have been previously offered." *Garner* v. *Kennedy*, 713 F.3d 237, 244, 248 (5th Cir. 2013) (citing *Gooden* and holding prison may not bar inmate from growing a quarter-inch beard). Circumstances such as the plaintiff's security level or disciplinary history may be relevant and lead to different results. Accordingly, *Longoria* and *Diaz* do not preclude plaintiff's claim as a matter of law.

Furthermore, it is unclear whether *Longoria* and *Diaz*, even if they did control in plaintiff's case, survive *Holt*. *Diaz* offered scant assessment of the prison's claims that there were no less restrictive alternatives, and stated instead that the court owed "substantial deference to prison officials in legitimate security matters." *Diaz*, 114 F.3d at 73. *Holt* questions that level of deference.

B. The District Court Properly Considered The Prison's Tolerance Of Other Practices Affecting Contraband Control And Inmate Identification As Evidence That Less Restrictive Alternatives Could Be Applied To Plaintiff

In *Holt*, the Court required close analysis of the prison's grooming restrictions in light of other prison policies that would affect the prison's

compelling interests in security. If the "proffered [compelling interest] objectives are not pursued" in analogous circumstances, this "suggests that 'those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree.'" *Holt*, 135 S. Ct. at 865-866 (quoting *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 546 (1993)). Thus, in *Holt*, the Court held the prison's medical exceptions to its no-beard rule, allowing quarter-inch beards, weighed against its claim that it could not permit a religious exception that would allow a half-inch beard. 135 S. Ct. at 866. The Supreme Court said the prison had not "establish[ed] * * * a meaningful increase in security risk" between the half-inch beard the prisoner requested and quarter-inch beards it permitted for medical reasons. *Ibid.* In addition, the Court pointed out, hair and clothing might also hide contraband, but "the [prison] does not require inmates to go about bald, barefoot, or naked." *Ibid.*

In their brief here, the prison officials state that the district court "erroneously considered" evidence from its women's prisons when assessing its policies barring plaintiff's kufi. Appellant Br. 66. But under *Holt*, which requires courts to consider policies at similar institutions, this evidence is particularly relevant. 135 S. Ct. at 866. Here, the district court properly considered other policies that touch on identification, contraband, or prison administration. It pointed out that the State allows female prisoners to wear hijabs, which cover more

of the head than would the plaintiff's kufi. ROA.2190, 6014-6016. The court found that a hijab presents the same sort of risks as a cap when it comes to identification, smuggling, and difficulties of allowing one prisoner to have a privilege others do not enjoy. The court held that the record showed that the prison has effectively accommodated them without security problems; male and female prisoners are both routinely searched and hijabs can be and are searched. ROA.2191, 6043-6044, 6113. Women, like men, have been disciplined for possession of contraband such as drugs, weapons, and tobacco. ROA.6046. Although the prison argues here that "security concerns were vastly different" at women's prisons (Appellant Br. 66), the district court found that security concerns at both prisons were similar, as women commit the same violations as men, albeit at "a slightly lower rate." ROA.2190, 2202-2203, 2691; see also ROA.6036-6040. The prison also permits men to wear hats in the prison's kitchen and while working outdoors, even though there are risks of smuggling and escape associated with these circumstances. ROA.2188, 4182-4813, 5206-5207, 6156-6160; Appellant Br. 76. These facts undermine the prison's assumption that if an inmate is permitted to wear a kufi outside of his cell, he will "undoubtedly hide contraband" in it. Appellant Br. 75.

The court's factual findings are not clearly erroneous, and it was entitled – indeed required – to scrutinize defendant's restrictions on kufis in light of other

head coverings the prison allows. *Holt* requires more than "prison officials' mere say-so" on such an issue. 135 S. Ct. at 866. Prison officials must demonstrate why they cannot allow a kufi for plaintiff, a low-security prisoner, even though the prison officials permit others to wear similar head coverings. The prison must "establish * * * a meaningful increase in security risk" between the kufi and the head coverings it permits. *Holt*, 135 S. Ct. at 865-866 (emphasis added).

C. The District Court Properly Held That The Prison Had Not Adequately Distinguished Its Circumstances From Those Of The Majority Of The Nation's Prisons Which Allow A Kufi And A Four-Inch Beard

Holt now requires a court to consider "policies followed at other well-run institutions" as "relevant to a determination of the need for a particular type of restriction." 135 S. Ct. at 866 (citation omitted). In *Holt*, the Court stated that the prison officials in that case had to "show, in the face of petitioner's evidence, why the vast majority of States and the Federal Government permit" the requested accommodation the prison refused to permit. *Ibid.* The prison at issue could not shoulder that burden.

In *Holt*, the Eighth Circuit had assessed evidence of other prisons' practices much as defendant suggests this Court should. The Eighth Circuit "acknowledg[ed] that other prisons allow inmates to maintain facial hair" but "held that this evidence 'does not outweigh deference owed to [the] expert judgment of prison officials who are more familiar with their own institutions.'" 135 S. Ct. at

861 (describing the Eighth Circuit's assessment). Here, similarly, Texas argues that this Court owes Texas prison officials "deference to [their] divergent assessment of the security risks and alternatives as compared to other states' prison systems." Appellant Br. 7. The Supreme Court soundly criticized this deferential approach in *Holt*, explaining that "the Court of Appeals * * * thought that [it was] bound to defer to the [prison's] assertion" of risk, but "RLUIPA, however, does not permit such unquestioning deference." *Id.* at 862, 864.

Most state prisons and the federal BOP allow plaintiff's beard and kufi. ROA.2204, 6223, 6242-6243. Experts with experience at these prisons testified that kufis and beards do not adversely affect security. ROA.2203, 6217, 7092-7100. Texas now argues that at least one prison official visited prisons in the BOP system and in California "to study those systems' religious-headwear policies and how they make it work." Appellant Br. 73. But, particularly after *Holt*, the prison must do more than show it merely contemplated alternatives. *Holt* said the RLUIPA "test requires the [prison] not merely to explain why it denied the exemption but to prove that denying the exemption is the least restrictive means of furthering a compelling governmental interest." 135 S. Ct. at 864.

In this case, the State has failed to show why, if kufis and beards can be managed in other prisons, they cannot be in Texas. The State pointed to its large prison population and difficulties in staffing. Appellant Br. 33-34; ROA.2204 &

n.9, 5213, 6676-6679 (noting prison was staffed at 88% of authorized positions); see also ROA.6213-6214 (noting most prisons are not staffed at 100% of authorized positions, and that 90% or 95% staffing is common across the nation). The BOP and California prisons allow beards and kufis, and these have, as the district court found, high inmate populations comparable to Texas's. ROA.2204 & n.9, 5213. The court concluded that, after correcting inconsistencies in Texas's statistical analysis, the record showed that Texas prisons actually had more officers per inmate than BOP. ROA.2204 n.9, 5213, 5219-5224. The court found that the various prison systems' "differences do not preclude comparisons," and although the policies of other prisons were "not dispositive in this case," they were "informative" and "evidence that the court may consider." ROA.2204 n.9.

The district court's analysis was hardly improper. Indeed, *Holt* requires it. The *Holt* Court considered a prison's arguments that its circumstances were unique because its inmates lived in barracks and worked in fields, but the Court rejected the prison's claim, finding it "unpersua[sive]" in "the face of [the prisoner's] evidence." 135 S. Ct. at 865. In *Holt*, the Court held that the prison had not met its burden to show why it "is so different from the many institutions that allow[ed]" the religious accommodation the prisoner sought. *Ibid.* Even before *Holt*, the Court endorsed similar reasoning. It found it important that BOP "has managed the largest correctional system in the Nation under the same heightened

scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners." *Cutter* v. *Wilkinson*, 544 U.S. 709, 725 (2005) (citation omitted). The district court's reliance on the policies of other prisons here is also strongly supported by this Court's holding in *Garner*. There, this Court found it "persuasive that prison systems that are comparable in size to Texas's—California and the Federal Bureau of Prisons—allow their inmates to grow beards, and there is no evidence of any specific incidents affecting prison safety in those systems due to beards." *Garner*, 713 F.3d at 247.

CONCLUSION

This Court should affirm the district court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 17, 2015, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all counsel are registered with the CM/ECF system and service will be accomplished through that system.

s/ April J. Anderson
APRIL J. ANDERSON
Attorney

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE:

(1) contains no more than 6,000 words;

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 29(d) and 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font; and

(3) has been scanned for viruses using Trend Micro Office Scan (version 8.0) and is free from viruses.

s/ April J. Anderson
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Dated: July 17, 2015