NO. 17-13384

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WASEEM DAKER,

Plaintiff-Appellant,

v.

TIMOTHY WARD, *et al.*,

Defendants - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
Case No. 5:7-cv-00025
The Honorable C. Ashley Royal

BRIEF OF *AMICUS CURIAE* MUSLIM ADVOCATES IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus curiae Muslim Advocates is a section 501(c)(3) non-profit organization. It has no parent company and issues no stock.

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IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus curiae **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. The issues at stake in this case relate directly to Muslim Advocates' work representing prisoners litigating claims of religious discrimination.

RULE 29(a)(4)(E) STATEMENT

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *amicus curiae* Muslim Advocates and its counsel—contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

For years, the Petitioner—Mr. Daker—has suffered at the hands of prison officials who deny him the opportunity to exercise his religion by growing a beard. This denial has come in many forms, included repeated, violent, forced shavings in unsanitary conditions. Yet when Mr. Daker turned to the courts for protection, the district court interpreted the Prison Litigation Reform Act ("PLRA") to bar his case, both as "frivolous and malicious" and because Mr. Daker supposedly did not allege the "imminent danger" required for prisoners with a history of unsuccessful lawsuits. Rather than reversing the district court's erroneous construction of the PLRA, a panel of this Court affirmed in a published decision (the "Panel Opinion").

Federal law demands more. Courts and prison officials must afford the highest respect to the religious practice of prisoners, permitting only those restrictions absolutely necessary to the functioning of the prison. All three branches of government, including the Supreme Court, have made clear that federal law should be interpreted to protect this fundamental right. By adopting an interpretation of the PLRA that bars Mr. Daker from receiving a chance to litigate his denial of religious practice, the Panel Opinion flies in the face of federal law's clear directive.

To correct this error on a "question of exceptional importance,"[1] this Court must grant Mr. Daker's petition for rehearing, vacate the panel opinion, and reverse the district court's dismissal of Mr. Daker's case.

ARGUMENT

I. Federal Law Places a Duty on Courts to Protect the Religious Freedom of Prisoners.

A. Religious liberty is among the most important freedoms guaranteed by the Constitution.

The freedom to practice one's religion is among "the cherished rights of mind and spirit" protected by the Constitution. *Malloy v. Hogan*, 378 U.S. 1, 5 (1964). For many Americans, "free exercise [of their religious beliefs] is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts." *Burwell v. Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). By including protection for the free exercise of religion in the First Amendment to the Constitution, "the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

[1] *See* Fed. R. App. Proc. 35(a)(2).

While the First Amendment's religion clauses were explicitly designed to protect all expressions of religious belief, "[t]he free exercise clause . . . . was specially concerned with the plight of minority religions." *Zelman v. Simmons-Harris*, 536 U.S. 639, 679 n.4 (2002) (Thomas, J., concurring) (quoting Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1159 (1991)). The experience of religious discrimination was still fresh in the minds of the framers of the Bill of Rights, and accordingly "it was 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.'" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532–33 (1993) (quoting *Bowen v. Roy,* 476 U.S. 693, 703 (1986)).

B. Religious minorities in prison are among those most in need of strong protection for their religious liberty.

The United States' tradition of protecting religious liberty—and particularly the religious liberty of religious minorities—extends to those incarcerated in America's prisons as well. "[P]risoners do not shed all constitutional rights at the prison gate," *Sandin v. Conner*, 515 U.S. 472, 485 (1995), and the protection of the Free Exercise Clause, "including its directive that no law shall prohibit the free exercise of religion, extends to the prison environment." *Morrison v. Garraghty*, 239 F.3d 648, 656 (4th Cir. 2001) (citing *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 348 (1987)). The Supreme Court has referred to prisons as among those state-run institutions "in which the government exerts a degree of control unparalleled in

civilian society and severely disabling to private religious exercise." *Cutter v. Wilkinson*, 544 U.S. 709, 720–21 (2005). Yet because of the strong protections of the First Amendment, prison officials may not "demand from inmates the same obeisance in the religious sphere that more rightfully they may require in other aspects of prison life." *Barnett v. Rodgers*, 410 F.2d 995, 1002 (D.C. Cir. 1969).

Especially vulnerable are religious minorities, because religious minorities in prison experience a disproportionately high level of faith-based discrimination. For example, in federal prisons, Muslims are significantly over-represented as grievers and litigants. *See Enforcing Religious Freedom in Prison*, U.S. Comm'n on Civil Rights Table 3.8, at 70; Table 4.1, at 82 (Sept. 2008) (noting that Muslims filed 42% of administrative remedy requests for accommodation from 1997-2008 and that Muslims litigated 29% of RLUIPA cases from 2001-2006). In 2008, Muslims constituted only 9.3% of federal prisoners, but brought the highest percentage of religious discrimination grievances, accounting for 26.3% of all grievances filed. *See id.*at Table 2.1 & 26. The Department of Justice also consistently reports a disproportionately high number of discriminatory incidents against Muslims and Jews in particular. *See* U.S. Dep't of Justice, *Update on the Justice Department's Enforcement of the Religious Land Use and Institutionalized Persons Act: 2010-2016*, at 4 (2016).

The concerning nature of this discrimination is compounded by the fact that religious minorities are over-represented in prison relative to the general population. For example, in 2013, the Federal Bureau of Prisons represented that 8.4% of the federal prison population self-identified their religion as "Muslim" and 3.1% as "Native American," while U.S. Census data placed the total number of Americans with those faiths at only .6% (for Muslims) and .1% (for Native American). Mona Chalabi, "Are Prisoners Less Likely to Be Atheists?", FiveThirtyEight (Mar. 12, 2015).[2] Accordingly, strong protections for religious practice are particularly important for members of religious minorities who are incarcerated.

C. Congress has taken action specifically to protect the religious liberty of prisoners.

Congress was concerned with exactly these difficulties in the religious lives of prisoners when it unanimously passed RLUIPA in 2000.[3] The Act's bipartisan co-sponsors noted that "[f]ar more than any other Americans, persons residing in institutions are subject to the authority of one or a few local officials. Institutional residents' right to practice their faith is at the mercy of those running the institution[.]" 146 Cong. Rec. S7774-01, S7775 (2000) (joint statement of RLUIPA co-sponsors Sen. Orrin Hatch and Sen. Edward Kennedy).

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[2] *Available at* https://fivethirtyeight.com/features/are-prisoners-less-likely-to-be-atheists/ (last accessed Aug. 1, 2021).

[3] Pub. L. 106-274, 114 Stat. 803 (2000), *codified at* 42 U.S.C. § 2000cc et seq.

RLUIPA's legislative history is replete with discussion of—and evidence for—the compelling need for religious protection among prisoners in state institutions. Some of these "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post hoc rationalizations"[4] included Michigan prisons prohibiting Chanukah candles,[5] Oklahoma prisons restricting the Catholic use of sacramental wine for celebration of Mass,[6] and prison policies banning jewelry that prevented prisoners from wearing a cross or Star of David.[7]

All three branches of government have recognized that RLUIPA's purpose is to protect the freedom of religion to the greatest extent possible. RLUIPA itself directs that its provisions "shall 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). RLUIPA's sponsors noted that the bill was part of a tradition of Congressional action "to protect the civil rights of institutionalized persons." 146 Cong. Rec. S7774-01, S7775 (statement of Sens.

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[4] 146 Cong. Rec. S7774-01, S7775 (statement of Sens. Hatch & Kennedy) (quoting S. Rep. No. 103-111, at 10 (1993)).
[5] *Hearing on Protecting Religious Freedom After* Boerne v. Flores *before the Subcomm. on the Constitution of the H. Committee on the Judiciary*, 105th Cong., 2d Sess., Pt. 3, at 41 (1998) (statement of Isaac M. Jaroslawicz).
[6] *See id.*, Pt. 2, at 58-59 (statement of Donald W. Brooks)
[7] z *Hearing before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 105th Congress, 1st Session 86 (July 14, 1997) (testimony of Prof. Douglas Laycock).

Hatch & Kennedy). In signing the Act, President Clinton issued a signing statement saying that "[r]eligious liberty is a constitutional value of the highest order" and that RLUIPA "recognizes the importance the free exercise of religion plays in our democratic society." Presidential Statement on Signing The Religious Land Use and Institutionalized Persons Act of 2000, 36 Comp. Pres. Doc. 2168 (September 22, 2000). A unanimous Supreme Court acknowledged RLUIPA as "the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens." *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005).

II. The Panel Opinion Cannot Be Reconciled With Federal Law's Tradition of Religious Liberty.

The framework of federal law laid out above places a duty on this Court to interpret statutes in such a way that they do not obstruct the clear duty to religious freedom. Mr. Daker's claims are exactly the sort of religious practice that federal law is designed to protect. While federal law protects even idiosyncratic expressions of religious belief, Mr. Daker's belief that Islam requires him to maintain a beard is shared by millions of Muslims worldwide. *See generally,* Br. of Islamic Law Scholars As Amici Curiae in Support of Pet., *Holt v. Hobbs*, No. 13-6827, 2014 WL 2465964 (U.S., May 29, 2014) (discussing sources in Islamic religious texts for widespread belief that Islam requires men to grow beards). No one has challenged Mr. Daker's long-standing status as an observant Muslim or the sincerity of Mr. Daker's belief that his religion requires him to grow a beard.

Prison officials also commonly overreach in their attempts to restrict beard growth in prison. Examples of prison grooming policies found to violate RLUIPA are numerous. *See, e.g.*, *Holt v. Hobbs*, 574 U.S. 352, 369 (2015); *Ware v. La. Dep't of Corr.*, 866 F.3d 263, 274 (5th Cir. 2017); *Couch v. Jabe*, 679 F.3d 197, 204 (4th Cir. 2012). Given Mr. Daker's credible claims that his religious expression has been and is being violently curtailed by prison officials, this case is especially appropriate to advance to the merits stage.

The clear mandate of federal law and the credible nature of Mr. Daker's challenge placed the district court and this Court under a duty not to erect unnecessary barriers to Mr. Daker's lawsuit. Yet, by inventing new procedural bars to prisoner suits in the PLRA, the Panel Opinion does just that. The Panel Opinion's construction of the PLRA's provision barring "frivolous or malicious" cases misreads the statute twice: first by including the word "duplicative," which is not present, and second by interpreting this phantom "duplicative" to encompass cases challenging different events. The Panel Opinion also contorts the PLRA's exemption from the PLRA's three-strikes bar for "imminent danger" to exclude situations in which a prisoner has demonstrated a pattern of statistically increased exposure to a disease.

The error in this statutory construction is manifest. But even if the PLRA were ambiguous in its application to these facts, an interpretation of federal law that bars

a valid challenge to religious discrimination like this one would betray both Congress's clear mandate and the proud tradition of religious freedom on which the United States is built. To correct this error, this Court must grant Mr. Daker's petition for rehearing, vacate the panel opinion, and reverse the district court's dismissal of Mr. Daker's case.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Daker's petition for rehearing and vacate the panel opinion in order to reverse the district court's dismissal of Mr. Daker's case.

Dated: August 2, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify on this 2nd day of August, 2021, that:

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A), because it contains 2007 words, excluding the sections exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief was prepared on a computer, using Microsoft Word, in Times New Roman (proportionally spaced) typeface with serifs, 14-point type, and double-spaced.

/s/ Matthew W. Callahan

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August 2021, a true and correct copy of the foregoing **BRIEF OF *AMICUS CURIAE* MUSLIM ADVOCATES IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*** was electronically filed with the Clerk of Court using the Court's CM/ECF system, which will send notification to all counsel of record that this document has been filed and is available for viewing and downloading.

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