No. 22-1809

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

GREGORY HOUSTON HOLT, *et al.*,

Plaintiffs-Appellants

v.

DEXTER PAYNE, *et al.*,

Defendants-Appellees

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

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING VACATUR AND REMAND

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in this appeal, which concerns the proper application of the Religious Land Use and Institutionalized Persons Act (RLUIPA). 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 has filed numerous amicus briefs addressing the statute's proper application in the prison context. See, *e.g.*, *Ramirez* v. *Collier*, 142 S. Ct. 1264 (2022) (No. 21-5592); *Holt* v. *Hobbs*, 574 U.S. 352 (2015) (No. 13-6827); *Smith* v. *Dozier*, 123 F.3d 456 (11th Cir. 2020) (Nos.

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The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES AND APPOSITE CASES

RLUIPA precludes state and local governments from imposing a "substantial burden on the religious exercise" of any prison inmate "unless the government demonstrates that imposition of the burden * * * is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000cc-1(a). The questions presented are:

1. Whether the district court's finding that plaintiffs failed to demonstrate the sincerity of their religious beliefs was clearly erroneous.

Gladson v. *Iowa Dep't of Corr.*, 551 F.3d 825 (8th Cir. 2009)

Ackerman v. *Washington*, 16 F.4th 170 (6th Cir. 2021)

[1] "R. Doc. __, at __" refers to records on the district court docket by docket number and ECF pagination. "Add. __" refers to page numbers in the addendum filed with appellants' opening brief. "Tr., Vol. __, __" refers to the preliminary-injunction hearing transcript by volume and page number.

Moussazadeh v. *Texas Dep't of Crim. Just.*, 703 F.3d 781 (5th Cir. 2012), as corrected (Feb. 20, 2013)

2. Whether the district court, in examining whether plaintiffs had established a "substantial burden" on their religious exercise, failed to focus on the specific restrictions that plaintiffs actually challenged.

Holt v. *Hobbs*, 574 U.S. 352 (2015)

Weir v. *Nix*, 114 F.3d 817 (8th Cir. 1997)

42 U.S.C. 2000cc-1(a)

3. Whether the district court improperly applied RLUIPA's least-restrictive-means test.[2]

Ramirez v. *Collier*, 142 S. Ct. 1264 (2022)

Holt v. *Hobbs*, 574 U.S. 352 (2015)

Yellowbear v. *Lampert*, 741 F.3d 48 (10th Cir. 2014)

42 U.S.C. 2000cc-1(a)(2)

STATEMENT OF THE CASE

Plaintiffs-appellants Gregory Holt, Wayde Stewart, and Rodney Martin are Muslim inmates currently in the custody of the Arkansas Department of Corrections (ADC). They filed this RLUIPA suit to challenge two ADC policies. The first policy—called the "religious-headdress" policy—precludes inmates from

[2] The United States takes no position on any other issues presented in this appeal, including how the district court should resolve this case on remand.

wearing any religious headwear except during religious services. Plaintiffs allege that the policy substantially burdens their religious exercise by preventing them from wearing kufis (a traditional Muslim headcovering) outside of prayer services. The second policy—called the "prayer-service" policy—provides for only one group-prayer service each week for all Muslim sects. Plaintiffs allege that the policy effectively forces them to choose between worshipping alongside inmates whom they do not consider to be Muslims, in violation of plaintiffs' beliefs, or forgoing congregational worship altogether. The district court, after a three-day bench trial, entered judgment in favor of defendants.

1. Factual Background

a. Religious Headdress Policy

ADC prohibits inmates from wearing any religious headdress outside of religious services. R. Doc. 45, at 19 (Religious Articles/Literature Policy). Despite this formal policy, however, ADC often permits inmates to wear kufis in their personal cells and in barracks. Tr., Vol. I, 67; Tr., Vol. II, 396. ADC also permits inmates to wear certain non-religious headwear while they are outside or at work: specifically, a prison-issued summer hat (a white cotton or polyester hat) or a prison-issued winter hat (a cream or beige knit beanie). Tr., Vol. II, 257-258, 260-261. Inmates may also wear the winter hat in indoor common areas if they have a medical need. Tr., Vol. II, 262-263. To ensure inmates do not hide

contraband in an approved hat, inmates must go through a metal detector and their hats must be searched manually by an officer. Tr., Vol. II, 258-259.[3]

Plaintiffs believe that they must wear their kufis at all times. Tr., Vol. II, 304-305, 344-345, 396-397. This command comes from the "hadith," a widely followed collection of spiritual teachings and observations from those who were close to Prophet Muhammad. Tr., Vol. II, 396-397; see also Tr., Vol. II, 379-381.

b. Prayer-Service Policy

ADC's prayer-service policy generally requires that all religious worship opportunities be led by an approved, outside volunteer. R. Doc. 45, at 7, 9 (Religious Services Policy). The policy, however, contains an exception for the Jumu'ah prayer service, which is a weekly Muslim congregational service held on Friday afternoons. See R. Doc. 45, at 14-15. Under the policy, the prison's chaplain or Islamic Coordinator may supervise "non-sectarian" Jumu'ah services when an approved volunteer is not present.[4] R. Doc. 45, at 9-10; Tr., Vol. I, 27-28, 50-51.

[3] Because kufis can take many different forms, and there are no strict requirements as to what a kufi must look or feel like, it is not clear that plaintiffs' kufis would differ significantly from the prison-issued hats. See Tr., Vol. II, 349.

[4] Pursuant to prior court orders, ADC employs an Islamic Coordinator who is responsible for Islamic worship opportunities across its facilities. R. Doc. 45, at 11; Tr., Vol. I, 40.

The Jumu'ah service has two main parts: a ritual prayer and the "khutbah" or sermon. R. Doc. 45, at 14-15; Tr., Vol. II, 298-299, 404. Under ADC policy, the Islamic Coordinator is responsible for selecting inmates to lead the ritual prayer, which consists of reading a Quranic selection provided by the Islamic Coordinator. R. Doc. 45, at 14. A recorded khutbah, provided by the Islamic Coordinator or a volunteer, is then played. R. Doc. 45, at 14-15.

ADC recognizes that Jumu'ah services are "uniquely valuable to Muslims" because Jumu'ah provides Muslim inmates their only opportunity to congregate and worship together. Tr., Vol. I, 118. ADC thus schedules a single Jumu'ah prayer service at each of its facilities on Friday afternoons for all inmates who wish to attend, including members of self-identified Muslim sects like the Nation of Islam (NOI) and the Nation of Gods and Earth (NGE). R. Doc. 45, at 15; Add. 52-53; R. Doc. 165, at 1-2.

Plaintiffs consider NOI and NGE to be separate religions from Islam. Tr., Vol. II, 287, 390, 427. NOI is generally considered "a Muslim sub-sect that shares many beliefs and practices of traditional Islam" except that, unlike traditional Muslims, NOI members "believe that Allah came to the United States in 1930 in the person of Fard Muhammad * * * to delegate Elijah Muhammad as his messenger." *Shaheed-Muhammad* v. *Dipaolo*, 138 F. Supp. 2d 99, 102 n.2 (D. Mass. 2001). NOI's beliefs also "emphasize[] the inherently divine qualities of

black people." *Ibid.* NGE "is a religious belief system that started as an offshoot of [NOI]." *Tucker* v. *Collier*, 906 F.3d 295, 298 (5th Cir. 2018). While NGE is "often identified with traditional Islam, some of [its] principles bear resemblance to those of other religions, including Buddhism and Christianity." *Ibid.* Plaintiffs view NOI's and NGE's polytheist beliefs as "blasphemous." Tr., Vol. II, 287.

In plaintiffs' experience, an NOI adherent often leads the ritual-prayer portion of the Jumu'ah service. Tr., Vol. II, 382-384. Although the Islamic Coordinator is responsible for selecting the ritual-prayer leader, those who attend Jumu'ah typically have some input as to who is selected. Tr., Vol. II, 382-384. And because more NOI adherents attend ADC's Jumu'ah services than traditional Muslims, an NOI adherent is often selected. Tr., Vol. II, 382-384. Additionally, while ADC policy prohibits inmates from delivering a khutbah (see R. Doc. 45, at 14; Tr., Vol. I, 47), in plaintiffs' experience, NOI prayer leaders frequently give khutbahs, often with messages that conflict with plaintiffs' beliefs, including "pro-Black" interpretations of the Quran. Tr., Vol. II, 300-303, 339, 341.

2. Procedural History

a. Plaintiffs filed this suit against various ADC officials in 2019, alleging that ADC's religious headdress and Jumu'ah prayer-service policies violate RLUIPA and the First and Fourteenth Amendments.[5] R. Doc. 1. After discovery,

[5] For simplicity, this brief refers to all defendants collectively as ADC.

the parties cross-moved for summary judgment. R. Doc. 41; R. Doc. 44. As relevant here, ADC argued in its summary-judgment motion that the challenged policies did not violate RLUIPA because they were the least restrictive means of achieving a compelling interest in prison security; ADC did not challenge the sincerity of plaintiffs' beliefs. See R. Doc. 41, at 2; R. Doc. 42, at 41 (Br. in Supp.) (stating that ADC does not dispute that its policies "implicate Plaintiffs' religious exercise").

The district court denied the parties' cross-motions for summary judgment on the RLUIPA claims. Add. 47-48. Specifically, the court concluded that plaintiffs had shown that they "believe they must wear a [k]ufi at all times, that belief is sincerely-held, and ADC's policy violates that belief, so the policy is a substantial burden." Add. 50. The court also stated that the Jumu'ah prayer-service policy "substantially burdens plaintiffs' sincere religious beliefs." Add. 49. The court, however, found that there were genuine issues of material fact about whether ADC had met its burden to show that its policies were the least restrictive means of furthering compelling governmental interests. Add. 49-51.

b. The district court held a three-day bench trial in November 2021. Tr., Vols. I-III. At the outset, the court explained that the language in the summary judgment order "was stronger than it should have been" about whether plaintiffs had shown that the challenged policies substantially burdened sincerely-held

beliefs. Tr., Vol. I, 12. While the court recognized that the "order did say that [plaintiffs] have met their burden," the court clarified that it meant to say that "there are issues of fact in dispute." Tr., Vol. I, 12.

At trial, all three plaintiffs testified that they sincerely believe that they are commanded to wear their kufis as a constant reminder of their service to Allah. Tr., Vol. II, 304-305, 344-345, 396-397. They also testified that they sincerely believe that Muslims are obligated to attend Jumu'ah services. Tr., Vol. II, 290, 332, 433. In their testimony, plaintiffs explained their belief that their prayers will not be validated if they are led in prayer by or pray with "blasphemers" and "innovators." Tr., Vol. II, 290, 303, 342-343, 366-367, 410.

Various ADC officials also testified. Two officials testified that the religious-headdress policy furthers ADC's interests in promoting security because inmates could use kufis to pass contraband or to identify with a gang. Tr., Vol. I, 73-74; Tr., Vol. II, 491-492; Tr., Vol. III, 502. And four officials asserted that ADC currently lacks enough staff to oversee separate Jumu'ah services for different groups of inmates because Jumu'ah must occur on Friday afternoons when there is great deal of other scheduled activity. Tr., Vol. I, 76-77, 87, 117, 175-176, 209; Tr., Vol. II, 469, 489. An ADC official further testified that, if ADC were to hold separate Jumu'ah services, ADC would have to classify each service as "sectarian," which would in turn require ADC to find an outside sponsor,

pursuant to ADC's current policy, to ensure "consistently respectful sacred rituals." Tr., Vol. I, 25, 92-93.

c. The district court issued a five-page opinion setting forth its findings of fact and conclusions of law. The court dismissed plaintiffs' complaint with prejudice, concluding that "ADC's Jumu'ah prayer and religious headwear policies do not substantially burden plaintiffs' sincerely held religious beliefs, and the policies are the least restrictive means of furthering ADC's compelling interest in security." Add. 53.

First, the district court held that plaintiffs had failed to show that they sincerely believed that they must wear their kufis at all times. Add. 55. The court cited Stewart's testimony that, if given the option, he may sometimes choose not to wear his kufi, and the fact that Martin (in his deposition) and Holt (at trial) testified that the Quran does not require Muslims to wear kufis. Add. 55. The court also suggested that the religious-headdress policy is not a substantial burden because ADC informally allows inmates to wear kufis most of the time.[6] Add. 55. Finally, the court concluded, even if the policy imposes a substantial burden, "ADC has a

[6] The district court appears to have inadvertently referred to RLUIPA's "least restrictive means" prong where it intended to refer to the "substantial burden" prong of the analysis. Add. 55. The court's actual discussion of the "least restrictive means" prong appears in the subsequent paragraph.

compelling government interest in security," and its ban on religious headwear is "the least restrictive means of meeting that interest." Add. 55-56.

Second, the court found that plaintiffs had not shown that they sincerely believed that they must engage in Jumu'ah prayer or that their prayer is invalidated when NOI and NGE adherents attend a Jumu'ah service or read a khutbah. Add. 54. The court further held that ADC's prayer-service policy does not substantially burden plaintiffs' religious beliefs, even if sincerely held, because inmates may not select the Quranic reading nor may they lead the khutbah. Add. 54. Finally, the court concluded that even if plaintiffs had met their burden, "the policy is the least restrictive means in serving [ADC's] compelling interest in security because ADC does not have the required staff or space to hold separate Jumu'ah services." Add. 54-55.

The court thus dismissed plaintiffs' complaint with prejudice and entered judgment in favor of ADC. Add. 57.

SUMMARY OF ARGUMENT

The district court's analysis of plaintiffs' RLUIPA claims was deficient in three ways.

1. First, the district court committed clear error in finding that plaintiffs failed to establish that their religious beliefs were sincerely held. That finding—which ADC itself never sought to advance—rested on an incorrect understanding

of RLUIPA. In particular, the court questioned plaintiffs' sincerity because they failed to identify a Quranic underpinning for their beliefs, even though RLUIPA expressly applies to "*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) (emphasis added). And the court likewise erred in requiring plaintiffs to demonstrate perfect adherence to their beliefs—a requirement that numerous courts have explicitly rejected. Moreover, the court used inconsistent logic for concluding that plaintiffs failed to establish the sincerity of their belief that ADC's prayer-services policy imposed a substantial burden: the court faulted Holt for refusing to attend Jumu'ah services alongside NOI and NGE adherents, but then faulted Stewart and Martin for attending those exact same services.

2. Second, the district court failed to apply RLUIPA's "substantial burden" test to the specific restrictions that plaintiffs actually challenged. The court found, for instance, that ADC's religious-headdress policy did not impose a substantial burden on plaintiffs because ADC permits inmates, on an informal basis, to wear their kufis most of the time. But plaintiffs seek the freedom to wear their kufis *at all times*—not just when ADC chooses to permit them. The court's analysis thus failed to address the specific accommodation that plaintiffs actually requested.

For similar reasons, the court also erred in finding that ADC's prayer-service policy did not substantially burden plaintiffs because NOI and NGE adherents do

not play a role in selecting the Quranic text for the ritual prayer. Plaintiffs do not seek the ability to select the text; rather, they seek a separate Jumu'ah prayer service where they would not be forced to worship alongside NOI and NGE adherents. The district court never assessed whether plaintiffs are substantially burdened by ADC's denial of *that* accommodation.

3. Third, the district court erred in applying RLUIPA's least-restrictive-means test. ADC sought to justify both of the challenged policies on security-based grounds. In accepting that stated justification, however, the court failed to address the plaintiffs' opposing arguments. RLUIPA requires courts to apply strict scrutiny to the denial of a religious accommodation. The decision here did not include that analysis. Among other things, the court failed to address ADC's inconsistent (and underinclusive) restrictions on inmate headwear, and failed to consider the policies of other prison systems—including the Federal Bureau of Prisons (BOP)—which have shown an ability to accommodate Muslim inmates who seek to wear kufis at all times and seek to worship separately from NOI adherents. The district court also failed to address a variety of uncertainties in the record, such as how ADC's staffing capacity might change at certain facilities' after various pandemic-related protocols are lifted.

Given the district court's failure to apply the correct legal standards to plaintiffs' RLUIPA claims, this Court should vacate the district court's judgment and remand with instructions to apply the proper standards.

ARGUMENT

I

THE DISTRICT COURT COMMITTED CLEAR ERROR IN HOLDING THAT PLAINTIFFS HAD FAILED TO MEET THEIR BURDEN TO SHOW THE SINCERITY OF THEIR RELIGIOUS BELIEFS

An inmate asserting a claim under RLUIPA must demonstrate, as a threshold matter, that his religious beliefs are sincerely held. See, *e.g.*, *Moussazadeh* v. *Texas Dep't of Crim. Just.*, 703 F.3d 781, 790 (5th Cir. 2012), as corrected (Feb. 20, 2013). To determine whether an inmate's beliefs are sincere, courts typically consider the plaintiff's words, actions, "length of adherence, knowledge about the belief system, and the existence of religious literature and teachings supporting the belief." *Ackerman* v. *Washington*, 16 F.4th 170, 181 (6th Cir. 2021). Courts "do not inquire into whether a belief is 'mistaken or insubstantial' even under the religious system to which the prisoner claims to adhere." *Id.* at 180 (citation omitted). "Even if others of the same faith may consider the exercise at issue unnecessary or less valuable than the claimant, [and] even if some may find it illogical, that doesn't take it outside the law's protection." *Yellowbear* v. *Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.).

Here, the district court committed clear error in finding that plaintiffs failed to show that their beliefs were sincerely held. "Findings of fact * * * must not be set aside unless clearly erroneous" and a "reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6). That is so because "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 575 (1985). That high degree of deference, however, does not mean that a "trial judge may insulate his findings from review by denominating them credibility determinations." *Ibid.* In this case, the district court did not base its insincerity findings on factors such as "demeanor" or "tone" but, instead, rooted them in a series of erroneous legal rationales. See *United States* v. *Fields*, 167 F.3d 1189, 1190 (8th Cir.) ("A ruling is clearly erroneous if it * * * reflects an erroneous view of the law."), cert. denied, 526 U.S. 1140 (1999).

1. In addressing the sincerity of plaintiffs' belief that they must wear kufis at all times, the district court improperly relied on plaintiffs' testimony that the Quran does not require them to wear kufis. Add. 55. RLUIPA, by its express terms, applies to "*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) (emphasis added). Although religious texts may be relevant to RLUIPA's sincerity inquiry, "no

'doctrinal justification' is *required* to support the religious practice allegedly infringed." *Gladson* v. *Iowa Dep't of Corr.*, 551 F.3d 825, 833 (8th Cir. 2009) (emphasis added).

Furthermore, even if RLUIPA did require plaintiffs to identify some textual mandate for their beliefs, plaintiffs testified that a different Islamic text—the hadith—commands them to wear a kufi. Tr., Vol. II, 379-381, 396-397. The Supreme Court has specifically cited the hadith as the kind of source that can bolster a RLUIPA plaintiff's showing of sincerity. *Holt* v. *Hobbs*, 574 U.S. 352, 362 (2015). Consistent with that approach, several courts have "acknowledged that the belief that the kufi should be worn at all times can be sincere," despite the lack of any explicit Quranic dictate. *Harris* v. *Wall*, 217 F. Supp. 3d 541, 554-555 (D.R.I. 2016) (collecting cases).

The district court also improperly required plaintiffs to establish that, absent the religious-headdress policy, they would wear their kufis at all times without fail. In particular, the court relied on one plaintiff's testimony that, if ADC were to amend its religious-headdress policy, he might still choose not to wear his kufi at certain times. See Add. 55 (citing Stewart's testimony). But a "finding of sincerity does not require perfect adherence to beliefs expressed by the inmate, and even the most sincere practitioner may stray from time to time." *Moussazadeh*, 703 F.3d at 791. As other courts have explained, "a sincere religious believer

doesn't forfeit his religious rights merely because he is not scrupulous in his observance." *Grayson* v. *Schuler*, 666 F.3d 450, 454 (7th Cir. 2012). The district court's finding that plaintiffs did not sincerely believe that their faith requires them to wear their kufis at all times thus rests on an erroneous understanding of what RLUIPA requires.

2. The district court also committed clear error in finding that plaintiffs do not sincerely believe that worshipping alongside NOI and NGE adherents would render their prayers invalid. Add. 54. ADC never presented any evidence to contest plaintiffs' testimony about that belief, and, at trial, the judge himself explicitly stated that he found at least one plaintiff's testimony on the issue to be credible. As the judge put it: "I'm looking at him," referring to Stewart, "because he is only like 6 feet away from me. And he said, ['']Well, I just want to observe my faith, and I don't want to be with these people who don't believe what I believe.['] I believe that." Tr., Vol. III, 554; see also Tr., Vol. III, 555 ("We have three men who believe in their position."). The court never attempted to reconcile its initial, on-the-record impression of plaintiffs' testimony with its ultimate finding that plaintiffs' beliefs were not sincerely held.

In any event, that finding—much like the court's finding as to the sincerity of plaintiffs' beliefs about wearing kufis—rested on an incorrect understanding of RLUIPA's sincerity requirement. The court based the finding entirely on the fact

that Holt had not attended Jumu'ah services in five years. See Add. 54. But Holt testified that the reason he stopped attending was because an NOI adherent took over as prayer leader and espoused views antithetical to his beliefs. See Tr., Vol. II, 404-410, 416-418, 426-428, 439-440. See also Tr., Vol. II, 410 (explaining that, while Holt believes it is generally a sin to miss Jumu'ah prayer, "if an innovator is leading Jumu'ah prayer, then you must absen[t] yourself"). Thus, Holt's refusal to attend Jumu'ah services during that period does not evince a lack of sincerity. As the Sixth Circuit recently explained, "[j]ust as only permitting Catholic inmates to observe the Sabbath on Thursdays would be a substantial burden, those same prisoners' refusal to do so surely would not show their beliefs about Sunday were somehow insincere." *Ackerman*, 16 F.4th at 183 (internal quotation marks, citation, and alteration omitted).

The district court similarly erred in relying on the fact that Martin and Stewart had attended a few NOI and NGE events, and that Martin had led Jumu'ah services with NOI and NGE adherents in attendance. Add. 54. As Stewart testified, plaintiffs were in a "no-win situation": their religion commanded they pray, but they did not "have an avenue or conduit to be separated from those blasphemers." Tr., Vol. II, 312-313 (discussing observance of Ramadan). The district court's conclusion that Stewart and Martin's past attendance of NOI and NGE events demonstrates insincerity rests, once again, on the erroneous view that

RLUIPA requires perfect adherence to a given religious practice.[7] *Moussazadeh*, 703 F.3d at 791 (explaining that "even the most sincere practitioner may stray from time to time"). More importantly, however, the court's reasoning is directly at odds with its rationale for finding that Holt's beliefs were insincere. As noted, the court faulted Holt for *refusing* to attend the exact same services that it faulted Stewart and Martin for attending. This inconsistency underscores the court's flawed understanding of RLUIPA's sincerity requirement.

Case law from other circuits further highlights how the district court's sincerity findings rest on a misapplication of RLUIPA. In *Fox* v. *Washington*, for instance, the Sixth Circuit relied on a record similar to that of the present case in concluding that a pair of RLUIPA plaintiffs had established the sincerity of their religious beliefs. 949 F.3d 270 (6th Cir. 2020). In that case, two inmates challenged a prison's refusal to provide weekly congregational services to adherents of the "Christian Identity" religion. *Id.* at 273. The Sixth Circuit held that the plaintiffs had "more than satisfie[d]" their burden on sincerity where they testified passionately about their beliefs at trial and the prison never contested their sincerity. *Id.* at 277. The court also cited the plaintiffs' reliance on specific

[7] Although Stewart and Martin have previously attended a few NOI-specific holiday celebrations, they did not "voluntarily" choose to attend, but did so because they were "invited" by the prison chaplain, and they felt their attendance was "in disobedience to our Creator." See Tr., Vol. II, 313-314, 373.

religious teachings and their continued "dedication to pursuing the relief they request[ed]" during their six-year lawsuit. *Id.* at 277-278.

Similar logic governs here: ADC never questioned plaintiffs' sincerity during more than three years of litigation, and plaintiffs spoke passionately about their beliefs—at times becoming visibly upset, as the judge himself noted—while also referencing various religious teachings, such as the hadith, to support their specific beliefs. See, *e.g.*, Tr., Vol. III, 555-556 (recognizing that it was at times hard for plaintiffs "to keep that emotion down" while testifying given their belief in their position). The district court, however, failed to address any of this testimony in explaining why it ultimately concluded that plaintiffs' beliefs were not sincerely held.

II

THE DISTRICT COURT'S SUBSTANTIAL-BURDEN ANALYSIS DID NOT FOCUS ON THE SPECIFIC FORMS OF RELIGIOUS EXERCISE THAT PLAINTIFFS ACTUALLY SEEK TO PURSUE

"RLUIPA requires a practice-specific analysis." *Ackerman* v. *Washington*, 16 F.4th 170, 182 (6th Cir. 2021). Thus, the statute requires courts to examine whether the defendant has substantially burdened the specific religious practice that the plaintiff has identified—"not whether the RLUIPA claimant is able to engage in *other* forms of religious exercise." *Holt* v. *Hobbs*, 574 U.S. 352, 361-362 (2015) (emphasis added) (explaining that a district court erred in holding that a

prison's grooming policy did not substantially burden a Muslim inmate because the inmate had access to a prayer rug, Islamic literature, a religious advisor, and a religious diet). The district court failed to engage in that practice-specific analysis here.

1. The district court held that plaintiffs had failed to show that ADC's religious-headdress policy substantially burdened their beliefs because "ADC informally allows inmates to wear kufis in their individual cells and at times allows them to be worn in barracks." Add. 55. But the court improperly framed the religious practice at issue. Plaintiffs have made clear that they cannot vindicate their beliefs merely by wearing kufis during the limited times that ADC chooses (in its discretion) to permit them to do so; rather, plaintiffs believe that they must have the option to wear their kufis at all times. Add. 53. A policy that restricts when and where they can wear their kufis thus still imposes a substantial burden on their religious exercise. See *Harris* v. *Wall*, 217 F. Supp. 3d 541, 555 (D.R.I. 2016) (finding that a headdress policy allowing a kufi to be worn only in the plaintiff's cell was a substantial burden although the plaintiff was confined to his cell for almost twenty-four hours a day); *Ajala* v. *West*, 106 F. Supp. 3d 976, 981 (W.D. Wis. 2015) (same).

2. The district court made a similar error as to plaintiffs' prayer-services claim. The court held that plaintiffs were not substantially burdened by being

forced to attend the same services as NOI and NGE adherents because those inmates do not typically lead the Jumu'ah prayer service. Specifically, the court pointed to ADC's prayer-services policy, which "requires the Islamic coordinator, not an inmate, to select the Quranic reading and does not allow inmates to lead the [k]hutbah." Add. 54. But that framing, again, mischaracterizes the nature of the religious practice at issue: plaintiffs do not seek to lead the khutbah or select the text but, rather, to worship with adherents of traditional Islam only. Plaintiffs believe that adherents "join ranks" and "are as one" during Jumu'ah prayer. Tr., Vol. II, 353-354. Thus, in plaintiffs' view, to pray with NOI and NGE adherents can sever one's relationship with Allah. Tr., Vol. II, 408-409. As Stewart put it: "For me to pray alongside or behind [NOI members] is a sin, that I am committing[,] the highest sin against our Creator." Tr., Vol. II, 303.

Plaintiffs have thus "drawn a line between what comports with [their] religious beliefs * * * and what does not." *Wilkinson* v. *Secretary, Fla. Dep't of Corr.*, 622 F. App'x 805, 815 (11th Cir. 2015) (per curiam). The district court was not permitted to re-draw that line for the purpose of assessing whether plaintiffs established a substantial burden on their religious exercise. See *ibid.* Indeed, several courts have recognized that a substantial burden may arise "when a prisoner's sole opportunity for group worship arises under the guidance of someone whose beliefs are significantly different from his own." *Weir* v. *Nix*, 114

F.3d 817, 821 (8th Cir. 1997) (interpreting RLUIPA's sister statute, the Religious Freedom Restoration Act, 42 U.S.C. 2000bb)[8]; see also, *e.g.*, *Fox* v. *Washington*, 949 F.3d 270, 280 (6th Cir. 2020) (holding that forcing plaintiffs to choose between attending services "with individuals whose beliefs they find 'obnoxious' and attending no group worship service at all" is a substantial burden); *Wilcox* v. *Brown*, 877 F.3d 161, 168-169 and n.5 (4th Cir. 2017) (affirming that the discontinuation of a group worship service for Rastafarians substantially burdened an inmate's observation of the Sabbath even though the inmate could pray privately or attend a service for a different religion).

Accordingly, this Court should vacate the district court's judgment, and remand with instructions for the district court to reconsider whether ADC's prayer-services policy imposes a substantial burden on the religious practices that plaintiffs actually identified: wearing a kufi at all times and worshipping separately from NOI and NGE members.

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[8] Although the Court in *Weir* ultimately held that the inmate had failed to establish a substantial burden on his religious exercise, it based that holding on the inmate's testimony that (1) the available spiritual advisor's theology was "doctrinally satisfactory" and (2) the inmate's beliefs did "not require him to worship separately from all non-fundamentalists." 114 F.3d at 821. In contrast, plaintiffs here *do* believe that separate worship is required. See, *e.g.*, Tr., Vol. II, 320-321 (judge's comment that it "is very clear" that Stewart's position was "he doesn't want to do anything with [NOI] because they believe something totally different[]").

III

THE DISTRICT COURT IMPROPERLY APPLIED THE LEAST-RESTRICTIVE-MEANS TEST

If a RLUIPA plaintiff succeeds in showing that the government has substantially burdened his or her religious exercise, "the burden flips and the government must 'demonstrate[] that imposition of the burden on that person' is the least restrictive means of furthering a compelling governmental interest." *Ramirez* v. *Collier*, 142 S. Ct. 1264, 1277 (2022) (brackets in original) (quoting 42 U.S.C. 2000cc-1(a)). "The least-restrictive-means standard is exceptionally demanding" and "requires the government to show that it lacks other means of achieving its desired goal without imposing a substantial burden on the * * * objecting party." *Holt* v. *Hobbs*, 574 U.S. 352, 364-365 (2015) (alterations, citation, and internal quotation marks omitted). In this case, the district court misapplied that test with respect to both of plaintiffs' claims.

1. The district court held that "ADC has a compelling government interest in security, and [its] religious headdress policy and practices[] are the least restrictive means of meeting that interest." Add. 55-56. Specifically, the court concluded that "ADC does not have sufficient staff or security to perform the additional searches that would be required if religious headwear is permitted throughout its facilities." Add. 56. But ADC never presented any evidence to show that it would actually require additional security staff at any facility if

inmates were permitted to wear kufis at all times. To the contrary, the trial record—which included an ADC official's testimony that it takes just twenty seconds to search an inmate's kufi (see Tr., Vol. II, 259)—suggests that ADC would likely face little difficulty in accommodating plaintiffs here. See, *e.g.*, *Ali* v. *Stephens*, 69 F. Supp. 3d 633, 646-647 (E.D. Tex. 2014) (concluding that "allow[ing] Kufis to be worn throughout the prison * * * does not present a security issue"), aff'd, 822 F.3d 776 (5th Cir. 2016).

Indeed, ADC already permits inmates to wear their kufis in their cells and barracks on an "informal[]" basis (see Add. 55) and also allows inmates to wear various other kinds of headwear. As noted, inmates may wear a summer hat or winter hat at work and while outside the building in the yard. Tr., Vol. II, 258, 260-261. And ADC permits inmates with certain medical needs to wear a winter hat at all times. Tr., Vol. II, 262-263. The district court never made any attempt to reconcile these facts—all of which were undisputed at trial—with its ultimate conclusion that ADC would require additional security staff if inmates were permitted to wear kufis at all times.

These facts also suggest that ADC's religious-headdress policy may be "substantially underinclusive." *Holt*, 574 U.S. at 367. "A law's underinclusiveness—its failure to cover significant tracts of conduct implicating the law's animating and putatively compelling interest—can raise with it the

inference that the government's claimed interest isn't actually so compelling after all." *Yellowbear* v. *Lampert*, 741 F.3d 48, 60 (10th Cir. 2014) (Gorsuch, J.). For example, in *Holt*, the Supreme Court held that a medical exemption to ADC's grooming policy undermined its arguments that it had a compelling interest in prohibiting beards for religious reasons. 574 U.S. at 368. Yet, despite the many gaps in ADC's restrictions on inmate headwear, the district court failed to consider whether ADC's religious-headdress policy was substantially underinclusive.

The district court also failed to consider how other prison systems are able to maintain security while permitting inmates to wear religious head coverings. Although a State need not adopt the same standards as other jurisdictions or the federal government, those standards are often probative in assessing whether an institution may achieve its stated ends through less restrictive means. See, *e.g.*, *Holt*, 574 U.S. at 368-369 (contrasting a state prison policy with BOP's and other States' policies). When "so many prisons offer an accommodation," RLUIPA requires the government to, "at a minimum, offer persuasive reasons why it believes that it must take a different course." *Id.* at 369. See also *Ramirez*, 142 S. Ct. at 1279-1280 (holding that Texas had not satisfied RLUIPA's least-restrictive-means test where it failed to explain why it could not offer a religious accommodation that both the federal government and at least one other State had permitted).

In this case, such comparisons suggest that ADC's categorical ban on wearing kufis outside of religious services may not be the least restrictive means of ensuring prison security. The BOP and numerous States permit inmates to wear kufis outside of religious services. See, *e.g.*, *Ali*, 69 F. Supp. 3d at 646-647. See also R. Doc. 163, at 5 & n.2 (Pl.'s Proposed Findings of Fact) (asking the court to take judicial notice of the BOP's policy on kufis); R. Doc. 163-2, at 13-14 (BOP Program Statement on Religious Beliefs and Practices). Although there may be reasons why ADC cannot adopt a similar policy, the district court did not identify such reasons.

2. The district court also held that ADC's prayer-service policy "is the least restrictive means [of] serving its compelling interest in security because ADC does not have the required staff or space to hold separate Jumu'ah services." Add. 54-55. At the time of trial, however, ADC had suspended all worship services for more than a year and a half due to the COVID-19 pandemic, and ADC was facing personnel shortages related specifically to the pandemic. Tr., Vol. I, 76-77, 79, 171-173, 237-238; Tr., Vol. II, 489. The record was also unclear as to when ADC would reinstitute group worship services and what their staffing capacity would be at that time. See R. Doc. 164, at 12-14.

Furthermore, even setting aside the pandemic-related gaps in the record, the district court never addressed whether the Jumu'ah prayer-service policy is

underinclusive. ADC previously had adequate staff and space to provide simultaneous congregational worship for other faith groups at some facilities. Tr., Vol. I, 81-85, 154-155. And, although ADC tried to distinguish Jumu'ah services because they must be held on Friday afternoons, one ADC official acknowledged that, before the pandemic, ADC could have accommodated simultaneous Jumu'ah services "[a]t some facilities at some times." Tr., Vol. I, 131-132. Additionally, the Federal BOP provides separate space for Jumu'ah services for NOI and traditional Muslim inmates without compromising its interest in security. Tr., Vol. I, 185-187; Tr., Vol. II, 412-413. See also R. Doc. 163-2, at 4-5. It was ADC's burden to "offer persuasive reasons why it believes that it must take a different course" from other institutions that offer the requested accommodation, such as differences in its physical space or staffing capabilities. See *Holt*, 574 U.S. at 369.

Given the district court's failure to address any of these factual uncertainties or otherwise explain its reasoning, this Court should remand for proper application of the least-restrictive-means test. In performing that analysis on remand, the district court should take into account any relevant facts that it previously failed to consider. That may include whether the specific ADC facilities where plaintiffs are currently housed would have the physical space to accommodate simultaneous worship services on Fridays or whether there are other material differences between BOP and ADC that would require ADC to take a different course.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's judgment and remand with instructions for the district court to apply the proper legal standards to plaintiffs' RLUIPA claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING VACATUR AND REMAND:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6466 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared using Microsoft Office Word in a proportionally spaced typeface (Times New Roman) in 14-point font.

(3) complies with Local Rule 28A(h)(2) because the ECF submission has been scanned for viruses with the most recent version of Windows Defender (Version1.2.3412.0) and is virus-free according to that program.

s/ Yael Bortnick
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Date: July 18, 2022

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2022, I filed the foregoing BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING VACATUR AND REMAND with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system, which will send notice to all counsel of record by electronic mail. All participants in this case are registered CM/ECF users.

I further certify that, within five days of receipt of the notice that the brief has been filed by this Court, the foregoing brief will be sent by Federal Express, next-day mail, to the Clerk of the Court (ten copies) and to the following counsel of record (one copy) pursuant to Local Rule 28A(d):

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