Nos. 19-13520, 19-13521

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LESTER J. SMITH,

Plaintiff-Appellee/Cross-Appellant

v.

GREGORY DOZIER,

Defendant-Appellant/Cross-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE AND URGING AFFIRMANCE ON THE ISSUES ADDRESSED HEREIN

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Lester J. Smith v. *Gregory Dozier*, Nos. 19-13520, 19-13521

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the United States as amicus curiae certifies that, in addition to those identified in the briefs filed by defendant-appellant and plaintiff-appellee, the following persons may have an interest in the outcome of this case:

1. Bortnick, Yael, U.S. Department of Justice, Civil Rights Division, counsel for the United States;
2. Calderon, Tovah R., U.S. Department of Justice, Civil Rights Division, counsel for the United States;
3. Dreiband, Eric S., U.S. Department of Justice, Civil Rights Division, counsel for the United States;
4. Maugeri, Alexander V., U.S. Department of Justice, Civil Rights Division, counsel for the United States.

The United States certifies that no publicly traded company or corporation has an interest in the outcome of this appeal.

s/ Yael Bortnick
YAEL BORTNICK
Attorney

Date: March 16, 2020

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued)

PAGE

TABLE OF CITATIONS

CASES: **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

LEGISLATIVE HISTORY:

RULE:

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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 prison inmates' 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

Department has filed briefs in other appeals involving RLUIPA's protections for institutionalized persons, including in this Court. See, *e.g.*, *Watkins* v. *Florida Dep't of Corrs.*, 669 F. App'x 982 (11th Cir. 2016) (No. 15-15543); *Ali* v. *Stephens*, 822 F.3d 776 (5th Cir. 2016) (No. 14-41165); *Knight* v. *Thompson*, 723 F.3d 1275 (11th Cir. 2013) (No. 12-11926). The United States files this brief as amicus curiae under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES

The United States addresses the following questions only:

1. Whether, under the Supreme Court's RLUIPA decision in *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015), the district court gave proper weight to the practices of other jurisdictions where the plaintiff showed that most prison systems allow beards longer than a half-inch and where the Georgia Department of Corrections failed to provide persuasive reasons why it cannot make similar accommodations.

2. Whether, under *Holt*, the district court afforded the proper deference due to prison officials in rejecting many of their factual assertions where the court found that such assertions were "pure conjecture" and credited the plaintiff's evidence on several contested issues.[1]

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[1] The United States takes no position on any other issue presented in this case. The United States notes that while the district court's order requires Georgia to amend the grooming policy for its entire correctional system, the Prison Litigation Reform Act mandates that "[p]rospective relief in any civil action with

(continued...)

STATEMENT OF THE CASE

1. Smith's RLUIPA Claim And First Appeal To This Court

As relevant here, plaintiff-appellee, Lester Smith, a Georgia state inmate, filed suit under RLUIPA, alleging that the inmate grooming policy for the Georgia Department of Corrections (Georgia) substantially burdened the practice of his sincerely held Muslim faith. Doc. 243, at 1.[2] At the time, Georgia prohibited inmates from growing beards of any length unless they qualified for a medical exception, in which case they could grow and maintain a beard between one-eighth and one-quarter inch in length. See *Smith* v. *Owens*, No. 5:12-CV-26, 2014 WL 773678, at *2 (M.D. Ga. Feb. 26, 2014), vacated and remanded, 848 F.3d 975 (11th Cir. 2017). Smith was granted a medical-condition exception allowing him to grow and maintain a beard of one-eighth inch; however, he was denied a religious accommodation to grow an uncut beard consistent with his religious beliefs. *Smith*, 848 F.3d at 977.

(…continued)
respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. 3626(a)(1).

[2] "Doc. __, at __" refers to the docket entry and page number(s) of documents filed in the district court. "Br. __" indicates the page number of Georgia's opening brief.

Georgia moved for summary judgment, arguing that because Smith qualified for a medical exception, his religious exercise was not substantially burdened. *Smith*, 848 F.3d at 977. In the alternative, Georgia argued that the grooming policy furthered compelling governmental interests in security, discipline, hygiene, and safety by the least restrictive means. *Ibid.* Smith opposed, arguing that the inconsistency between allowing a medical exception to the grooming policy while denying a religious accommodation demonstrated that the policy was not the least restrictive means. *Ibid.* As an alternative, which Smith styled as a "settlement offer," he proposed that Georgia revise its grooming policy to allow all inmates to grow a beard of no longer than one-quarter inch. *Ibid.* The district court granted Georgia's motion for summary judgment, and Smith appealed. Doc. 243, at 1.

While Smith's appeal was pending in this Court, the Supreme Court issued its decision in *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015), which unanimously held that Arkansas' grooming policy violated RLUIPA insofar as it prevented an inmate from growing a one-half-inch beard in accordance with his religious beliefs. After *Holt*, Georgia revised its grooming policy to allow all inmates to grow a beard of up to one-half inch. See *Smith*, 848 F.3d at 978. Georgia moved to dismiss Smith's appeal as moot, arguing that Smith had received the relief he sought. *Ibid.* This Court denied the motion, concluding that the case was not moot because Smith had "consistently expressed his belief that cutting his beard *(without*

qualification as to length) contravenes the teachings of Islam." *Ibid.* (emphasis added). Accordingly, the court could still "provide meaningful relief." *Id.* at 979.

This Court vacated and remanded the case to the district court to analyze the revised grooming policy in a manner consistent with *Holt*. *Smith*, 848 F.3d at 981. The Court specifically instructed the district court on remand to conduct "a more particularized, less deferential analysis." *Id.* at 981. The Court explained, "*Holt* calls for an individualized, context-specific inquiry that requires [Georgia] to demonstrate that application of the grooming policy *to Smith* furthers its compelling interests" and "to consider the 'marginal interest in enforcing' the grooming policy *in Smith's case*." *Ibid.*

2. Smith's Trial On Remand

On remand, the district court held a two-day bench trial on Smith's RLUIPA claim and made extensive findings of fact. Doc. 243, at 2. Georgia did not dispute that its half-inch beard policy substantially burdens Smith's exercise of a sincerely held religious belief, and the court found this fact supported by the record. Doc. 243, at 4. Georgia nonetheless asserted that its policy furthers numerous compelling interests, including safety, security, uniformity, minimizing the flow of contraband, identification of inmates, hygiene, and costs. Doc. 243, at 4. The court found that these interests "generally * * * are compelling governmental interests." Doc. 243, at 4-5. The question for the court was thus whether

Georgia's half-inch beard policy furthers Georgia's interests using the least restrictive means.

The court found that Georgia's grooming policy did not further its interests using the least restrictive means because it is both inconsistent and underinclusive. Doc. 243, at 5. First, as to the dangerousness of searching beards, the court found that female inmates can grow head hair of *any length* and that male inmates can grow head hair of *three inches*. Doc. 243, at 5 (emphasis added). The court pointed out that Georgia's concerns about inmates concealing contraband would exist regardless of whether an inmate has a beard. Doc. 243, at 6. It found that Georgia's explanation for why its search procedures were adequate to search an inmate's mouth, body, and clothing but not a beard was "insufficient." Doc. 243, at 6. The court credited the testimony of Smith's expert, who had over 40 years' correctional experience, including experience searching beards for the Federal Bureau of Prisons (BOP) and setting grooming policies, that officers could effectively search a beard without putting themselves in danger by having the inmate vigorously frisk and twist his beard. Doc. 243, at 6-7. The court concluded that the "underinclusiveness" of the grooming policy "casts serious doubt" on the claim that a half-inch beard is the least restrictive means of managing safety concerns. Doc. 243, at 7.

Second, as to concealing contraband, the court recognized that even Georgia's experts conceded that inmates hide contraband "[e]verywhere" and that contraband in beards "does not present different risks or dangers than contraband in clothes." Doc. 243, at 7-8. Therefore, the court concluded that Georgia had "failed to demonstrate why beards would pose a contraband problem if they were searched along with head hair, mouths, and clothes," especially where "longer head hair is allowed and can be adequately searched." Doc. 243, at 8.

Third, the court addressed Georgia's compelling interests in preventing jealousy, gang identification, hygiene issues, and violence and found the grooming policy underinclusive as to each. Doc. 243, at 8-10. The court found that Georgia's concerns about violence were "speculative," and that Georgia had "failed to demonstrate why beard hair cannot be accommodated for religious reasons, but there are no restrictions on long hair for women and staff." Doc. 243, at 8. The court also found Georgia's concerns about beards being a source of jealousy were "pure conjecture," especially given that religious exceptions exist to other prison policies to allow special privileges, such as religious clothing articles, for other inmates. Doc. 243, at 8-9. Similarly, although Georgia expressed concern that beards would allow Muslim inmates to identify with each other, the court pointed out that Georgia allows Muslim inmates to wear kufi hats, which also allow inmates to identify with each other. Doc. 243, at 9. Finally, with respect to

hygiene, the court again found Georgia's witnesses' testimony unconvincing given that the same policies for head hair—requiring regular trimming and inspection—could be implemented for beards. Doc. 243, at 9-10.

The court thus concluded that Georgia failed to meet its "exceptionally demanding" burden of showing that its half-inch beard policy provides the least restrictive means of furthering any of these interests. Doc. 243, at 10 (quoting *Holt*, 135 S. Ct. at 864). At the same time, the court concluded that Georgia had offered "logical and persuasive reasons to show that allowing untrimmed beards would be unmanageable." Doc. 243, at 11. However, as an apparent compromise between Georgia's half-inch beard policy and Smith's request for an untrimmed beard, and in light of the evidence regarding other jurisdictions' policies, the court found that "the same reasons are not nearly as persuasive when applied to a three inch-beard [*sic*]." Doc. 243, at 11. Indeed, the court found that 37 States, the District of Columbia, and the BOP allow inmates, either by their standard policy or through an exemption, to grow a beard without any length restriction and that another four States allow inmates with a religious exemption to grow a beard longer than a half-inch. Doc. 243, at 3, 10. Based on this evidence, and in contrast to Georgia's showing that an untrimmed beard would be unmanageable, the court found that a three-inch beard "cannot be easily grabbed, it can be safely searched,

it can be periodically shaven to address inmate identification concerns, and it can be regularly cut to detect hygiene issues." Doc. 243, at 11, 13.

Finally, the court rejected Georgia's argument that it should deny Smith a religious exemption based on his criminal history and disciplinary record. Doc. 243, at 15-16. The court recognized that "Smith's criminal history and disciplinary issues while incarcerated" were relevant but ultimately found it "hard to fathom" how a three-inch beard is a significant security concern given that, under Georgia's grooming policy, Smith is allowed to grow three inches of head hair. Doc. 243, at 15.

The district court therefore concluded that Georgia's grooming policy "limiting inmates' beard length to one-half inch without any religious exemptions violates" RLUIPA. Doc. 243, at 18. The court ordered Georgia to "modify its grooming policy to allow inmates qualifying for a religious exemption to grow a beard up to three inches in length" and "provide Plaintiff Lester Smith with such an exemption." Doc. 243, at 18. The court's order further provided that the exemption was "subject to revocation based on the inmate's behavior and compliance with the revised grooming policy." Doc. 243, at 18.

3. The Current Appeal

Georgia appealed, and Smith filed a cross-appeal. In its opening brief, Georgia argues, among other things, that the district court (1) "gave improper

weight to the practices of other jurisdictions," and (2) "failed to give [the State] the deference due to prison officials." See Br. 40-49.

Georgia moved to stay the injunction pending appeal. Appellant's Mot. For Stay (filed Nov. 15, 2019). This Court denied the stay as to Smith but granted a stay with respect to the part of the injunction directing Georgia to modify its statewide grooming policy. See Order Granting in Part and Denying in Part Appellant's Motion for a Stay Pending Appeal (issued Dec. 27, 2019) (Order). Judge Rosenbaum concurred in part and dissented in part. Order 3. Judge Rosenbaum stated that she would deny the motion to stay both as to Smith and with respect to the statewide policy. Order 3. Judge Rosenbaum explained that Georgia had not sufficiently explained why three inches of head hair, which is allowed under Georgia's policy, "is any less dangerous than a three-inch length of beard on an inmate's face, particularly in light of the fact that the record in the district court indicates that federal prisons allow untrimmed beards." Order 3.

SUMMARY OF ARGUMENT

RLUIPA prohibits a State from imposing a substantial burden on an inmate's religious exercise except when it does so to further a compelling governmental interest using the least restrictive means of accomplishing that interest. 42 U.S.C. 2000cc-1(a). In analyzing whether Georgia met its burden of showing that its inmate grooming policy satisfies RLUIPA's "least restrictive

means" requirement, the district court properly applied the principles set forth in the Supreme Court's decision in *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015), which involved a similar challenge to a prison's restriction on beards.

First, under *Holt*, if most other prisons would accommodate the religious practice that plaintiff has requested and has been denied, prison officials must show why they cannot allow that practice at their prison. Following *Holt*, the district court gave proper weight to the practices of other jurisdictions. The court found that most prison systems allow beards longer than a half-inch and that Georgia failed to provide persuasive reasons why it cannot make similar accommodations.

Second, *Holt* curtailed the overly broad deference that some lower courts have afforded prison officials when assessing both security risks and the availability of less restrictive alternatives under RLUIPA. Again following *Holt*, the district court afforded the proper deference due to prison officials in rejecting many of their assertions, after it found that such assertions were "pure conjecture" and chose to credit Smith's evidence on several contested issues.

ARGUMENT

THE DISTRICT COURT PROPERLY APPLIED *HOLT* V. *HOBBS* IN CONCLUDING THAT GEORGIA'S INMATE GROOMING POLICY IS NOT THE LEAST RESTRICTIVE MEANS OF PURSUING A COMPELLING STATE INTEREST

A. RLUIPA Protects The Religious Liberty Of Prison Inmates By Requiring That Any Substantial Burden On Religion Be The Least Restrictive Means Of Furthering A Compelling Governmental Interest

RLUIPA protects the religious liberty of prison inmates by requiring that a State's imposition of a substantial burden on inmates' exercise of religion be the least restrictive means of furthering a compelling governmental interest. Specifically, it provides that no State shall substantially burden 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). RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A).

In *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015), the Supreme Court considered the application of these protections to an Arkansas inmate's request for an exemption from the prison's grooming policy to grow a half-inch beard in accordance with his religious beliefs. The prison argued that the policy was necessary to further

compelling governmental interests in stopping the flow of contraband and facilitating prisoner identification. *Id.* at 861. The district court was skeptical that contraband could be hidden in a short beard but, emphasizing that prison officials are entitled to deference, held in favor of the prison. *Ibid.* The Eighth Circuit affirmed. *Ibid.* 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." *Ibid.* (internal quotation marks omitted).

The Supreme Court unanimously reversed. *Holt*, 135 S. Ct. at 859. It 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). The Court explained that if most other prisons would accommodate the religious practice that the inmate has requested and has been denied, prison officials must show why they cannot allow that practice at their prison. *Id.* at 866. The Court also criticized the Eighth Circuit's deferential approach, 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 863-864. 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." *Id.* at 864.

This analysis under RLUIPA is fact-intensive. As this Court has explained, "*Holt* calls for an individualized, context-specific inquiry" that focuses on application of a challenged policy to a particular inmate. *Smith* v. *Owens*, 848 F.3d 975, 981 (11th Cir. 2017).

B. The District Court Properly Concluded That Georgia Failed To Adequately Distinguish Its Circumstances From Those Of The Majority Of The Nation's Prisons, Which Allow Longer Beards

Under *Holt*, other prisons' practices are highly probative of whether less restrictive policies can be pursued without compromising a compelling interest. The Court in *Holt* required a State to "show, in the face of petitioner's evidence, why the vast majority of States and the Federal Government permit" the requested accommodation, "but it cannot." 135 S. Ct. at 866. When "so many prisons offer an accommodation," *Holt* requires the government to, "at a minimum, offer persuasive reasons why it believes that it must take a different course." *Ibid.*

1. Georgia failed to do so here. Despite this demanding standard, the only difference that Georgia identified at trial between it and other penal institutions was its averment that, generally, "they house a large number of more violent inmates and they don't have the same staff ratios and resources to accommodate

beards." Doc. 243, at 13. When pressed, the only "specific differences" Georgia was able to identify were that "California has catwalks and AR-15s" and "New York has better staffing ratios." Doc. 243, at 13. Thus, Georgia did not "even attempt[] to determine how other states manage inmates with beards," and it provided "no evidence showing that states that allow beards experience more" issues with "violence, contraband smuggling, and security issues." Doc. 243, at 14. In contrast, Smith's expert, who has 44 years' correctional experience, including in general management of federal prisons and setting grooming policies, testified that Georgia's prisons' staffing ratios are in the middle for state prison systems and that Georgia's prisons are staffed slightly better than the BOP. Doc. 243, at 6, 13-14. After reviewing these competing claims, the district court concluded that Georgia "has failed to offer persuasive reasons why it cannot implement" the minor changes that would be required if it were to allow three-inch beards, as do most prison systems in this country. Doc. 243, at 14.

2. On appeal, Georgia argues that the district court misinterpreted the evidence of what other jurisdictions allow. Br. 42. Specifically, Georgia argues that of the 37 States that the district court found allow untrimmed beards, either for all inmates or as a religious exception, 20 of those 37 States provide prisons the option to restrict beards based on specific safety and security concerns. Br. 42. However, here too, the court's injunction allows for a religious exemption to be

revoked "based on the inmate's behavior and compliance with the revised grooming policy." Doc. 243, at 18. Moreover, regardless of whether the actual number is 37 or 17, given that numerous other prisons permit the requested accommodation, Georgia still was required to offer persuasive reasons why it must take a different course. See *Ali* v. *Stephens*, 822 F.3d 776, 788 n.7 (5th Cir. 2016) (holding that evidence of two other prison systems, including the BOP, where four-inch beards were allowed, was "pertinent evidence"); see also *Holt*, 135 S. Ct. at 866 (explaining that the fact that "so many other prisons allow inmates to grow beards while ensuring prison safety and security suggests that the [prison] could satisfy its security concerns through a means less restrictive than denying petitioner the exemption he seeks").

Georgia also argues that it was not required to present evidence regarding "the kinds of inmates in other prisons," "how other states manage inmates with beards," or "evidence showing that other states have issues with beards" to satisfy its burden. Br. 42. Further, Georgia complains that the district court afforded improper weight to the evidence of other prisons' policies because "there is no evidence in the record as to the 'success' of these other jurisdictions." Br. 43. But under RLUIPA, it was Georgia's burden to show that its refusal to allow Smith a religious accommodation was the least restrictive means of furthering a compelling governmental interest, which the Supreme Court has recognized is an

"exceptionally demanding" standard. *Holt*, 135 S. Ct. at 864. Where, like here, there is evidence of numerous contrary policies, a court may not defer to prison officials' "mere say-so that they could not accommodate [the plaintiff's] request," because these other policies indicate that a less restrictive means may be available. *Id.* at 866.[3]

3. Georgia also relies (Br. 41-42) on this Court's decisions in *Knight* v. *Thompson*, 723 F.3d 1275 (11th Cir. 2013) (*Knight I*), vacated, 135 S. Ct. 1173, reinstated in part, superseded in part, 797 F.3d 934 (11th Cir. 2015) (*Knight II*). But this case does not help Georgia. Following *Holt*, the Supreme Court vacated and remanded the decision in *Knight I* to this Court. *Knight I*, 723, F.3d 1275, vacated, 135 S. Ct. 1173. On remand, this Court largely reinstated its prior decision, which had affirmed a district court's decision to uphold a hair-length restriction because the court concluded that the evidence—including a "detailed" record of actual security incidents—demonstrated that long hair for male inmates "pose[d] actual security, discipline, hygiene, and safety risks" in that particular correctional agency. *Knight II*, 797 F.3d at 944-945, 947. Given this

[3] While RLUIPA does not require that Georgia produce any *particular* kind of evidence explaining why it takes a different approach from other prisons, *Holt* makes clear that it is the State's obligation to prove that it has pursued the least restrictive means of furthering its compelling interests, including by offering persuasive reasons showing why what works elsewhere would not work in Georgia.

countervailing evidence and "the District Court's factual findings," which were reviewed for clear error, the Court upheld the lower court's decision. *Id.* at 942 n.4, 945.

Relying on *Knight II*, Georgia argues that the district court's reliance on the practices of other jurisdictions in this case "misses the mark." Br. 42 (quoting *Knight II*¸ 797 F.3d at 947). But as Georgia recognizes, *Knight II* acknowledged that the practices of other institutions are indeed relevant, even though they are not controlling. Br. 41 (citing *Holt*, 135 S. Ct. at 866; *Knight II*, 797 F.3d at 947). And this Court has reaffirmed that principle in subsequent cases. For example, in *United States* v. *Secretary, Florida Department of Corrections*, 828 F.3d 1341 (11th Cir. 2016), this Court found that Florida's religious diet program was not the least restrictive means of furthering the State's interest in cost containment in light of evidence that the BOP and other prison systems were able to provide the requested accommodation and the fact that the State made only meager efforts to explain why it could not do so. *Id.* at 1346-1348.

More importantly, this Court already has distinguished the present appeal from *Knight II*, which presented a different procedural posture and is factually distinguishable. The instant case was pending in this Court when *Holt* was decided. But the Court found that "the focused inquiry, factual findings, and extensive record that supported our affirmance in *Knight II* are not present in this

case." *Smith*, 848 F.3d at 980. Therefore, the Court vacated the judgment in favor of Georgia and remanded the case to the district court with instructions to conduct "a more particularized, less deferential analysis" with respect to the question of whether the grooming policy is the least restrictive means of furthering compelling governmental interests. *Id.* at 981.

On remand, the district court found that Georgia failed to satisfy its burden of showing that a half-inch beard policy was the least restrictive means of furthering its security and other interests. Georgia made only "meager efforts to explain why [its] prisons are so different from the penal institutions" that provide the requested religious accommodation, "such that the [grooming policies] adopted by those other institutions would not work in [Georgia]." *Rich* v. *Secretary, Fla. Dep't of Corrs.*, 716 F.3d 525, 534 (11th Cir. 2013). The fact that Georgia "has not even attempted to determine how other states manage inmates with beards" (Doc. 243, at 14), demonstrates that, unlike the prison in *Knight II*, Georgia's refusal to grant Smith an exemption from its grooming policy was "a stubborn refusal to accept a workable alternative." *Knight II*, 797 F.3d at 947. Given the "highly deferential standard of review" that applies to the district court's factual findings, see *Holton* v. *City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1350 (11th Cir. 2005), this Court should affirm the district court's conclusion under *Holt* that Georgia failed to show why its half-inch beard policy is the least restrictive means

of furthering its compelling interests where other jurisdictions are able to accommodate longer beard lengths.

C. 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 standard does not, however, preclude a court from rejecting a prison's policy and its 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. See *Holt*, 135 S. Ct. at 864.

1. Before *Holt*, some courts gave overly broad deference to prison officials' assertions that their policies were the least restrictive means of ensuring security. *Holt* requires a more rigorous analysis and establishes that a prison may not "merely * * * explain why it denied the exemption." *Holt*, 135 S. Ct. at 864. The Supreme Court explained that RLUIPA does not permit "unquestioning deference" and 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 União do Vegetal*, 546 U.S. 418, 434 (2006)). The Court described the deference due to 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.* *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." *Ibid.* (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).

Thus, in the RLUIPA context, the trial court, "as the finder of fact, remain[s] free to reject" witnesses' testimony that is contradicted. *Knight II*, 797 F.3d at 945. For example, the Fifth Circuit, applying *Holt*, recently affirmed a district court's conclusion that a State's grooming policy, which prohibited a Muslim inmate from growing a four-inch beard, was not the least restrictive means for controlling contraband, explaining that, although the court must respect a prison official's expertise, the district court did not exceed its prerogative in resolving competing testimony in the inmate's favor. *Ali*, 822 F.3d at 788-789 (citing *Knight II*, 797 F.3d at 945). On appeal, the State had argued that the district court had not "afford[ed] any level of deference to the testimony of its witnesses." *Id.* at 788 (internal quotation marks omitted). But the Fifth Circuit rejected that argument, concluding instead that the district court had simply made a factual determination based on its assessment of conflicting testimony. *Id.* at 789 n.10. Indeed, the Fifth Circuit explained that its holding was consistent with *Knight II*, where this Court's

analysis likewise "was tied to the district court's particular factual findings and resolution of competing evidence." *Ibid.*

In this case, the district court properly carried out its obligation to assess the evidence and apply RLUIPA's standard. In doing so, the court was entitled to evaluate whether to credit Smith's or Georgia's experts on issues in dispute. For example, Georgia argues that the district court erred in not deferring to its expert, who it claims testified that dangerous contraband could be hidden in beards. Br. 47-48. Contrary to Georgia's characterizations of its expert's testimony, Georgia's expert testified that "contraband in beards does not present different risks or dangers than contraband in clothes—'[t]hey're all the same.'" Doc. 243, at 8. Consistent with this testimony and with *Holt*, the district court found that beards would not pose a contraband problem if they were searched similarly to head hair and clothing. Doc. 243, at 8.

2. Moreover, under *Holt*, the district court did not clearly err in declining to base its findings on Georgia's speculations. A court need not defer to "policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations." *Knight II*, 797 F.3d at 944 (quoting *Rich*, 716 F.3d at 533). "Indeed, prison policies 'grounded on mere speculation' are exactly the ones that motivated Congress to enact RLUIPA." *Holt*, 135 S. Ct. at 867 (Sotomayor, J., concurring) (quoting S. Rep. No. 111, 103d Cong., 1st Sess. 10 (1993)). Instead, the prison

must present "specific and reliable" evidence showing that the restriction furthers a compelling governmental interest. *Davila* v. *Gladden*, 777 F.3d 1198, 1206 (11th Cir.) (interpreting RLUIPA's sister statute, the Religious Freedom Restoration Act, 42 U.S.C. 2000bb), cert. denied, 136 S. Ct. 78 (2015).

Here, the district court did not clearly err in refusing to accept Georgia's "speculative" assertions that beards can be grabbed and cause injury to an inmate, where Smith's expert testified that no basis exists to support this concern. Doc. 243, at 8. Similarly, while Georgia's expert hypothesized that beards would be a source of jealousy if not all inmates were allowed them, Smith's expert testified that there was no evidence that allowing beards had caused violent jealousy in other prisons. Doc. 243, at 8-9. This testimony was bolstered by the court's observation that Georgia continues to provide other religious exceptions that allow inmates to have special privileges, such as religious clothing articles. Doc. 243, at 9. Given conflicting testimony on these issues, it was entirely appropriate for the court to weigh the evidence and make findings, rather than simply accept Georgia's claims about security. Applying *Holt*, the Fifth Circuit recently affirmed that, "in light of the speculative nature of the testimony of [the prison's] witnesses," a trial court is not bound to accept a prison's predictions regarding the consequences of allowing beards. *Ali*, 822 F.3d at 793. "Such conjecture does not satisfy [the government's] burden." *Ibid.*

3. Finally, Georgia claims that, under the district court's analysis, the only way it would have been able to satisfy its RLUIPA burden would be to cite to a specific example of harm in its own facilities. Br. 48. This is simply not what the district court required. Relying on *Holt*, the court explained that Georgia "cannot merely 'explain' why it cannot allow an exemption but must 'prove that denying the exemption is the least restrictive means of furthering a compelling governmental interest.'" Doc. 243, at 14 (citing *Holt*, 135 S. Ct. at 864). The court concluded that Georgia had failed to do so where the State had "offered no evidence showing that states that allow beards experience more [security] issues," in contrast to evidence from the BOP that demonstrated that allowing inmates to practice their religion in fact made the environment safer. Doc. 243, at 14. The district court did not "arbitrarily ignore[] the testimony of [Georgia's witnesses] when [plaintiff's] witnesses contradicted [their] testimony." *Knight II*, 797 F.3d at 945. Georgia's argument is the equivalent of "utter[ing] the magic words 'security and costs'" and expecting to "as a result receive unlimited deference." *Davila*, 777 F.3d at 1206 (citation omitted).

CONCLUSION

If this Court reaches the issues presented herein, the Court should affirm the district court's analysis under *Holt*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE AND URGING AFFIRMANCE ON THE ISSUES ADDRESSED HEREIN:

(1) complies with the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5477 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

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