No. 22-1809

In the United States Court of Appeals for the Eighth Circuit

GREGORY HOLT, WAYDE STEWART, AND RODNEY MARTIN,
Plaintiffs–Appellants,

v.

DEXTER PAYNE, DALE REED, JOSHUA MAYFIELD, AUNDREA CULCLAGER, TOMMY BOURGEOIS, AND JIM BABCOCK IN THEIR OFFICIAL CAPACITIES,
Defendant–Appellant.

On Appeal from the United States District Court for the Eastern District of Arkansas
Civil Case No. 5:19-cv-00081-BSM, Judge Brian S. Miller

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PLAINTIFFS-APPELLANTS

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RULE 26.1 DISCLOSURE STATEMENT

The Becket Fund for Religious Liberty has no parent corporations and issues no shares of stock.

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INTEREST OF AMICUS CURIAE[1]

The Becket Fund for Religious Liberty is a non-profit law firm dedicated to protecting the free exercise of all religious traditions. To that end, it has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in litigation, including in multiple cases at the United States Supreme Court. *See, e.g., Fulton v. City of Philadelphia,* 141 S. Ct. 1868, 1874, (2021); *Agudath Israel of Am. v. Cuomo*, 141 S. Ct. 889 (2020) (Mem.); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Holt v. Hobbs* (*Holt I*), 574 U.S. 352 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,* 565 U.S. 171 (2012).

In 2015, along with Professor Douglas Laycock, Becket represented Gregory Holt (also known by Abdul Maalik Muhammad) in his successful Supreme Court appeal. Holt, a sincere Muslim, sued the Arkansas Department of Corrections (ADC) for the right to wear a religiously required half-inch beard—a practice allowed by at least 45 U.S. state and federal prison systems. *See Holt I*, 574 U.S. at 359, 368. The district court dismissed Holt's complaint, and this Court affirmed. *Id.* at 360.

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[1] Counsel for all parties in this case have given consent for the filing of this brief.

The Supreme Court granted Holt's handwritten petition for certiorari and reversed. *See id.* at 360. In a 9-0 decision, the Supreme Court held that ADC's policy substantially burdened Holt's sincere religious exercise, and that ADC had failed to meet strict scrutiny—in part because ADC "failed to show . . . why the vast majority of States and the Federal Government permit inmates to grow 1/2 - inch beards . . . but it cannot." *Id.* at 368.

Becket submits this brief because it is concerned that history is repeating itself. Once again, Holt has asked for permission to practice his faith in ADC custody. Once again, Holt has pointed to the practices of other well-run prison systems that accommodate the religious practices he wishes to pursue. And once again, a court in this Circuit has failed to hold ADC to its statutory burden under federal civil rights law.

But this case is larger as well. The legal errors made by the district court could, if left uncorrected, impair the religious liberty of prisoners across the Eighth Circuit. The Religious Land Use and Institutionalized Persons Act (RLUIPA) should instead be interpreted "in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g). Becket submits this brief to highlight the ways the district court departed from RLUIPA caselaw in this and other circuits.

INTRODUCTION

Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) as a promise: that Americans may still practice their faith behind bars. In 2015, the Supreme Court made good on that promise, ruling that Gregory Holt could follow his Muslim faith and grow a half-inch beard while in prison. The Supreme Court's decision was unanimous and clear: ADC's no-beard policy burdened Holt's sincere religious beliefs, and ADC could not meet strict scrutiny without "offer[ing] persuasive reasons why it believe[d] that it must take a different course" from the many other state and federal prison systems that would have allowed Holt's beard. *Holt I*, 574 U.S. at 369.

Seven years later, ADC continues to deny Holt's basic rights. This case is about a request by Holt and two other Muslim inmates to both attend Jumu'ah (Friday prayer services) that meet the basic requirements of their faith, and to wear kufi, a traditional Muslim head cap smaller than the winter hats ADC already allows. Yet notwithstanding *Holt I*, ADC has been intransigent. It has argued that RLUIPA does not apply to its facilities (JA175-79; R. Doc. 42, at 28-32), a claim rightly rejected by the court below. JA257; R. Doc. 87, at 2. It has stated that it will not provide any religious accommodations without a court order. JA490-91; R. Doc. 162, at 43-44 (space, security, and a court order necessary for separate services); JA492; R. Doc. 162, at 48 (court order necessary for kufi). And for the past five years, it has refused to obey the terms of its own consent

decree by preventing followers of Islam like Holt, Stewart, and Martin from meeting separately for Jumu'ah and not allowing them to wear kufi outside of certain limited circumstances. *Compare*, *e.g.*, JA131; R. Doc. 41-1, at 2; JA291; R. Doc. 160, at 61 (prior consent decree stating that the decision to hold separate Jumu'ah services would be entrusted to the Muslim chaplain) *with* JA496-JA497; R. Doc. 162, at 52-53 (Director Payne testifying that he would not allow separate Jumu'ah services even if the chaplain decided they were necessary).

The district court ruled on summary judgment that ADC's Jumu'ah and kufi policies substantially burdened Plaintiffs' sincere religious beliefs. JA258-59; R. Doc. 87 at 3-4. Yet after trial, the district court abruptly reversed course and held that Plaintiffs' objection to ADC's Jumu'ah and kufi policies were *not* sincere because of alleged inconsistencies in their behavior. As to Jumu'ah services, the district court found that Martin's and Stewart's occasional participation in joint Jumu'ah services with members of other faiths (Nation of Islam (NOI) and Nation of Gods and Earth (NGE)) meant their beliefs were insincere—while simultaneously finding that Holt's choice to boycott the religiously forbidden mixed Jumu'ah services meant that his desire to attend properly conducted Jumu'ah services was likewise insincere. And with respect to kufi policies, the district court deemed Martin insincere because he explained his religious beliefs had evolved over time. The

district court erred as a matter of law. Occasional inconsistency does not, by itself, defeat sincerity.

The district court also erred as a matter of law when it held in the alternative that ADC's rules regarding Jumu'ah and kufi-wearing passed strict scrutiny. With regard to Jumu'ah, there is already a well-established less-restrictive alternative: the separate services that ADC agreed to in its consent decree. JA131; R. Doc. 41-1, at 2; JA291; R. Doc. 160, at 61. Where the agency itself "has at its disposal an approach that is less restrictive," then it cannot meet strict scrutiny, even if it has never actually offered its less-restrictive alternative to these particular plaintiffs and has no intention of doing so now. *Hobby Lobby*, 573 U.S. at 730.

With respect to kufi-wearing, ADC fares no better. *Holt I* was clear: "when so many prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course." 574 U.S. at 369. At least 20 other prison systems allow inmates to wear kufi outside of their cells. Holt, Stewart, and Martin raised other prison systems and their more permissive policies below, but ADC never explained why it was different from them, and the district court's order ignored them. This was error.

"Prison officials are experts in running prisons and evaluating the likely effects of altering prison rules, and courts should respect that expertise. But that respect does not justify the abdication of the

responsibility, conferred by Congress, to apply RLUIPA's rigorous standard." *Holt I*, 574 U.S. at 364. It is the task of this Court, and district courts in this Circuit, to hold prison systems like ADC to their statutory burden. That does not mean prisoners always win. But it does mean that prison systems will lose where, as here, they have not met the burden imposed by Congress and the Supreme Court. Because the district court failed to hold ADC to its burden, reversal is necessary.

ARGUMENT

I. The district court wrongly required Plaintiffs to demonstrate perfect consistency in their beliefs.

The Supreme Court, this Court, and numerous other courts have long rejected the notion that failing to strictly adhere to religious tenets forecloses a religious accommodation claim. Adopting such a rule would punish prisoners who seek to repent, to grow in their faith, or who adhere to religions with strict or aspirational goals—goals to which adherents often fall short.

This is particularly true in this case. The district court erred by placing determinative weight on Plaintiffs' allegedly inconsistent religious practices. The district court erred concerning Jumu'ah services because Martin's and Stewart's alleged inconsistencies are insufficient as a matter of law to find them insincere, and because Holt's practice of not attending religiously unacceptable Jumu'ah prayers are entirely consistent with his religious beliefs.

The district court committed this same error as to kufi-wearing because it again found that Martin's occasional inconsistency—without anything else—meant that he was insincere. And to top it all off, the district court introduced a separate error by finding that Holt and Stewart were insincere because their religious beliefs about wearing kufi were not "require[d]" by the Quran. JA578; R. Doc. 165, at 4. That finding contravenes a separate portion of RLUIPA, which prohibits inquiring into whether a religious belief is "compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

A. Cases from the Supreme Court, this Circuit, and other Courts of Appeals establish that perfect consistency is not necessary to establish sincerity.

There is broad consensus that perfect consistency is not a prerequisite for bringing a successful religious accommodation claim. "[C]ourts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Love v. Reed*, 216 F.3d 682, 688 (8th Cir. 2000) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981)), *accord Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994) (religious convictions that have developed over time are still protected); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 n.9 (1987) (same); *Ehlert v. United States*, 402 U.S. 99, 103-04 (1970) (same).

This Court has also recognized that imperfect adherence to one's existing religious beliefs does not defeat a religious accommodation claim as a matter of law. Rather, "[t]he determination of whether a belief is religious or not is an extremely delicate task which must be approached with caution." *Wiggins v. Sargent*, 753 F.2d 663, 666 (8th Cir. 1985). In *Love v. Reed*, for example, this Court noted that a plaintiff's religious beliefs could be "evolving" or that a plaintiff could be "struggling to assimilate the full scope" of his religious beliefs—and that neither of these things defeats sincerity. 216 F.3d at 688.

More recently, this Court reversed a district court order holding a defendant in criminal contempt for repeatedly failing to stand when the court convened and recessed. *United States v. Ali*, 682 F.3d 705, 707 (8th Cir. 2012). The defendant argued that her Islamic religious beliefs prohibited her from standing for others to show them honor, as that was reserved for God and the Prophet Muhammad, and therefore, she was entitled to a religious accommodation under RFRA. *Id*. The district court noted, however, that the defendant rose when she was introduced to the jury and used that fact to find her insincere. *Id.*

This Court reversed, holding that under RFRA,[2] "focusing on [the defendant's] 'inconsistent' application of her belief in refusing to rise to

[2] This analysis applies equally to RLUIPA claims. *See Holt I*, 574 U.S. at 358 (RLUIPA "allows prisoners 'to seek religious accommodations pursuant to the same standard as set forth in RFRA'") (quoting *Gonzales*

honor the court but standing so that prospective jurors could see her [was] not appropriate." *Id.* at 710. Relying on *Love*, the Court concluded that such evidence was insufficient to show that the defendant was not sincere, especially where the parties did not otherwise dispute the defendant's sincerity. *Id.* at 710-11. The Court thus held that the defendant's religious beliefs were substantially burdened and remanded to the district court to determine whether strict scrutiny was satisfied. *Id.* at 711.

This approach is in line with that of other Courts of Appeals. Numerous other Circuits have held that "backsliding" or failing to strictly comply with one's religious beliefs does not alone defeat a religious accommodation claim. As the Seventh Circuit explained, "a sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance; for where would religion be without its backsliders, penitents, and prodigal sons?" *Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012); *May v. Baldwin*, 109 F.3d 557, 563 (9th Cir. 1997) ("compliance on a few occasions with" a command that violated prisoner's religious beliefs did "not undermine his description of the burden imposed").

The Fifth Circuit has reached the same result. In *Moussazadeh v. Texas Department of Criminal Justice*, the district court found a prisoner

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v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006)).

insincere in his religious beliefs about consuming kosher food because he had from time to time purchased "nonkosher" food from the prison's commissary. 703 F.3d 781, 791 (5th Cir. 2012), *as corrected* (Feb. 20, 2013). The Fifth Circuit reversed, holding that "[e]ven assuming, *arguendo*, that some of the food Moussazadeh purchased was nonkosher, that does not necessarily establish sincerity" because "sincerity does not require perfect adherence to beliefs expressed by the inmate," as "even the most sincere practitioner may stray from time to time." *Id*. 791-92 (citing *Grayson*, 666 F.3d at 454). Put differently, a "few lapses in perfect adherence do not negate [an] overarching display of sincerity." *Id*. at 792. This is especially true because the government "had never questioned Moussazadeh's sincerity" and the evidence in support of sincerity included the "continued prosecution" of a suit through "seven years of litigation." *Id*.

These holdings square with common experience. Beliefs can evolve over time, and even the most consistent believer—especially in the prison context—may determine that the discrimination he will face at times outweighs perfect adherence to his beliefs. Indeed, requiring perfect adherence could raise constitutional concerns by forcing "prisons . . . in effect to promote strict orthodoxy, by forfeiting the religious rights of any inmate observed backsliding, thus placing guards and fellow inmates in the role of religious police." *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988) (Posner, J.).

Indeed, demanding perfect adherence contradicts real-world religious experience and creates perverse incentives for both prisons and inmates. Failure, sin, repentance, and growth are all central to many major religions. *See, e.g.*, *Psalm* 51:10 ("Create in me a clean heart, O God, and renew a right spirit within me."); *Luke* 15:7 ("Just so, I tell you, there will be more joy in heaven over one sinner who repents than over ninety-nine righteous persons who need no repentance."); *Surah al-Baqara* 2:222 ("Surely Allah loves those who turn unto him in repentance and loves those who purify themselves."); *Sri Guru Granth Sahib* at 70 ("[I]f you have committed the four great sins and other mistakes . . . if you then come to remember the Supreme Lord God, and contemplate Him, even for a moment, you shall be saved.").[3] Further, a requirement of perfect adherence would tend to favor less "demanding" religious traditions over those that impose heavy burdens on their adherents. Indeed, "[s]ome religions place unrealistic demands on their adherents; others cater especially to the weak of will. It would be bizarre for prisons to . . . in effect . . . promote strict orthodoxy[] by forfeiting the religious rights of any inmate observed backsliding." *Reed*, 842 F.2d at 963.

On the other end of the spectrum, consistently refusing to participate in a religiously unacceptable prayer service (like the mixed Jumu'ah here) is a sign of principled sincerity, not insincere disinterest. "[W]hen

[3] *Sri Guru Granth Sahib* 70 (Sant Singh Khalsa & Kulbir Singh Thind trans., 2000) (1604), https://perma.cc/NX98-CTKW.

the only option available for a prisoner is under the guidance of someone whose beliefs are significantly different from or obnoxious to his, the prisoner has been effectively denied the opportunity for group worship[.]" *Fox v. Washington*, 949 F.3d 270, 280 (6th Cir. 2020) (cleaned up)). A rule requiring an inmate to attend a worship service that his faith forbids in order to establish his sincere interest in a *different* worship service would amount to the kind of state-sponsored religious coercion that is anathema to the First Amendment. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

B. The district court erred by finding that Plaintiffs' alleged inconsistencies in religious practice meant they were categorically insincere.

In light of this caselaw, the district court erred by finding that Plaintiffs' allegedly inconsistent Jumu'ah and kufi practices made them insincere.

To begin, the district court's Jumu'ah findings fail for a fundamental reason: they are internally inconsistent. Plaintiffs all testified that they sincerely believe they must attend Jumu'ah prayer services that are led and composed of fellow Muslims. Holt Br. at 5-7. ADC only offers a single Jumu'ah service, open to Muslims, NOI, and NGE. *Id.* NOI and NGE hold dramatically different beliefs from Islam, and Holt, Martin, and Stewart

believe that praying alongside them invalidates their prayers. *Id.* The court concluded that Stewart and Martin were insincere because they occasionally attended mixed Jumu'ah services. JA577; R. Doc. 165, at 3. But the court also found that Holt was insincere precisely because he had *not* attended mixed Jumu'ah services. *Id.* This finding amounts to a Catch-22: attend improper Jumu'ah services, and you're insincere; forego improper Jumu'ah services, and you're still insincere.

The district court erred in assessing sincerity as to Plaintiffs' request for Jumu'ah services. Stewart's and Martin's limited inconsistency does not invalidate sincerity as a matter of law, and Holt's practices were actually consistent with his religious beliefs. As to Stewart and Martin, the district court found that they were insincere in their request for separate Jumu'ah services because they occasionally attended NOI and NGE events, including Jumu'ah services. *Id.* But as this Court and others have held, Martin's and Stewart's beliefs were likely "evolving" and they were "struggling to assimilate the full scope" of their religious beliefs. *Love*, 216 F.3d at 688. Martin testified that while he sometimes attended Jumu'ah services with NOI and NGE adherents, their participation "invalidated" his prayers. JA414; R. Doc. 161, at 125. And Stewart explained that he had attended an NOI religious celebration but that in hindsight, he realizes that he sinned against his Creator and needed to "ask for forgiveness for" his attendance at those events. JA407-08; R. Doc. 161, at 83-84.

The fact that Stewart and Martin may have been inconsistent from time to time in their Jumu'ah practices does not by itself mean that they were insincere. Again, occasional inconsistency in religious practices does not automatically mean a claimant is insincere. *Ali*, 682 F.3d at 710; *Moussazadeh*, 703 F.3d at 791-92; *Grayson*, 666 F.3d at 454. The district court's decision to look *solely* to Stewart's and Martin's alleged past conduct in order to reject their current request for a religious accommodation was therefore legal error.

The district court also erred concerning Holt's sincerity as to Jumu'ah services because Holt stated that he did not attend the prison's Jumu'ah services for five years because he believed they were religiously invalid. JA577; R. Doc. 165, at 3. Holt explained at length at trial that the mixed Jumu'ah services held at the prison permitted non-Muslims like NOI and NGE to attend and participate, thereby invalidating the Jumu'ah services in his eyes. JA465; R. Doc. 161, at 174 ("What they are calling Jumu'ah.") To him, the inclusion of non-Muslims at services meant that "that's still not Jumu'ah prayer" and "[r]enders the prayer invalid" such that "Allah does not accept it." JA456-57; R. Doc. 161, at 165-66.

Holt further elaborated his beliefs in ways that directly contradicted the district court's finding that his failure to attend showed insincerity: he acknowledged that typically, "failing to go to Jumu'ah . . . is a sin," but if a non-Muslim "is leading Jumu'ah prayer, *then you must absence yourself*." JA459; R. Doc. 161, at 168 (emphasis added); *cf. Fox*, 949 F.3d

at 280 (offering only a religiously unacceptable service is the functional equivalent of offering no service at all). This explanation fully accounts for Holt's actions. Contrary to the district court's finding, then, Holt's actions were not only entirely consistent with his religious beliefs, but his actions were consistent over *five years*. *See Moussazadeh*, 703 F.3d at 792 (relative consistency through "seven years of litigation" demonstrated plaintiff's sincerity).

The district court's sincerity analysis as to kufi-wearing fares no better. The fact that Martin "now believes that the Quran requires him to wear his kufi at all times," JA578; R. Doc. 165, at 4, is insufficient to find insincerity because, again, it is clear that Martin's religious beliefs were "evolving" and that he was "struggling to assimilate the full scope" of his religious beliefs. *Love*, 216 F.3d at 688.

The district court also erred in finding Holt and Stewart insincere because they admitted that "the Quran does not require Muslims to wear kufis." JA578; R. Doc. 165, at 4. The district court apparently based this conclusion on its mistaken belief that religious instructions found outside the Quran are not binding on Muslims. *But see* Holt Br. at 34 (explaining the role of the Hadith, "stories and traditions of the Prophet Mohammed," in Islam). Had the district court read *Holt I* with care, it would have realized its error: the fact that the beard requirement in *Holt I* was likewise derived from the Hadith was no obstacle to the Supreme Court's

conclusion that Holt's request to wear a beard was both religious and sincere. *Holt I*, 574 U.S. at 362.

More importantly, even if that were not so, the district court's analysis introduced a different error by contravening a separate requirement under RLUIPA. RLUIPA's text categorically forbids inquiries into whether a particular belief is "required" by defining "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) (emphasis added); *see also Native Am. Council of Tribes v. Weber*, 750 F.3d 742, 750 (8th Cir. 2014) ("[T]his type of inquiry into what is or is not central to a particular religion has no place in an RLUIPA analysis."). Therefore, even if wearing a kufi were not "compelled by" or "required" by Holt's or Stewart's religious beliefs (and, according to the Plaintiffs' unrebutted testimony (JA44-48; R. Doc. 161, at 154-55), it is), it would not follow that Holt and Stewart were insincere.

Accordingly, even assuming the district court was right on the facts, its analysis left no room for Plaintiffs to grow or develop in their devotion—or repent for past inconsistencies. The district court placed a burden on Plaintiffs that was far more stringent than the showing of sincerity that RLUIPA requires. In so doing, the district court made itself into an arbiter of religious matters such as whether mixed Jumu'ah services are acceptable in Islam, and whether kufi-wearing is religiously required. Both RLUIPA and the First Amendment foreclose such a result,

and with good reason: theological judgments like these are beyond the ken of the federal judiciary. For all these reasons, the district court's sincerity findings were erroneous and demand reversal.

II. The district court failed to hold ADC to its statutory burden on strict scrutiny.

Under *Holt I*, courts retain a "responsibility, conferred by Congress, to apply RLUIPA's rigorous standard" in reaching an ultimate legal conclusion about whether strict scrutiny is satisfied. *Holt I*, 574 U.S. at 364. That standard requires that ADC prove that its refusal to accommodate Plaintiffs' religious beliefs both (1) furthers "a compelling governmental interest," and (2) is the "least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). This burden is "exceptionally demanding," *Holt I*, 574 U.S. at 364 (quoting *Hobby Lobby*, 573 U.S. at 728), and "merely assert[ing] a security concern" is insufficient. *Murphy v. Mo. Dept. of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004). A court's analysis cannot be concerned "with other, potentially more problematic requests down the line," but must "take cases one at a time, considering only 'the particular claimant whose sincere exercise of religion is being substantially burdened.'" *Ramirez v. Collier*, 142 S. Ct. 1264, 1281 (2022).

Here, ADC fails both prongs. On ADC's refusal to provide separate Jumu'ah prayers, ADC failed to present a compelling interest for the policy—and indeed, ADC's own policies and practices with Christian

inmates prove that security is no obstacle for the three Plaintiffs in this case. On its kufi policy, ADC could not explain why it cannot balance both Plaintiffs' religious beliefs and ADC's security interest, when so many other state and federal prisons manage to do so. ADC therefore failed to prove its kufi policy is the least restrictive means under *Holt I*, *Ramirez*, and this Court's own precedent. As such, the district court's ruling should be overturned.

A. ADC's own policies and testimony prove it has no compelling interest in preventing separate Jumu'ah prayers.

ADC's argument that it has a compelling security interest in prohibiting separate denominational Jumu'ah services fails for three reasons: first, ADC's *own policies* already contemplate and permit such services; second, ADC permits Christian inmates to have several separate denominational services, but not Muslim and NOI inmates; and third, unrebutted evidence shows ADC's refusal of separate services on security grounds is pretextual.

First, for the past 35 years, ADC has expressly contemplated, and agreed to host, separate denominational Jumu'ah services under certain conditions, belying their so-called security concerns. ADC has a long history of being forced to accommodate Muslim inmates only after a court orders it to do so. In one such lawsuit, ADC entered into a settlement order over the hiring of Muslim chaplains and the provision of Islamic services, including Jumu'ah prayers. *See* JA130-34; R. Doc. 41-11. ADC

agreed to "leave the decision as to the need for separate NOI and AMM [Muslim] Jumah prayer to the discretion of the … Muslim Chaplain." *Id.* at ¶3.

This is fatal to ADC's argument. The *Blue* settlement order is still in effect and untouched. For the past 35 years, then, ADC has represented, and continues to represent, that it will provide separate Muslim and NOI prayers should the Muslim Chaplain recommend it. Nowhere in the settlement order does ADC raise security concerns about this policy—indeed, ADC has deliberately placed the decision about separate services beyond its own control entirely. Clearly, it is possible to host separate Jumu'ah prayers. And if the problem truly is just one of insufficient staff, that is not a compelling interest under RLUIPA, since the Supreme Court has long held that "both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs." *Hobby Lobby*, 573 U.S. at 730 (citing 42 U.S.C. § 2000cc-3(c) of RLUIPA). If ADC needs to hire an additional Muslim Chaplain or more security guards to accommodate a second Jumu'ah prayer, so be it. Moreover, accepting ADC's staffing argument would create perverse incentives: by continuing to offer pay too low to attract sufficient prison guards, ADC could deny prisoners myriad constitutional rights with impunity. Its unwillingness to properly staff up is not a compelling interest.

Second, ADC's claim that providing two denominational Jumu'ah prayers instead of just one is a staffing-related security risk is belied by the number and scope of denominational services provided to other religious groups. For example, ADC's administrator of chaplaincy services testified at trial that Plaintiffs' prison provides denominational services for Baptists, Catholics, Seventh-day Adventists, Pentecostals, and Hispanic Christians, among others—often at the exact same time. R. Doc. 160, at 83-84. Yet ADC claims it lacks capacity for a mere two Jumu'ah services on Fridays. Denominational discrimination violates the "clearest command of the Establishment Clause," and the law demands "that every denomination" be "equally at liberty to exercise and propagate its beliefs." *Larson v. Valente*, 456 U.S. 228, 244, 245 (1982). And in any event, ADC has already committed to not disfavoring Muslim inmates over Christian ones in the very same *Blue* settlement order where they agreed to permit separate Jumu'ah services. JA130-34; R. Doc. 41-11, at ¶¶ 3, 6. In short, favoring other religious denominations in violation of the Establishment Clause is not a compelling interest under RLUIPA. *Cf. O Centro*, 546 U.S. at 433-34 (existing exemption for Native American religious use of peyote undermined compelling governmental interest in not permitting limited religious use of *hoasca*, another controlled substance which presented similar risks).

Third and finally, ADC does not have a compelling security interest in barring separate Jumu'ah services because unrebutted evidence at trial

suggests ADC combines Muslims with NOI adherents as a pretext to control gang activity associated with NOI. In its summary judgment order, the district court ordered this case to proceed to trial in part because there was an open question of fact over whether "the ADC may be using the policy to control NOI adherents, which would indicate that its defense of the policy is pretextual." J.A. 258-59. At trial, Jim Babcock, senior chaplain at Cummins prison, testified that around 70% of Jumu'ah attendees at Cummins are NOI adherents that are also members of the prison gang Gangster Disciples. R. Doc. 160, at 165 He further testified that combining "traditional Muslim" inmates with the NOI Gangster Disciples prevents the latter group from being "easily able to band together," and that the prison "use[s] the joint Jumu'ah to accomplish [the] goal … of keep[ing] them from banding together." *Id.* at 165-166. Despite stating in its summary judgment order that it was holding trial to address this issue, the district court's final order never addresses Chaplain Babcock's testimony.

According to the testimony at trial, the real security problem facing ADC is not Holt or other Muslims. It is gang members that affiliate with NOI and try to use the Jumu'ah prayer to hold gang meetings. Like its sister statute RFRA, RLUIPA "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." *Hobby Lobby*, 573

U.S. at 726 (quoting *O Centro*, 546 U.S. at 430-31 (2006)); *accord Holt I*, 574 U.S. at 362. RLUIPA thus "requires that courts take cases one at a time, considering only 'the particular claimant whose sincere exercise of religion is being substantially burdened.'" *Ramirez,* 142 S. Ct. at 1281(quoting *Holt I*, 574 U.S., at 363). For that reason, the Supreme Court has rejected prison officials' arguments that they cannot accommodate one set of inmates when "their real concern seems to be with other, potentially more problematic requests" from other inmates. *Id.* at 1281. So too here. Controlling security risks from *other* religious groups in prison is not a compelling interest that justifies limiting Plaintiffs' rights.

B. ADC failed to show why it could not follow the practices of twenty other prison systems and allow Plaintiffs to wear their kufi.

The district court likewise erred when it found that ADC's policy of only allowing Muslim inmates to wear their kufi at certain times passed strict scrutiny under RLUIPA. 42 U.S.C § 2000cc-1(a). It is ADC's burden to establish that its restrictive policy meets strict scrutiny—and when other jurisdictions can achieve the same compelling interests that ADC has asserted while burdening religion to a lesser degree, a prison must "at a minimum, offer persuasive reasons why it believes that it must take a different course." *Holt I*, 574 U.S. at 368-69; *Dunn v. Smith*, 141 S. Ct. 725, 725 (2021) (Kagan, J., concurring) ("past practice, in Alabama and elsewhere," demonstrated the feasibility of accommodating religious

practice). Put differently, "if a less restrictive means is available for the Government to achieve its goals, the Government must use it" or otherwise "prove that it could not adopt the less restrictive alternative." *Holt I*, 574 U.S. at 365 (cleaned up).

Just last term, in *Ramirez v. Collier*, the Supreme Court reiterated this holding. There, John Ramirez, a death-row inmate, requested that Texas permit him to have his Southern Baptist pastor audibly pray with him and lay hands on him while he was being put to death. The Court found that Ramirez satisfied his burden of establishing a substantial burden and then assessed Texas's strict scrutiny affirmative defense. 142 S. Ct. at 1279.

The Court found that Texas failed to show its policy was the least restrictive means because there existed a "long history" of audible prayer in the death chamber. *Id.* Moreover, the Court explained that "both the Federal Government and Alabama have recently permitted audible prayer or speech in the execution chamber," and while Texas claimed its situation was different, it never explained why, thereby failing the inquiry. *Id.* ("That is not enough under RLUIPA.").

Although *Ramirez* was decided just a few months ago, this Circuit had already reached the same conclusion: prison policies can be more restrictive than proposed alternatives only if administrators can persuasively justify their deviations. In *Native American Council of Tribes v. Weber*, this Court found the fact "that other correctional

facilities permit inmates to use tobacco for religious purposes supports the existence of less restrictive means of ensuring order and security in prisons." 750 F.3d at 752.

The requirement that prisons meaningfully consider the policies of other "well-run institutions" and explain why they cannot take the same course is nothing new. Indeed, no less than seven sister circuits require prison administrators to consider less restrictive alternatives employed elsewhere. *Spratt v. R.I. Dep't of Corr.*, 482 F.3d33 (1st Cir. 2007); *Jova v. Smith*, 582 F.3d 410 (2nd Cir. 2009); *Couch v. Jabe*, 679 F.3d 197 (4th Cir. 2012); *Tucker v. Collier*, 906 F.3d 295 (5th Cir. 2018); *Ackerman v. Washington*, 16 F.4th 170 (6th Cir. 2021); *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005); *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014).

In short, the Supreme Court, this Circuit, and at least seven other circuits all hold that a prison system is required to both consider the religious accommodation practices of other well-run prison systems and to justify with "persuasive reasons" why they cannot offer a comparable accommodation. *Holt I*, 574 U.S. at 369.

That rule makes this an easy case. At trial, Director Payne testified that he does *not* consider policies from other prison systems when adopting ADC's Jumu'ah and kufi policies. JA 494-95; R. Doc. 162, at 50-51. Chaplain Mayfield testified that he reviews the policies of other prison systems in his annual review of ADC's religious accommodations

policies. R. Doc. 160, at 45-46, 66. However, he provided no explanation for why ADC could not implement the less-restrictive alternatives used by other prison systems. *See id.* ADC thus failed to obey *Holt I*'s admonition that, "when so many prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course[.]" *Holt I*, 574 U.S. at 369.

The practices of other prison systems show that less-restrictive alternatives abound. The federal Bureau of Prisons and 19 state systems have less restrictive kufi policies. *See* Appendix, *infra*. Indeed, many states that have similar or smaller Muslim inmate populations[4] offer more generous kufi policies than ADC—all while furthering the same interest in prison security. *Id.* Had Plaintiffs been incarcerated in the neighboring states of Oklahoma, Kansas, or Kentucky, they would be allowed to wear their kufi at any time and throughout the facility. Had Plaintiffs been incarcerated in the federal prison system *in Arkansas*, they would likewise have had the same right.

These 19 states and the federal Bureau of Prisons allow for the kufi to be worn at any time and throughout their facilities. Instead of an outright

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[4] Arizona, Colorado, Connecticut, Florida, Georgia, Kansas, Kentucky, Minnesota, Nevada, South Carolina, Texas, and Utah all have both smaller Muslim inmate populations and less restrictive kufi policies compared to Arkansas. Muslim Advocates, *Fulfilling The Promise of Free Exercise For All: Muslim Prisoner Accommodation in State Prisons*, Free Exercise Report Appendix A (2019), https://perma.cc/B9E8-LERN.

ban, these jurisdictions address their security concerns through less restrictive means, including by restricting colors, designs, or size. At a minimum, the district court should have required ADC to provide a persuasive justification for why the less-restrictive policies followed by neighboring states and the federal government will not work in its prisons. The court did not hold ADC to its burden, and that was error.

CONCLUSION

The decision below should be reversed.

Date: July 18, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this *amicus* brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i) because it contains 6,156 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a 14-point proportionally spaced typeface using Microsoft Word 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 18, 2022, a true and correct copy of the foregoing Brief *Amicus Curiae* of the Becket Fund for Religious Liberty was served electronically on the counsel registered for service via the CM/ECF system.

July 18, 2022

/s/ Adèle A. Keim
Adèle A. Keim

Appendix

Survey of Prison Systems with Less-Restrictive Kufi Policies

System	Policy Language	Policy Citation
Federal (BOP)	In order to achieve uniformity, inmates who have a SENTRY religious preference listed below are authorized to wear the following religious headwear throughout the institution including the SHU consistent with [14b] above: Muslim—kufi—black or white crochet cap	U.S. Dep't Just., Fed. Bureau of Prisons, BOP Pol'y No. 5360.09 Religious Beliefs and Practices, § 548.16(b)(1) (2004), https://perma.cc/379R-A6BX.
Arizona	Religious headwear may be worn throughout the complex/facility in accordance with the inmates' identified religious belief. Unless otherwise stated, all headwear is limited to one item only. Headwear shall not contain graphics or writing. Inmates who have declared a religious preference listed below are authorized to wear the following: Muslim kufi (men) - black or white crochet cap	Ariz. Dep't Corr., Dep't Ord. 904 – Inmate Religious Activities/ Marriage Requests, § 5.6.3 (2021), https://perma.cc/EAR4-YXSC.
California	INMATES ARE PERMITTED TO WEAR AND OR POSSESS PERSONAL RELIGIOUS CLOTHING ITEMS AS INDICATED IN THIS MATRIX. HEAD GEAR – Males - Including, but not limited to: Kufi	Cal. Code Regs. tit. 15, § 3190 (incorporating the Religious Personal Property Matrix (2013)),

		https://perma.cc/C8CK-WZTU.
Colorado	Religious head wear may be worn while outside of the cell and religious services. Offenders will not be required to wear a baseball cap or a stocking cap over their religious headwear.	Colo. Dep't Corr., Regul. No. 800-01 Offender Pastoral Care, Religious Programs, Services, Clergy, Faith Group Representatives, and Practices § (R)(8) + (10) (2022), https://perma.cc/B3YB-2WFV.
Connecticut	Inmate Dress Code. Inmate dress shall conform with the following standards: Religious headwear may be worn at all times.	Conn. Dep't Corr., Admin. Directive No. 6.10 Inmate Property, § 36(I) Inmate Dress Code (2013), https://perma.cc/YBH5-PA3P.
Florida	1. Religious items for wearing or carrying at all times: c. Muslim – white koofi for men	Fla. Admin. Code R. 33-602.201 (16)(c)(1)(c) (2022), https://perma.cc/3Y7H-AMJ9.
Georgia	Kufi prayer caps (small caps that fit flush on the head) may be worn at any time provided that it is a single ply fabric, it is white in color, and it does not present a safety or security issue. The cap can cover no more of the offender's head than is covered by a state issued detail cap. Logos	Ga. Dep't Corr., No. 106.08 Islamic (Muslim) Guidelines, IV.B.2, https://perma.cc/FT8P-358Z.

	and embroidery must be white so that the appearance is white on white.	
Kansas	Yarmulkes, koofi and tams may be worn at all times.	Kan. Dep't Corr., Internal Management Policy and Procedure No. 10-110D Programs and Services: Religious Programs, § III.E.3 (2018), https://perma.cc/4MBT-6R4T.
Kentucky	In order to achieve uniformity, an inmate who has expressed a religious preference listed below may wear the following religious headwear in the institution as follows: Muslim kufi white	Ky. Corr., Policies and Procedures No. 23.1 Religious Programs, § II.G.4.a (2018), https://perma.cc/7JME-AJRZ.
Maine	Kufi (male) (in addition to Kufi made of cotton or similar lightweight material, may also have winter Kufi made of wool or similar heavyweight material) - white, black, or beige only; may not obscure the resident's face; may be worn outside the cell or room.	Me. Dep't Corr., DOC Form No. AF-24.3-C-C-6/1/22R Allowable Personal Religious Items (2022). https://perma.cc/D6DQ-VVFS.
Maryland	(3) An offender may wear approved religious headgear at all times except when a photo ID is being taken (5) An offender shall be permitted to wear religious headgear in all	Md. Dep't Pub. Safety and Corr. Servs., Religious Services Manual OPS.140.0002.13.E.3, E.5 (2017),

	areas of the facility, unless there is a safety or security concern.	https://perma.cc/7GLS-NXE8.
Michigan	Prisoners in Level I through V may wear an approved item not identified with an asterisk at any time, subject to the restrictions of this or any other policy. AL-ISLAM (MUSLIM): One kufi cap or tarboosh for men.	Mich. Dep't Corr., Pol'y Directive No. 05.03.150 Religious Beliefs and Practice of Prisoners, Attachment A (2022), https://perma.cc/KK6J-ZRKU.
Minnesota	Incarcerated individuals/juvenile residents whose religion requires a particular head covering (currently the hijab, the yarmulke, and the Rastafarian tam for certain sects) to be worn throughout the day are accommodated, subject to the need to identify the incarcerated individual/juvenile resident. The wearing of any garb is subject to safety considerations and may be prohibited in certain case due to safety and security needs. Unless there are emergency circumstances, staff must not ask the incarcerated individual/juvenile resident to remove the religious head covering in the view of members of the opposite gender. g) Religious Head Covering Table: Kufi-Males only, black or white	Minn. Dep't Corr., Pol'y No. 302.300 Spiritual Care, § B.2, B.3.g (2021), https://perma.cc/VY23-6R3M.
Nevada	1 black or white standard-size Kufi (men) 1 black or white	Nev. Dep't of Corr., AR 810.2 Faith

	standard-size Hijab (women) to be worn over head only, and only during worship service	Group Overview Chart, Allowable Personal Items at p.11 (2019) (distinguishing between kufi and hijab, where hijab is only allowed during worship service), https://perma.cc/LPN9-XPQP.
Oklahoma	Religious Headgear: Must be made for the purpose of religious worship (such as kufi caps, Yarmulke, Indian headband). No solid red, blue, or camouflage colors may be used. No bandannas allowed. Headgear must lay flat upon the head. **May be worn at all times.** Not made from any state material/property.	Okla. Dep't Corr., Allowable Items-Inmate Religious Property: Individual Possession, Attachment B OP-030112. https://perma.cc/G2RW-ZH5E.
Pennsylvania	Inmates are permitted to wear religious headgear in all areas of the facility unless there is a documented hygienic, safety or security concern (e.g. the Visiting Room)	Pa. Dep't Corr., Policy Statement No. DC-ADM 819 Religious Activities § A.4.d (2013), https://perma.cc/XV4Q-7YVM.
South Carolina	Clothing: All inmates wear uniforms, and no special clothing will be allowed. Muslim inmates may wear a white kufi ~~while praying or during Muslim services~~ head covering throughout the facility, indoors and outdoors.	S.C. Dep't of Corr., PS-10.05, Handbook of Inmate religious Practice, Rule 15 (2015),

		https://perma.cc/H8A5-67XH.
Texas	Offenders shall not wear caps, hats or headgear in the dayroom, with the exception of those worn by offenders for religious purposes.	Tex. Dep't Crim. Just., Offender Orientation Handbook No. I-202 § III.F.8 (2017), https://perma.cc/Z75Q-HFJ3.
Utah	Procedure: Head Apparel Approved religious head apparel: A. may be worn at any time or in any area of the institution; B. is subject to search; and C. shall not be altered in any way.	Utah Dep't Corr., Institutional Operations Division Manual, Facilities Operation: Services and Program Delivery, FH03 Access to Religious Programs, § 04.05 (Procedure: Head Apparel), 04.07 (Religious Symbols Chart), https://perma.cc/72XY-7ANM.
Wyoming	Head Coverings. Head coverings approved as a head covering for religious purposes under WDOC Form #355, Unified Matrix for Authorized Personal Religious Property (i.e., a kufi or yarmulke (skull cap made from a single layer of single-colored black or white cloth) may be worn as follows:	Wyo Dep't of Corr., Pol'y and Proc. # 5.600, Inmate Religious Activities, IV.F.10.i.d.1 (2021), https://perma.cc/9MHE-D6PE.

	(1) Head coverings approved for religious purposes may be worn throughout the facility, indoors and outdoors.	