No. 13-6827

IN THE
Supreme Court of the United States

GREGORY HOUSTON HOLT,
A/K/A ABDUL MAALIK MUHAMMAD,
Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION, ET. AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE ANTI-DEFAMATION LEAGUE, THE INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, MUSLIM ADVOCATES, THE QUEENS FEDERATION OF CHURCHES, AND THE SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTERESTS OF *AMICI CURIAE*

The religious and civil liberties organizations joining this brief represent a diversity of theologies and worldviews. Although their beliefs and missions vary, *amici* are united in supporting institutionalized persons' religious exercise.[1]

The **Anti-Defamation League** ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Towards that end, ADL works to oppose government interference, regulation, and entanglement with

[1] Pursuant to this Court's Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *Amici Curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), *Amici Curiae* note that, on April 15 and 21, 2014, the parties respectively filed letters with the Clerk of Court reflecting their consent to the filing of *amicus* briefs.

religion, and strives to advance individual religious liberty. At the same time, ADL is actively engaged in monitoring, exposing, and counteracting the threat posed by violence-prone extremists – including certain hate groups that actively organize in prisons. ADL is committed to safeguarding the free exercise rights of all Americans, including prison inmates and others confined to state institutions, yet recognizes the challenge that prison officials face in seeking to accommodate the diverse religious beliefs of the general prison population while protecting personnel, other inmates, and the public. Such a balance can best be achieved by considering specific facts and circumstances, without resort to reflexive speculation or generalizations.

The **International Society for Krishna Consciousness, Inc.** ("ISKCON") is a monotheistic, or Vaishnava, tradition within the broad umbrella of Hindu culture and faith. There are approximately 500 ISKCON temples worldwide, including 50 in the United States. As a religious organization, ISKCON has been subjected to discrimination in the United States and has sought judicial relief based on the Free Exercise Clause. ISKCON has successfully pressed before the Supreme Court its constitutional rights to engage in religious practice. *See Lee v. Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992) (per curiam). Because ISKCON is a religious minority in the United States that often relies on courts to protect its rights, it submits this brief in order to support the rights of religious prisoners to exercise their faiths.

Muslim Advocates, a national legal advocacy and educational organization formed in 2005, works on the

frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim Advocates advances these objectives through litigation and other legal advocacy, policy engagement, and civic education, and by serving as a legal resource for the American Muslim community, all in order to promote the full and meaningful participation of Muslims in American public life. The issues at stake in this case directly relate to Muslim Advocates' work fighting institutional discrimination against the American Muslim community.

The **Queens Federation of Churches, Inc.** (the "Federation") was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. The Federation and its 390 member congregations are vitally concerned with protecting religious liberty, and have repeatedly appeared as *amicus curiae* for that purpose. The Federation supports RLUIPA's requirement, as applicable to cases such as this one, that the government convincingly prove the compelling interest in any law or regulation that interferes with the free exercise of religion.

The **Sikh American Legal Defense and Education Fund** ("SALDEF") was founded in 1996 and is the oldest national Sikh American civil rights and educational organization. SALDEF is dedicated to empowering Sikh Americans by building dialogue, deepening understanding, promoting civic and political participation, and upholding social justice and religious freedom for all Americans. A religious minority with distinct articles of faith, Sikhs have been in America for over 100 years. Due to their minority status and

religious practice, in addition to suffering overt discrimination, Sikhs are often subject to government regulations prescribing attire and personal appearance that conflict with Sikh religious requirements, such as keeping uncut hair and beards and wearing turbans.

SUMMARY OF ARGUMENT

Ever since Congress enacted the Religious Land Use and Institutionalized Persons Act, lower courts have struggled to apply the statute, often reaching different results on like facts. Although this Court has granted certiorari specifically to address Mr. Holt's request to grow a half-inch beard, the universe of cases implicating prisoners' religious accommodations encompasses other common requests, including those involving diets, personal religious items, worship services, and grooming. Confusion is evident across this universe of cases, leading to unjust and inconsistent results. Thus, Muslim prisoners in the Eighth Circuit have been left to purchase their own halal meals, while Jewish prisoners in the Fifth Circuit are entitled to kosher meals free of charge. African-Hebrew Israelite prisoners in the Seventh Circuit have been forced to cut their hair before appearing in court, while Cahuilla Native American prisoners in the Ninth Circuit are allowed to grow long hair without reprisal.

Underlying this confusion are divergent legal tests the lower courts use when inquiring into each of RLUIPA's two central prongs. First, RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Despite the clarity and expansiveness of this statutory prescription, some lower courts probe a prisoner's

actions for unfailing adherence to his or her chosen faith, or require a prisoner to prove that a particular practice is rooted in a theological "authority." This judicial dissection of religious belief threatens to deny protection to those who need it most—namely, devotees of unfamiliar, minority or disfavored religions. Second, RLUIPA requires the government to satisfy strict scrutiny by demonstrating that it is imposing a substantial burden in furtherance of a compelling interest, via the least restrictive means. 42 U.S.C. § 2000cc-1(a). Yet, contrary to that prescription, certain lower courts temper their inquiry with improper deference, often crediting unsupported invocations of security concerns by prison officials who have not considered the feasibility of alternatives.

This confusion among the lower courts is undercutting the congressional purpose behind RLUIPA and denying prisoners the religious accommodations that are elsewhere secured as a matter of statutory right. *See generally*, *Cutter v. Wilkinson*, 544 U.S. 709, 717 n.5 (2005). It is also complicating prison administration, for it is difficult for prison officials to predict with confidence what policies comply. Scott Budzenski, *Tug of War: The Supreme Court, Congress, and the Circuits – The Fifth Circuit's Input on the Struggle to Define a Prisoner's Right to Religious Freedom in* Adkins v. Kaspar, 80 St. J. L. Rev. 1335, 1337 n.15 (2006) ("The inconsistent application of the RLUIPA creates confusion among prison officials as to exactly what conduct amounts to an unconstitutional violation of prisoners' religious rights.").

This Court should take the opportunity in this case to minimize existing disparities and provide clear guidance calculated to promote uniformity among the lower courts. More specifically, *Amici* respectfully urge the Court to clarify how lower courts should inquire into (a) substantial burdens and (b) strict scrutiny. When evaluating substantial burdens, basic inquiry into the sincerity of a prisoner's religious belief should not stray into judicial assessments of whether a particular religious practice is central to or mandated by established orthodoxy—lest courts transgress into the forbidden realms of parsing scripture, choosing between competing doctrines, or consigning a prisoner to the perspective of fellow adherents. It should remain axiomatic that religious individuals are the ultimate authorities on their own religious beliefs. Whenever the government pressures adherents to modify or forsake their sincere beliefs (however novel or rare those beliefs may be), a substantial burden exists.

Once a prisoner establishes a *prima facie* case of substantial burden, strict scrutiny must follow. Accordingly, courts must require prison officials to demonstrate that the government's interests as presented in a particular case are compelling, and that the officials have not only considered less restrictive means but also demonstrated that such means are unavailable or deficient. In cases where prison officials apply inconsistent standards between faiths or genders, reject accommodation requests based on rote commitment to administrative uniformity, or fail to account for policies in comparable institutions, they fail to meet their statutory burden.

Were the Court in this case simply to confirm these basic principles, it would provide clarity that is essential for lower courts, prison officials, and religious prisoners across the United States.

ARGUMENT

I. LOWER COURTS HAVE WANDERED OFF COURSE IN WEIGHING SUBSTANTIAL BURDENS ON RELIGIOUS EXERCISE

Whereas the prescription of RLUIPA is clear and broad regarding the inquiry into substantial burden, lower courts' application of it has often been muddled and cramped. To establish a *prima facie* case under RLUIPA, a prisoner must demonstrate that the government has imposed a substantial burden on his or her religious exercise. 42 U.S.C. § 2000cc-1(a). RLUIPA defines "religious exercise" as "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),(B). To avoid doubt, Congress has expressly instructed that the statute should be "construed 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).

In evaluating substantial burdens, certain lower courts and prison officials appear to have gone off the statutory track in asking whether a prisoner holds a sincere religious belief. This Court should now reiterate that nothing more than a basic determination of credibility and sincerity is appropriate. Further, when assessing the weight of the burden, lower courts have split regarding the importance that the religious conduct at issue must have to an official faith. This

Court should resolve the split and hold that governmental pressure on prisoners to modify or forsake any sincere religious belief constitutes a substantial burden.

A. Certain Lower Courts Are Improperly Inquiring Into Whether Prisoners' Beliefs Are Orthodox

Because RLUIPA accommodates *religious* exercise, questions may arise as to whether a prisoner's purported belief is in fact religious and sincere. *See Cutter*, 544 U.S. at 725 n.13. This Court has made clear the proper scope of such inquiry under the Free Exercise Clause. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981).

Eddie Thomas was a pacifist Jehovah's Witness whose religious beliefs forbade him from producing armaments. *Id.* at 709. After Thomas was transferred to a department that fabricated tank turrets, he quit his job at a steel foundry. *Id.* at 710. The State of Indiana subsequently denied him unemployment benefits on the ground that he had ceased work voluntarily. *Id.* at 710. Indiana argued that the denial was appropriate because Jehovah's Witness doctrine did not mandate that Thomas quit his job. *See id.* at 715 ("The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was 'scripturally' acceptable."). In rejecting Indiana's argument, this Court held that Indiana should do no more than assess, with restraint and sensitivity, whether a plaintiff has an honest religious conviction. *Id.* at 715-16.

> [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Id. Since *Thomas*, this Court has repeatedly recognized that "courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828, (2000) (plurality opinion) (citing *Emp't Div., Dept. of Human Res. of Ore. v. Smith*, 494 U.S. 872, 887 (1990) (collecting cases)).

Despite clear, corresponding instruction from this Court as well as RLUIPA, lower courts continue to test and second-guess the religious beliefs of those who come before them, venturing beyond the narrow question of whether those beliefs are sincere. The various circuits typically appreciate that the inquiry into sincerity is limited "almost exclusively [to] a credibility assessment," *e.g.*, *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 792 (5th Cir. 2012), as corrected (Feb. 20, 2013),[2] but in some instances

[2] Circuit courts frequently reverse district courts that dismiss prisoners' claims on sincerity grounds. *See, e.g.*, *Tennyson v. Carpenter*, No. 13-1338, 2014 WL 1015908 at *4 (10th Cir. Mar. 18, 2014) (district court improperly determined that a prisoner's participation in a Christian praise choir was not pursuant to a sincere religious belief); *Thompson v. Smeal*, 513 F. App'x 170, 174 (3d Cir. 2013) (district court erred in finding that prisoner did not have a sincere religious belief that Christians should celebrate

circuits, district courts and prison officials struggle to get the message.

Three examples from within the past year are illustrative of the misconceptions that continue to plague prisons and lower courts. First, a Tennessee district court found that two Jewish prisoners were unlikely to establish that their kosher diet requests were sincere, specifically because they "failed to cite *any religious authority* suggesting that failure to eat ceremonially slaughtered meat somehow violates the tenets of their faith." *Roberts v. Schofield*, No. 11-cv-1127, 2014 WL 1028427 at *2 (M.D. Tenn. Mar. 18, 2014) (emphasis added). Second, the Third Circuit held that a Muslim prisoner's request for a diet of halal meat was properly denied at the threshold (*not* at the strict-scrutiny phase) simply because "most Muslims incarcerated within [Pennsylvania] eat the alternative protein diet or the no animal products diet." *Riley v. DeCarlo*, 532 F. App'x 23, 28-29 (3d Cir. 2013). Third, the Florida Department of Corrections enacted an all-encompassing program of religious diets that denied kosher meals to prisoners who failed to satisfy "a process of interviews and follow-up investigation that focuse[d] on the prisoner's knowledge of religious dogma," and went as far as having prison chaplains

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Christmas and Easter communally); *Moussazadeh*, 703 F.3d at 791-92 (district court should not have found that a prisoner was insincere in his Jewish beliefs because he occasionally purchased non-certified-kosher food). *But see Gardner v. Riska*, 444 F. App'x. 353, 355 (11th Cir. 2011) (affirming district court dismissal on sincerity grounds where defendants submitted evidence that inmate purchased non-kosher food).

"measure a prisoner's fidelity to a particular religion by conducting interviews, internet searches, inspecting prison records, and reviewing a prisoner's past religious activities." *United States v. Sec'y, Fla. Dep't of Corr.*, No. 12–cv–22958, 2013 WL 6697786 at *12-13 (S.D. Fla. Dec. 6, 2013). The Southern District of Florida properly enjoined the program, finding that "Defendants' orthodoxy testing strays too far into the realm of religious inquiry, where government officials are forbidden to tread." *Id.* at *13 (internal citations omitted).

Even if later corrected, such recurring governmental intrusion into religious belief and religious doctrine, particularly in reference to "orthodox" religious "authority," occasions serious concern. As this Court explained in *Thomas*, religious beliefs are protected on an individual, not sectarian, basis. *Thomas*, 450 U.S. at 715 ("Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one."). The sincere religious beliefs of adherents of all stripes deserve to be credited by the courts, regardless of whether they may be perceived as fringe.

To be sure, it does not follow from RLUIPA's breadth that any religious assertion by any prisoner is unassailable. *Cf.* 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) (RLUIPA was structured to control frivolous prison litigation without barring meritorious challenges to restrictions on religious liberty). While the sincerity inquiry is narrow, it is also meaningful. Courts may properly scrutinize prisoners' religious protestations where their beliefs suspiciously align

with secular self-interests or are otherwise incredible. For example, the Tenth Circuit has found that a couple accused of marijuana trafficking could not be insulated from criminal prosecution on the basis that they had previously founded the Church of Cognizance, which worships marijuana. *See United States v. Quaintance*, 608 F.3d 717, 718-19 (10th Cir. 2010) (evaluating sincerity under the Religious Freedom Restoration Act). Because the evidence established that the Quaintances used their professed religious beliefs "as cover for secular drug activities," *id*. at 720, including by promising a courier that he would be legally safe to transact a $100,000 marijuana deal provided he signed a church membership pledge, *id*. at 722, the trial court properly found the Quaintances' beliefs to be insincere, *id*. at 723. As *Quaintance* illustrates, narrow inquiry into sincerity will still bar the gate to frivolous RLUIPA claims.

The Court would do much good by reiterating that, under RLUIPA, the government should not sit in judgment of either the orthodoxy of beliefs or the orthopraxy of behaviors. Instead, prison officials and judges should undertake only a narrow assessment—one sufficient to assure themselves that the religious beliefs of the prisoners seeking accommodation are genuine. *See Thomas*, 450 U.S. at 716.

B. Certain Lower Courts Are Improperly Insisting That Prisoners Prove Practices Are Central To Their Faith

While RLUIPA does not itself define the term "substantial burden," Congress intended the term to codify this Court's definition from free exercise cases preceding *Smith*, 494 U.S. at 872. *See* 146 Cong. Rec.

16,700 (2000); *cf. also* 42 U.S.C. § 2000bb. As the Tenth Circuit has aptly summarized (on the basis of this Court's precedents), religious exercise is substantially burdened when a government:

> (1) requires participation in an activity prohibited by a sincerely held religious belief, or
>
> (2) prevents participation in conduct motivated by a sincerely held religious belief, or
>
> (3) places substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief.

Abdulhaseeb v. Calbone, 600 F.3d 1301, 1315 (10th Cir. 2010) (citing *Thomas,* 450 U.S. at 717-18, and *Sherbert v. Verner,* 374 U.S. 398, 404 (1963)). The Tenth Circuit clarified that not every infringement on a prisoner's religious exercise will be substantial; a prisoner must demonstrate that the government's denial poses more than a mere inconvenience. *Abdulhaseeb*, 600 F.3d at 1316 (internal citations omitted). A majority of circuits have employed variations on the same test in order to identify accommodation denials that pose more than minor impediments to religious practice.[3] Courts

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[3] *See, e.g.*, *LeBaron v. Spencer*, 527 F. App'x 25, 29 (1st Cir. 2013); *Hayes v. Tennessee*, 424 F. App'x 546, 555 (6th Cir. 2011); *Nelson v. Miller*, 570 F.3d 868, 878 (7th Cir. 2009); *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007); *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006); *Warsoldier v. Woodford*, 418 F.3d 989, 995-96 (9th Cir. 2005); *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004); *McEachin v. McGuinnis*, 357 F.3d 197, 202 (2d Cir. 2004). While "[m]ost of these courts have adopted some form of

routinely determine that prison restrictions on religious diets, possessions, worship, and grooming, impose substantial burdens.

The Tenth Circuit's approach in *Abdulhaseeb* is instructive. There, Madyun Abdulhaseeb requested halal meat consonant with his Islamic faith. *Abdulhaseeb*, 600 F.3d at 1306. Although other Muslims "may find a vegetarian or non-pork diet sufficient to satisfy Islam," the court found that Abdulhaseeb sincerely believed that his religious diet should include halal meats. *Id.* at 1314. In reversing summary judgment for the Oklahoma Department of Corrections, the Tenth Circuit held it reasonable to infer that the prison's "failure to provide a halal diet either prevents Mr. Abdulhaseeb's religious exercise, or, at the least, places substantial pressure on Mr. Abdulhaseeb not to engage in his religious exercise by presenting him with a Hobson's choice—either he eats a non-halal diet in violation of his sincerely held beliefs, or he does not eat." *Id.* at 1316-17.

Other circuits, however, have been more begrudging and approached the inquiry into substantial burden more harshly. According to the Eighth Circuit:

> Substantially burdening one's free exercise of religion means that the regulation must significantly inhibit or constrain conduct or expression that manifests some central tenet of

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the *Sherbert/Thomas* formulation," they have not done so uniformly, and "[t]he result of this practice has been to create several definitions of 'substantial burden,' with minor variations." *Klem*, 497 F.3d at 279.

> a person's individual religious beliefs; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion.

Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 813 (8th Cir. 2008).

Such a formulation of the standard improperly focuses the inquiry into substantial burden on the *centrality* of the belief. But RLUIPA's plain terms should foreclose that result: the text defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious beliefs." 42 U.S.C. § 2000cc-5(7)(A). Nevertheless, the Eleventh Circuit has followed the Eighth Circuit's lead, holding that an Odinist prisoner could not prove he was substantially burdened because he failed to marshal authoritative religious sources demonstrating that his requested items were "fundamental" to his faith. *Smith v. Governor of Ala.*, No. 13-cv-11173, 2014 WL 1303920 at *4-5 (11th Cir. Apr. 2, 2014). The Eighth and Eleventh Circuits' approaches deviate from the framework articulated by this Court, then codified by Congress in RLUIPA. *See Thomas*, 450 U.S. at 718 (government imposes substantial burden when it "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs."); *see also* 42 U.S.C. § 2000cc-5(7)(A).[4]

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[4] The Seventh Circuit has also articulated a heightened approach to substantial burdens that, while different from the

This divergence in standards has inevitably led to inconsistent assessments of substantial burdens, even where similar facts are presented. In *Patel*, the Eighth Circuit held that a Muslim prisoner could not prove a substantial burden on his religious diet, because he had the option of purchasing halal meals from the commissary. *Patel*, 515 F.3d at 814 ("Requiring him to purchase commissary meals does not significantly inhibit, meaningfully curtail, or deny Patel a reasonable opportunity to practice his religion."). Applying the friendlier standard, however, the Fifth Circuit held that a Jewish inmate being "forced to pay for his kosher meals" "substantially burdens his ability to exercise his religious beliefs." *Moussazadeh,* 703 F.3d at 794.

Similarly, the court in *Walls v. Schriro*, No. 05-cv-2259, 2008 WL 544822 at *5 (D. Ariz. Feb. 26, 2008) found a substantial burden could arise from a Hare Krishna prisoner's "sincere belief that eating meals prepared by Hare Krishna devotees", and free from meat, garlic, onions, eggs, and caffeine, "is a requirement of his faith." Less than a year later, a West Virginia court determined that there was no substantial burden for a Hare Krishna inmate to eat meals prepared by those who did not share his faith. *Blake v. Rubenstein*, No. 08–cv–00906, 2009 WL 772924 at *5 (S.D. W.Va. Mar. 17, 2009)

Eighth Circuit's rule, seems unsympathetic to prisoners' interests. *See Koger v. Bryan*, 523 F.3d 789, 798 (7th Cir. 2008) (Noting that a substantial burden is one that "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable.").

(distinguishing *Walls* because the inmate there alleged two separate burdens, while in *Blake* the plaintiffs only alleged one).

Lower courts' confusion is not limited to dietary accommodations. District courts similarly fracture as to the religious items prisoners can possess. They have reached different results, for example, regarding the possession of prayer oil. One district court found that denying prayer oil to a Muslim plaintiff constituted a substantial burden because it forced him to "refrain from religiously motivated conduct." *Charles v. Verhagen*, 220 F. Supp. 2d 937, 946 (W.D. Wis. 2002) *aff'd*, 348 F.3d 601 (7th Cir. 2003). Another disagreed and found no substantial burden; while recognizing that prayer oil may be desirable, it deemed oil less than essential to Shia Islam practice. *Sareini v. Burnett*, No. 08-cv-13961, 2011 WL 1303399 at *4 (E.D. Mich. Mar. 31, 2011). A third district court determined that denying prayer oil to a Shetaut Neter adherent did not constitute a substantial burden because he was "able to carry out . . . nearly all other aspects of his religious faith." *See Curry v. Calif. Dep't of Corr.*, No. 09-cv-03408, 2012 WL 968079 at *6-7 (N.D. Cal. Mar. 21, 2012). The *Curry* decision reflects a recurring legal error: lower courts conclude that, so long as a prisoner can practice *some* aspects of his religion, prohibiting *other* aspects does not impose a substantial burden.[5]

[5] The district court in the instant appeal made this same error. J.A. at 176-77 (refusal to allow Muslim prisoner to grow a beard did not impose a substantial burden, because Mr. Muhammad had been separately provided a prayer rug, a religious advisor, and a religious diet).

RLUIPA, however, protects individual acts of religious exercise, not just holistic religious adherence. *See, e.g.*, *Perez v. Frank*, No. 06-cv-00248, 2007 WL 1101285 at *9 (W.D. Wis. Apr. 11, 2007) ("RLUIPA protects individual acts of piety, regardless of their centrality.").

The discrepancies in legal analysis extend to group worship as well. Multiple courts have found that forbidding group worship imposes substantial burdens. *See, e.g.*, *Phillips v. Ayers*, No. 07-cv-2897, 2010 WL 1947015 at *8 (C.D. Cal. Jan. 14, 2010) (preventing Muslim prisoner from attending Friday Jumah Prayer Service was a substantial burden); *Meyer v. Teslik*, 411 F. Supp. 2d 983, 990 (W.D. Wis. 2006) (Native American's ability to "engage[ ] in silent prayer is not, by itself, justification for forbidding his participation in communal worship."). Other courts, however, have questioned whether group worship is sufficiently critical. *See, e.g.*, *Selby v. Caruso*, No. 09-cv-152, 2010 WL 3892209 at *4 (W.D. Mich. Aug. 20, 2010) *report and recommendation adopted*, 09-cv-152, 2010 WL 3852350 (W.D. Mich. Sept. 29, 2010) (no substantial burden where a Christian prisoner failed to allege that group worship was "central and fundamental" to his religious beliefs). Still others have determined that denying group worship is not a substantial burden, where a prisoner has alternative forms of practice. *See, e.g.*, *Kaufman v. Pugh*, 733 F.3d 692, 697 (7th Cir. 2013) ("There was no evidence that he would be unable to practice atheism effectively without the benefit of a weekly study group."); *Reischauer v. Jones*, No. 06-cv-149, 2009 WL 232625 at *9 (W.D. Mich. Jan. 29, 2009) ("The failure to provide a group service did not prevent Plaintiff from worshiping on his own, from worshiping with a small group of other prisoners, or from

worshiping with a Muslim cleric or religious volunteer."). These are but a few examples among many where lower courts have reached opposing conclusions on similar facts simply because they applied different standards for identifying substantial burdens.

Amici respectfully urge this Court to hold that government imposes a substantial burden upon prisoners' religious exercise whenever it pressures adherents to modify or forsake their religious beliefs, regardless of whether those beliefs are fundamental to their faith. This Court's articulation of that standard would do much to ameliorate the disparities highlighted *supra*.

II. LOWER COURTS HAVE COMPROMISED STRICT SCRUTINY IN DEFERRING TO PRISON ADMINISTRATORS

Once a prisoner demonstrates a substantial burden on his or her religious exercise, the burden of evidence and persuasion shifts to the government to satisfy strict scrutiny. 42 U.S.C. § 2000cc-1(a). Thus, the government must demonstrate "that imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id*.

The government cannot, consistent with its statutory burden, obtain judicial deference merely by invoking its general interests in safety and security (which of course are always operative in the prison setting). Rather, the government must demonstrate why it needs to impose each substantial burden at

issue on each individual prisoner in order to further its compelling interests. Moreover, the government must prove that it considered less restrictive means before concluding that none affords a viable alternative for meeting its compelling interests. In scrutinizing such purported proof, courts should examine any inconsistent applications of prison policies. On this point, too, lower courts appear confused and in need of this Court's guidance.

A. Certain Lower Courts Are Improperly Crediting Generalized Prison Interests When Evaluating Whether Specific Burdens Find Compelling Justification

This Court has addressed an analogous statutory prescription regarding compelling governmental interests under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et. seq*. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (noting that RLUIPA "allows federal and state prisoners to seek religious accommodations pursuant to the same standard as set forth in RFRA."). *O Centro* explained that statutory regimes calling for strict scrutiny "should be adjudicated in the same manner as constitutionally mandated applications of the test." *Id*. at 430. Strict scrutiny, as codified, "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." *Id*. at 430-31. When asserting a compelling interest, the government must do more than offer a "mere invocation of the general characteristics" of "broadly

formulated interests." *Id.* at 431, 439. Instead, the statute calls for a "case-by-case determination of the question, sensitive to the facts of each particular claim." *Id.* at 431 (quoting *Smith*, 494 U.S. at 899 (O'Connor, J., concurring)). At the same time, the case-by-case inquiry under RLUIPA should proceed with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Cutter*, 544 U.S. at 722-23.

The Tenth Circuit recently applied strict scrutiny in the prison context consistent with this Court's instructions. *Yellowbear v. Lampert*, 741 F.3d 48, 58 (10th Cir. 2014). Andrew Yellowbear, a member of the Northern Arapaho Tribe, sought to access the prison's existing sweat lodge for purposes of his religious exercise. *Id.* at 53. The prison refused to provide him with any access, citing safety and cost concerns. *Id.* The Tenth Circuit rejected the prison's "abstract" concerns, noting that counsel's argument "about the 'inherent dangers' of sweat lodges finds precisely no support" in the evidence proffered below. *Id.* at 58. The prison also offered no evidence of actual costs, prompting the Tenth Circuit to explain that strict scrutiny cannot "be satisfied by the government's bare say-so." *Id.* at 59. While acknowledging that prison officials may receive deference once they set forth detailed record evidence supporting their positions, the Tenth Circuit held that "prison officials may [not] declare a compelling governmental interest by fiat." *Id.* at 59. Particularly where prison officials daily undertook the same security procedures for inmates'

medical needs that they eschewed for inmates' religious practice, they failed to establish a compelling interest. *Id*. at 60.[6]

By contrast, the Eighth Circuit deferred generously when affirming a Missouri prison's refusal to provide a sweat lodge for a Cherokee inmate. *Fowler v. Crawford*, 534 F.3d 931, 933 (8th Cir. 2008). The Eighth Circuit announced that "A prison's interest in order and security is always compelling." *Id*. at 939. After examining the evidence, the Eighth Circuit stated that the prison officials had "exercised their discretion and determined that a sweat lodge at [the prison] jeopardizes prison safety and security to an unacceptable degree. This is precisely the exercise of discretion to which RLUIPA requires us to defer." *Id*. at 943. Whatever the state of the record in that case, the Eighth Circuit's legal view of "required deference" and interests that are "always compelling" seems out of place in the context of RLUIPA and its call for strict scrutiny. What is more, since the *Fowler* case, the Eighth Circuit and district courts within it have granted near-automatic deference to prison officials'

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[6] Other circuits have also strictly analyzed prison assertions of compelling interests. *See, e.g.*, *Moussazadeh*, 703 F.3d at 794 (Texas prison failed to link its interests in security and cost control to refusing to provide a Jewish man with kosher food); *Klem*, 497 F.3d at 284 (Pennsylvania prison did not have a compelling interest in order or safety when it barred a Children of the Sun Church practitioner from possessing more than ten books at any time); *Lovelace*, 472 F.3d at 190 (Court refused to "rubber stamp" a Virginia prison's "superficial" explanation as to why banning a Nation of Islam adherent's Ramadan observance fulfilled a compelling interest).

claims of compelling interests.[7] *See, e.g.*, *Singson v. Norris,* 553 F.3d 660, 662-63 (8th Cir. 2009) (denying a Wiccan access to tarot cards in his cell because of deference to prison's assertions of safety and security); *Jihad v. Fabian*, No. 09-cv-1604, 2011 WL 1641767 (D. Minn. May 2, 2011) (refusing to allow Muslim to pray five times a day outside his cell, away from the toilet, due to deference to institutional security). Indeed, the Eighth Circuit's liberal deference is manifest in this case. *See* J.A. at 184-87.[8]

Differences over deference have translated to contrasting rulings regarding accommodations owed to prisoners who adhere to the Nation of Gods and Earth ("NGE"), a religion that formed during the 1960s Black Muslim movement and shares its roots with the Nation of Islam. *See Marria v. Broaddus*, No. 97-cv-8297, 2003 WL 21782633 at *5 (S.D.N.Y. July 31, 2003).

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[7] A different panel of the Eighth Circuit recently pushed back against this acquiescence to prison officials, finding that South Dakota failed to satisfy strict scrutiny in banning all tobacco use by Lakota Sioux prisoners. *Native Am. Council of Tribes v. Weber*, No. 13-1401 and 13-2745, 2014 WL 1644130 at *7 (8th Cir. Apr. 25, 2014) (Bright, J.).

[8] The Eleventh and Fifth Circuits have similarly deferred to stated security concerns in the prison context. *See, e.g.*, *Knight v. Thompson*, 723 F.3d 1275, 1284 (11th Cir. 2013), *petition for cert. filed* No. 13-955, 2014 WL 546539 (Feb. 6, 2014) (forbidding Native American from growing long hair furthered compelling interest in Alabama prison security, discipline, hygiene, and safety); *Thunderhorse v. Pierce*, 364 F. App'x 141, 146 (5th Cir. 2010) (forbidding Native American Shaman from growing long hair furthered compelling interest in Texas prison security).

Lower courts have split as to whether NGE is entitled to *any* religious accommodations under RLUIPA.

In the *Marria* case, NGE member Marria brought suit under RLUIPA to challenge the New York Department of Corrections' complete ban on all NGE gatherings, fasting, literature, and other materials. *Id.* at *4-5. After determining that plaintiff held sincere religious beliefs, *id.* at *12, and that those beliefs had been substantially burdened, *id.* at *13-14, the district court shifted the burden to New York to satisfy strict scrutiny, *id.* at *14. At that stage, although the court agreed with New York that prison safety, security, and order are compelling interests generally, it held that the prison had failed to prove that it had a compelling interest specifically in designating NGE as a security threat and banning all religious activities and literature. *Id.* at *14-18. The court refused to "abdicate its role" in applying strict scrutiny, refused to allow the prison to "merely brandish the words 'security' and 'safety'", and refused to defer to the prison's "*post hoc* justifications." *Id.* at *14. The court ordered the prison to provide plaintiff with the requested NGE literature, and remanded for the prison to appropriately tailor its provision of the requested religious meetings, fasting schedules, and other accommodations. *Id.* at *19-21.

Earlier this year, however, a Virginia district court reached the opposite result: it deferred to the prison's classification of NGE as a gang, and upheld a ban on NGE meetings, literature, and other materials. *Coward v. Jabe*, No. 10-cv-147, 2014 WL 932514 at *1 (E.D. Va. Mar. 10, 2014). The court assumed without deciding that NGE constituted a religion, *id.* at *4, but

then deferred to the prison's assessment that NGE "poses a threat to prison safety," *id.* at *5. Although the plaintiff presented affidavits from NGE adherents attesting that the faith did not condone violence or racism, the court ruled that a complete ban was justified because prison officials had established that *some* NGE members engaged in those activities. *Id.* at *5. This stands in direct contrast to *Marria*, where the court acknowledged that some members of the NGE faith "have committed crimes or otherwise violated prison regulations" before adding that "Catholics, Protestants, Jews, Muslims, NOI, etc. . . . likewise violate prison regulations . . . but no one would suggest that such facts preclude the classification of these recognized groups as religions deserving of First Amendment protection." *Marria*, 2003 WL 21782633 at *17.

Consistency commends that lower courts take the same strict approach to scrutiny under RLUIPA. This means that prison officials should be required to prove, with record evidence, their compelling interest in applying the specific restriction under challenge against the specific prisoner who is burdened. A prison must demonstrate that its interest is compelling when applied "to the person," not just in the abstract. 42 U.S.C. §2000cc-1(a). In *O Centro*, for example, the government failed to demonstrate that it had compelling interests in specifically preventing a 130-member branch of a Brazilian Christian Spiritist sect from importing the controlled substance *hoasca* for religious use. *O Centro*, 546 U.S. at 437. Just as the federal government cannot invoke the broad characteristics of controlled substances to justify a specific ban on sacramental use by a single sect, prison

authorities cannot invoke the broad requirements of prison security to justify individual denials of religious accommodations. Instead, prisons must demonstrate that their interest is compelling when applied to "the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 430-31.

Prisons that invoke general interests as compelling, without tying the application of each interest to each specific prisoner and accommodation, fail to satisfy RLUIPA's strict scrutiny. *Amici* respectfully urge this Court to confirm as much.

B. Certain Lower Courts Are Excusing Prison Officials From Considering And Refuting Less Restrictive Policies Operative Elsewhere

Finally, strict scrutiny requires the government to link any compelling interest to its specific, chosen means for achieving it. *O Centro*, 546 U.S. at 430-31 (2006). RLUIPA's "least restrictive means" standard requires the government to show that there are "no alternative forms of regulation" that would fulfill the state's compelling interest. *Sherbert*, 374 U.S. at 407. "[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 815 (2000). To meet this aspect of its burden, the government must consider plausible alternatives, and also demonstrate "that the alternative[s] [would] be ineffective to achieve its goals." *Id.* at 816.

The Ninth Circuit has provided an instructive assessment of a prison's proof of least restrictive means. *Warsoldier*, 418 F.3d at 989. Billy Soza

Warsoldier, a Cahuilla Native American, followed a religious practice of cutting his hair only upon the death of a loved one. *Id*. at 991-92. He had not cut his hair since his father's death, twenty-five years earlier. *Id*. at 992. While he was incarcerated, the prison had a policy forbidding male inmates from growing their hair longer than three inches. *Id*. After Warsoldier refused to cut his hair, he was confined to his cell, prohibited from using the main yard for recreation, removed from his position with an Inmate Advisory Council, and stripped of preexisting privileges. *Id*. The Ninth Circuit found that the three-inch policy and the resulting series of punishments imposed a substantial burden on Warsoldier because they were designed "to coerce him into compliance" and pressured him "to abandon [his] religious beliefs by cutting [his] hair." *Id*. at 995-96.

Once the burden shifted to the government to satisfy strict scrutiny, the availability of a less-restrictive alternative proved dispositive in favor of Warsoldier. As the court noted, the prison could not "meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Id*. at 999.[9]

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[9] Other circuits require that the government consider alternatives in order to satisfy strict scrutiny under RLUIPA. *See, e.g.*, *Yellowbear*, 741 F.3d at 62 (government failed to refute plaintiff's suggested alternatives that would permit him to attend sweat lodge); *Couch v. Jabe*, 679 F.3d 197, 203 (4th Cir. 2012) (prison had less-restrictive alternative short of forbidding Sunni Muslim from growing one-eighth inch beard); *Jova v. Smith*, 582 F.3d 410, 416-17 (2d Cir. 2009) (New York prison carefully

Although Warsoldier had proposed a religious exemption to the hair-length policy as a less restrictive means, the prison asserted that it "must enforce the grooming policies upon all inmates regardless of their religious convictions." *Id.* The Ninth Circuit held otherwise after comparing California's assertion against the established policy of the Federal Bureau of Prisons, which does not regulate hair-lengths yet meets "their indistinguishable interests without infringing on their inmates' right to freely exercise their religious beliefs." *Id.* at 1000. Further observing that female inmates may grow longer hair, the Ninth Circuit found that California's failure to explain the differential treatment established "that the hair length restriction is not the least restrictive means to achieve the same compelling interests." *Id.* at 1000-01. Thus, evidence of policies and practices in effect elsewhere was important to the Ninth Circuit in assessing the availability of a less-restrictive alternative for the prison at issue.

By contrast, other circuits have brushed aside inconsistencies, granted unwarranted deference, and shifted the burden of proof back to inmates when assessing less restrictive alternatives. The Eleventh

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considered alternatives in prohibiting Tulukeesh adherents from engaging in martial arts sparring, but failed to prove less restrictive alternatives to dietary accommodations); *Klem*, 497 F.3d at 284 (Pennsylvania prison had less-restrictive alternatives short of limiting Children of the Sun Church practitioner to ten books in his cell); *Spratt v. R.I. Dep't Of Corr.*, 482 F.3d 33, 41 (1st Cir. 2007) (Rhode Island prison offered no evidence that it had considered less restrictive alternatives to a complete ban on preaching by a Christian inmate).

Circuit recently addressed *Warsoldier's* exact issue—a request to accommodate the religious faith of Native American prisoners by relaxing insistence upon short hair. *Knight*, 723 F.3d at 1276-77.[10] In so doing, the Eleventh Circuit expressly rejected *Warsoldier's* legal analysis and held that Alabama prison administrators need not actually consider and reject less-restrictive alternatives. *Id*. at 1285-86. Although presented with evidence that other jurisdictions allowed prisoners to grow long hair, and that Alabama itself allowed female inmates to do so, the Eleventh Circuit credited the state's position that no less-restrictive alternatives were available. *Id*. at 1286. That seems inconsistent with this Court's guidance, especially to the extent that Alabama's female prisoners are permitted to grow their hair long, for a regulation "cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (zoning ordinance that forbade Santeria animal slaughter, but not commercial animal slaughter, was not narrowly tailored to fulfill a compelling interest) (internal citations omitted).

Similarly, the Sixth Circuit shifted the burden of proof back to the prisoner in holding it was permissible

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[10] Growing long hair as a religious practice is not limited to Native Americans or Nazirites (*see infra*). The Sikh practice of *kesh* likewise forbids cutting hair or beards. *See generally*, Brief of *Amicus Curiae* The Sikh Coalition, No. 13-955 (Mar. 13, 2014) (supporting the pending certiorari petition in *Knight v. Thompson*).

for Ohio prison officials to deny a religious hair-length exemption. *Hoevenaar v. Lazaroff*, 422 F.3d 366 (6th Cir. 2005). Hoevenaar was a Cherokee Native American who wished to maintain a kouplock, a two inch by two inch section of hair that is grown longer than the rest. *Id*. at 366-67. The Ohio district court had ruled that the government failed to prove that prison security would be compromised, because (i) religious hair-length exemptions had previously been permitted without incident and (ii) Ohio prisons were simultaneously allowing women to grow long hair. *Id*. at 369. The Sixth Circuit reversed, characterizing the district court as "improperly substitut[ing] its judgment for that of prison officials." *Id*. at 370. The Circuit then held that, once prison officials offer justification for a regulation, "the courts *must defer* to the expert judgment of the prison officials unless the prisoner proves by substantial evidence that the officials have exaggerated their response to security considerations." *Id*. at 370 (internal citations omitted, emphasis added). The Sixth Circuit's standard thus requires the prisoner to prove why even perfunctory government evidence should not carry the day. Instead of applying RLUIPA's statutory strict scrutiny through to the government's ultimate burden of persuasion, *see* 42 U.S.C. § 2000cc-5(2), the Sixth Circuit's standard threatens to regress towards rational-basis review – the same review that governs the Free Exercise Clause, *see Turner v. Safley*, 482 U.S. 78, 87-89 (1987), and Congress passed RLUIPA specifically to ratchet up.

The Seventh Circuit has also watered down the inquiry into least restrictive means. *See Lewis v. Sternes*, 712 F.3d 1083 (7th Cir. 2013). In *Lewis,* Peter

Lewis, an Illinois prison inmate, belonged to the African Hebrew Israelites of Jerusalem. *Id.* at 1083-84. As part of his religious practice, Lewis took the Nazirite vow to never cut his hair (per the lessons of the Biblical figure Samson). *Id.* at 1084. The Illinois prison determined that Lewis's uncut hair constituted a security risk because it had formed into dreadlocks and could not be readily searched for contraband. *Id.* Knowing Lewis faced an upcoming court date in another case, the prison gave him two options: Lewis could either cut his hair and attend court, or else he could refuse a haircut, be placed in segregation, and miss his court appearance. *Id.* Lewis relented in getting a haircut, then filed an RLUIPA lawsuit. *Id.* at 1084-85.

In rejecting Lewis's request for a religious dreadlock exemption, the Seventh Circuit faulted him for presenting no evidence that the prison's "need to regulate hair length" was "not great enough to warrant interference with his religious observance." *Id.* at 1085. The Seventh Circuit affirmed the district court's finding that, "bearing in mind the level of deference this court is required to give to prison officials on security matters," no alternative existed because Lewis had not proved "that a manual search of his hair would have been as effective at furthering the prison's security interest." *Lewis v. Snyder*, No. 04-cv-50160, 2011 WL 4036140 at *5 (N.D. Ill. Sept. 12, 2011). Without using the words "less restrictive means," the Seventh Circuit rejected Lewis' evidence that an inmate in his same facility went unpunished for wearing dreadlocks, and that another Illinois prison allowed dreadlocks. *Lewis*, 712 F.3d at 1085-86. Instead, the Seventh Circuit faulted Lewis for failing to

prove that "the prison's security concerns are outweighed" by his "sincere religious observance." *Id.* at 1087.[11] Like the Sixth Circuit in *Hoevenaar*, the Seventh Circuit improperly shifted the burden to the prisoner.[12] The Eighth Circuit required the same shift in this case. *See* J.A. at 186 (prisoner must offer substantial evidence that prison's response was "exaggerated" to override deference).

Under RLUIPA, however, it should not be the prisoner's duty to demonstrate that his religious exercise should trump regulation; to the contrary, it falls upon the prison to reverse what is otherwise the operative rule (*i.e.*, individualized religious accommodation trumps general prison interests and policies). A prison can justify a substantial burden on religious exercise only by satisfying strict scrutiny. *See* 42 U.S.C. § 2000cc-5(2) ("Demonstrate" means to meet

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[11] *See also Williams v. Snyder*, 367 F. App'x 679, 683 (7th Cir. 2010) (deferring to prison's judgment that sanctioning Rastafarian for violating a ban on dreadlocks was least restrictive means of fulfilling compelling security interest).

[12] A district court in Louisiana recently reached the opposite result on similar facts by focusing on less-restrictive means. *See Williams v. Champagne*, No. 11-160, 2014 WL 1365940 (E.D. La. Apr. 6, 2014). The court determined that although the prison officials had proved that enforcing a short-hair policy was "*one way* of addressing safety and hygiene concerns," they had not proved it was the *least restrictive* way. *Id.* at *4. Indeed, when the Rastafarian inmate offered plausible alternatives, the prison had no reply. *Id.* With only "bare assertions" of health and security in the record, the prison was not entitled to summary judgment dismissing William's RLUIPA claim. *Id.*

"the burdens of going forward with the evidence and of persuasion.").

Congress passed RLUIPA for the sake of protecting religious exercise by mandating individual exceptions to generally applicable laws. *Cf. O Centro*, 546 U.S. at 434 (permitting judicial exemptions under RFRA). The express, statutory insistence upon strict scrutiny, including searching consideration of less restrictive alternatives, is to be policed by the judiciary. Yet something is getting garbled in translation when applied by lower courts. Correct application of the statute requires courts to evaluate less restrictive means with an eye towards prisons' internal consistency and comparable institutions' practices. For a prison to satisfy RLUIPA's strict scrutiny, it must demonstrate why alternative means cannot fulfill its compelling interests.

Amici certainly credit prison interests in health, safety, and security, and agree that policies necessary to secure those interests should remain in place. Our respectful submission is simply that courts should apply uniform, rigorous standards before accepting that prison officials have properly denied a prisoner of sincere belief the religious accommodation he or she seeks.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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