NO. 19-7199

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ERIC DEPAOLA,

Plaintiff-Appellant,

v.

HAROLD W. CLARKE, *et al.*,

Defendants - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF *AMICUS CURIAE* MUSLIM ADVOCATES IN SUPPORT OF PLAINTIFF-APPELLANT AND FOR REVERSAL OF THE DISTRICT COURT

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IDENTITY AND INTERESTS OF *AMICI 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 fighting religious discrimination against vulnerable communities.

Amicus file this brief with the consent of all parties.

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

Federal law demands that courts and prison officials afford the highest respect to the religious practice of prisoners, permitting only those restrictions absolutely necessary to the functioning of the prison. By denying Plaintiff's summary judgment motion in the case below, the district court improperly denied Plaintiff and his religious practice the dignity to which they were entitled under the law.

Plaintiff Eric DePaola is a Muslim man incarcerated in Red Onion State Prison operated by the Virginia Department of Corrections ("VDOC"). Mr. DePaola, like many Muslims, is required by his faith to grow a beard. VDOC policy requires that beards be kept groomed, though the only approved manner of grooming beards is through prison-provided barber services. When the prison's provision of barber services became erratic, Mr. DePaola's beard grew beyond the length required by prison policy. Rather than offer a path to compliance, prison officials threw Mr. DePaola into segregation and placed him in a "step-down" program. As part of the incentives to comply with the program, Mr. DePaola was deprived of the opportunity to attend Jum'ah, the weekly communal service of Islam, which his faith requires him to attend. Faced with deprivation of his religion either way and in the face of strong compulsion by prison officials, Mr. DePaola made the difficult decision to shave his beard in violation of his faith.

Under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), passed by a unanimous Congress and expansively interpreted by a unanimous Supreme Court, prison officials are required to narrowly tailor any burdens on prisoners' religious activity to further a compelling government interest. 42 U.S.C. § 2000cc-1(a). The legislative history, text, and case law interpreting RLUIPA all lead to the same conclusion: Mr. DePaola has a right to freely exercise his religion, even while incarcerated, and this Court cannot uphold the district court's casual dismissal of his sincere religious beliefs as a "privilege" subject to the whims of prison officials. Accordingly, this Court must reverse the district court's denial of summary judgment to Plaintiff and remand the case for further proceedings.

ARGUMENT

I. Federal Law Has Long Recognized the Vitally Important Role Religion Plays in the Lives of Many Americans, Including 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). As Justice Murphy noted, "nothing enjoys a higher estate in our society than the right given by the First and Fourteenth Amendments freely to practice and proclaim one's religious convictions." *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943) (Murphy, J., concurring). 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).

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)).[1] 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). 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). But because of the strong protections of the First Amendment, prison officials may not "demand from

[1] *See also Turner v. Safley*, 482 U.S. 78, 84 (1987) ("[F]ederal courts must take cognizance of the valid constitutional claims of prison inmates."); *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) ("[R]easonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty.").

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).

This vulnerability is felt especially keenly by 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. 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 is particularly important for members of religious minorities who are incarcerated.

C. RLUIPA was designed 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).

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

[2] *Available at* https://fivethirtyeight.com/features/are-prisoners-less-likely-to-be-atheists/ (last accessed Mar. 1, 2018).
[3] Pub. L. 106-274, 114 Stat. 803 (2000), *codified at* 42 U.S.C. § 2000cc et seq.

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]

In RLUIPA, Congress addressed this threat to religious freedom by requiring that any substantial burden on a prisoner's religious exercise be the "least restrictive means of furthering [a] compelling government interest." 42 U.S.C. § 2000cc-1(a). This standard—also known as "strict scrutiny"—is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). By extending the protection of strict scrutiny to state prisoners, Congress clearly indicated an intent to go beyond the more permissive constitutional standard governing prisoner claims under the First Amendment.

All three branches of government have recognized RLUIPA's purpose is to protect the freedom of religion to the greatest extent possible. RLUIPA itself directs

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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).

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. Hatch & Kennedy).[8] 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).

Accordingly, federal courts have recognized the deep and searching nature of the inquiry that Congress mandated. *See Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015)

[8] RLUIPA's legislative record reflects that religious accommodation can be not only workable but even helpful to prison officials' rehabilitative goals by decreasing recidivism. *See Issues Relating to Religious Liberty Protection and Focusing on the Constitutionality of a Religious Protection Measure: Hearing Before the S. Comm. on the Judiciary*, 106 Cong. 14 (1999) (statement of Steven T. McFarland) (noting that "[r]eligion changes prisoners, cutting their recidivism rate by two-thirds"); 146 Cong. Rec. S7991-02 (statement of Sen. Strom Thurmond) ("[I]t is clear that religion benefits prisoners. It helps rehabilitate them, making them less likely to commit crime after they are released.").

(unanimous) (deference to prison officials "does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard."); *Gonzales v. O Centro Spirit Beneficente Uniao do Vegetal*, 546 U.S. 418, 436–37 (2006) (unanimous) (RFRA's compelling interest test requires "case-by-case" evaluations of accommodations); *Lovelace v. Lee*, 472 F.3d 174, 193 (4th Cir. 2006) ("The Act's laudable goal of providing greater religious liberty for prisoners will be thwarted unless those who run state prisons—wardens and superintendents acting in their official capacities—satisfy their statutory duty."). Because of the searching nature of this inquiry, it is error for a court "to assume that prison officials were justified in limiting appellant's free exercise rights simply because [a plaintiff] was in disciplinary confinement." *Young v. Coughlin*, 866 F.2d 567, 570 (2d Cir. 1989) (citing *LaReau v. MacDougall,* 473 F.2d 974, 979 n.9 (2d Cir. 1972)).

II. The District Court Failed to Correctly Apply Federal Law by Denying Summary Judgment to Plaintiff Below.

The framework of federal law laid out above placed a duty on the district court to accord Mr. DePaola's practice of his religion the highest regard and scrutinize closely any attempt by prison officials to restrict it. By denying Plaintiff's motion for summary judgment, the district court failed to perform its duty.

Nowhere is this failure more obvious than the district court's emphasis on the actions of Mr. DePaola, rather than the prison officials, in evaluating Mr. DePaola's presence in the step-down program. There is no question that Mr. DePaola's

religious beliefs required him to maintain a beard. Defendants implemented a policy that required him to shave that beard and, when they deemed that policy had been violated, they stripped Mr. DePaola of liberties pursuant to that policy. Whether Mr. DePaola could have taken other steps to mitigate his punishment is irrelevant if the policy itself is illegal, as the policy here is. That is why, for example, a prisoner who is deprived of a religious diet for disciplinary reasons can still press a cause of action for violation of his religious freedom, regardless of whether his prior actions could have avoided the deprivation. *See Lovelace*, 472 F.3d at 188–89. The burden is on the government to accommodate Mr. DePaola's religious practice and justify its burdens on that practice; not on Mr. DePaola to jump through whatever hoops prison officials can place between him and his religious exercise.

Further, VDOC officials deprived Mr. DePaola of the opportunity to attend Jum'ah prayers, even by video, as an incentive to comply with prison procedures. This was error. Jum'ah—the gathering of Muslims for group prayer on mid-day Friday—has been one of the central practices of Islam for centuries. *See* Br. of *Amici Curiae* Imam Abdullah Al-Amin, et al., Supporting Respondents, *O'Lone v. Shabazz*, No. 85-1722, 1987 WL 880917, at *18-38 (U.S. Jan. 30, 1987) (discussing extensively the religious history of Jum'ah in Islam, including its parallels to Christian mass and the Jewish sabbath). Attendance at group prayer is exactly the sort of sincere religious exercise that federal law aims to protect. *See Emp't Div.,*

Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990) (under the First Amendment, "the 'exercise of religion' often involves not only belief and profession but the performance of ... physical acts [such as] assembling with others for a worship service. . . ."); RLUIPA Hearing No. J-105-110 (1998) at 163 (testimony of Prof. Eisgruber) (noting that "meeting for prayer" is "obviously religious" and that any construction of RLUIPA that excluded it would be "fundamentally flawed").

Depriving prisoners of the "privilege" of these kinds of religious practices is "inconsistent with both RLUIPA's text and Congressional intent, as RLUIPA makes clear that inmates' *religious exercise is not a privilege, but a right.*" *Greenhill v. Clarke*, 944 F.3d 243, 251 (4th Cir. 2019) (emphasis in original). This Court has not hesitated to reverse lower courts that fail to properly apply RLUIPA, particularly when those courts fail to properly justify "a harsh and unyielding policy." *Wall v. Wade*, 741 F.3d 492, 503 n.16 (4th Cir. 2014) (policy that restricted group worship to prisoners with physical indicia of faith violated RLUIPA and First Amendment); *see also Lovelace*, 472 F.3d at 191-92 (4th Cir. 2006) (policy that restricted group worship for prisoners who violated the terms of their religious meal plan was not entitled to summary judgment under RLUIPA). The policy depriving Mr. DePaola of his attendance at Jum'ah is a sufficiently "harsh and unyielding" burden on his religious exercise that very few considerations could possibly justify it. The district

court's opinion, like the opinions in *Wall* and *Lovelace*, fails to provide any such justification.

In passing RLUIPA, Congress was concerned with prison officials needlessly restricting the religious practices of prisoners, and particularly prisoners who practice minority faiths like Mr. DePaola. To permit Defendants to discipline Mr. DePaola for his religious grooming practices and to deliberately deprive Mr. DePaola of the chance to participate in weekly group prayer in accordance with his sincerely held beliefs—in the name of rehabilitating him, when accommodations are readily available—betrays both Congress's clear mandate and the proud tradition of religious freedom on which the United States is built. Accordingly, this Court must act to reverse the district court's denial of summary judgment to Mr. DePaola.[9]

CONCLUSION

For the foregoing reasons, this Court should vacate the decision below, grant Mr. DePaola's motion for summary judgment, and remand to the district court for a calculation of damages.

[9] Appellant's Opening Brief carefully describes how Defendants' actions also violated Mr. DePaola's rights under the Free Exercise Clause as well as RLUIPA. Accordingly, those arguments are not repeated here.

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Respectfully submitted,

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