IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

LESTER J. SMITH,
Plaintiff-Appellee/Cross-Appellant,

v.

BRIAN OWENS,
Commissioner of GDOC in his official and individual capacities,
Defendant,

GREGORY DOZIER,
Commissioner of GDOC in his official and individual capacities,
Defendant-Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION
No. 5:12-cv-00026-WLS-CHW - W. Louis Sands, *Senior Judge*

BRIEF OF APPELLEE/CROSS-APPELLANT LESTER J. SMITH

J. Scott Ballenger
Sarah Shalf
Raymond Gans (Third Year Law Student)
Timothy Whittle (Third Year Law Student)
Appellate Litigation Clinic
UNIVERSITY OF VIRGINIA SCHOOL OF LAW
580 Massie Road
Charlottesville, VA 22903
202-701-4925
sballenger@law.virginia.edu

Counsel for Appellee/Cross-Appellant

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

Lester J. Smith v. Gregory Dozier
Appeal No. 19-13520-D

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO FED. R. APP. P. 26.1-1

Appellee/Cross-Appellant Smith certifies that, to the best of counsel's knowledge, the Certificate of Interested Persons filed with Appellant Timothy Ward's brief is complete.

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STATEMENT REGARDING ORAL ARGUMENT

Appellee/Cross-Appellant Lester James Smith agrees with the Georgia Department of Corrections in requesting oral argument in this case. The public has an interest in the vindication of Smith's statutory and constitutional rights, as do other inmates seeking protection for their substantially burdened religious and conscience rights. The district court's inadequate remedy will undermine the balance of interests established by Congress in the Religious Land Use and Institutionalized Persons Act. Because this appeal involves important legal questions and nuanced application of law to facts, this court will be aided by oral argument.

JURISDICTIONAL STATEMENT

Smith adopts GDOC's jurisdictional statement with the addition that he timely filed a notice of cross-appeal on September 16, 2019. Doc.255/1.

STATEMENT OF THE ISSUES

1. Whether the district court erred in refusing to grant a remedy that accommodates Smith's sincerely held religious belief that he must wear an untrimmed beard.

2. Whether the district court correctly held that GDOC's restrictive beard-length policy, which substantially burdened Smith's religious exercise, was not the least-restrictive means of pursuing the government's interests.

3. Whether the district court's injunction is consistent with RLUIPA and the Prison Litigation Reform Act.

INTRODUCTION

The Religious Land Use and Institutionalized Persons Act ("RLUIPA") prevents the government from enforcing any rule or policy in a way that substantially burdens an inmate's sincere religious beliefs, unless the government *proves* that the enforcement of the rule against that inmate is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc-1(a). This is the highest standard of justification known to the law—the same standard that a prison would need to meet in order to justify outright racial discrimination, involuntary sterilization of prisoners, or a viewpoint-discriminatory restriction on the opinions prisoners can peacefully express. Both houses of Congress passed RLUIPA unanimously[1] and declared that the statute "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) (emphasis added).

Appellee/Cross-Appellant Lester Smith ("Smith") is a Muslim inmate in the custody of the Georgia Department of Corrections ("GDOC") whose sincere religious beliefs require him to grow an untrimmed beard. GDOC restricts inmates'

[1] *See* https://www.congress.gov/bill/106th-congress/senate-bill/2869/actions.

beards to one-half inch and indiscriminately denies all requests for religious exceptions to that policy. At trial, Smith proved that the federal Bureau of Prisons ("BOP") and over three-fourths of state prison systems nationwide permit untrimmed beards, either for all prisoners or for those requiring a religious accommodation, without significant difficulty. The district court made factual findings that GDOC's half-inch beard policy is inconsistent and underinclusive, and it found that GDOC's various justifications for that policy are unpersuasive and too speculative to satisfy GDOC's heavy burden of proof under RLUIPA.

GDOC's attempts to relitigate the evidence in this Court do not demonstrate that any of the district court's findings are clearly erroneous. GDOC's claim to have been sandbagged by the district court's three-inch remedy is inconsistent with the record, which shows that both "fist-length" and three-inch alternatives were considered before and during trial—including by GDOC itself. Its argument that the district court failed to defer to the judgment of prison officials is flatly inconsistent with the Supreme Court's landmark decision in *Holt v. Hobbs*, 574 U.S. 352, 135 S. Ct. 853 (2015). And GDOC's contention that RLUIPA or the Prison Litigation Reform Act ("PLRA") forbid any injunction that extends beyond the plaintiff before the court also is inconsistent with Supreme Court authority. *See Brown v. Plata*, 563 U.S. 493 (2011). GDOC identifies no reversible error in the district court's findings

and conclusions, which merely hold GDOC to the heavy burden of justification that Congress has demanded before prisoners' religious liberty may be infringed.

The district court did err, however, in limiting the relief it ordered to three inches. The court reasoned that GDOC's refusal to permit at least three-inch beards was inconsistent and unjustifiable in light of its tolerance of three-inch head hair for male inmates, but that it was "plausible" that untrimmed beards could pose greater difficulties than three-inch beards would. RLUIPA calls for strict scrutiny, not compromise remedies or balancing of interests, and it imposes an "exceptionally demanding" burden of justification and proof on GDOC that cannot be met by speculative concerns. *Holt*, 135 S. Ct. at 864 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014)). In particular, GDOC bore the burden to supply "persuasive reasons" why it could not employ the same techniques and policies that have allowed so many prison systems nationwide to accommodate untrimmed beards. *Id.* at 866. GDOC utterly failed to meet that burden, as the district court's own findings demonstrate. GDOC also has never made any determination that Smith's exercise of religion must be restricted for reasons particular to him—and this record could not support such a limitation.

This Court should remand with instructions that the district court modify its injunction to require GDOC to allow for untrimmed beards, in order to accommodate the consciences of Smith and other inmates in his situation, as RLUIPA requires.

STATEMENT OF THE CASE

Smith is a devout Muslim who sincerely believes the tenets of Islam. Doc.243/3. His beliefs include the tenet that he may not shave his beard, *id.*, as well as the requirement that he maintain "neatness and cleanliness." Doc.243/10. Smith has consistently maintained that his faith requires him to grow an untrimmed beard, Doc.1, but, as the district court observed, Smith also recognized that some interpretations of Islam permit a "fist-length" beard as an alternative. Doc.243/17; Doc.181/31.

A. Pre-Trial Proceedings

Smith filed a grievance with GDOC requesting a religious accommodation to be able to grow an untrimmed beard. Doc.243/3; Doc.1; Doc.181/27. GDOC denied Smith's request because its policy prohibited inmates without a medical exemption from growing beards, and did not permit accommodations from that policy for religious reasons under RLUIPA. Doc.1; Doc.114-1/¶5. Smith then filed this lawsuit, alleging that GDOC's grooming policy substantially burdens the exercise of his sincerely held religious beliefs because he understands his Muslim faith to prevent him from shaving or cutting his beard. Doc.243/1; Doc.1.

Nearly two years after initiating his lawsuit, Smith suggested that a less restrictive "alternative for both parties" would be to revise GDOC's beard policy to permit prisoners to grow quarter-inch beards—relief he clearly should have been

entitled to, given GDOC's then-policy of permitting quarter-inch beards for some medical reasons. Doc.117-1/3; Doc.124/3. GDC did not accept this alternative. *See Smith v. Owens*, 848 F.3d 975, 978 n.5 (11th Cir. 2017).

After the district court granted GDOC's first motion for summary judgment in 2014, Smith appealed to this Court. Doc.125; Doc.129. While that appeal was pending, the Supreme Court decided *Holt v. Hobbs*, 135 S. Ct. 853 (2015). In the wake of *Holt*, GDOC modified its grooming policy to allow all inmates to grow beards one-half inch in length. Doc.183-2/¶32. GDOC then argued on appeal that Smith's claim to an untrimmed beard was moot because Smith, according to GDOC, had conceded that his religious beliefs require no more than a quarter-inch beard. Brief for Appellee at 12-13, *Smith v. Owens*, 848 F.3d 975 (11th Cir. 2017) (No. 14-10981).

This Court rejected GDOC's mootness argument. *Smith*, 848 F.3d at 978. It then vacated the district court's grant of summary judgment and remanded the case, instructing the district court to analyze Smith's RLUIPA claim pursuant to *Holt*. *Id.* at 981. Counsel was appointed and discovery proceeded. Doc.147; Doc.148

In his deposition, Smith explained that some Islamic teachings permit adherents to grow a fist-length beard if they cannot grow an untrimmed beard. Doc.181/31. Smith also explained that, under his religion, it is "preferable" to never trim one's beard but that, if he were forced to shave his beard for certain reasons,

such as a work requirement, his religious beliefs mandate that the beard be "[a]t least a fistful" in length. Doc.181/26.

After discovery, Smith and GDOC both filed motions for summary judgment. Doc.177-1; Doc.183-1. Both parties' motions were denied. Doc.213. The case then proceeded to a two-day bench trial. Doc.235; Doc.236.

GDOC admitted that its policy places a substantial burden on Smith's religious exercise. Doc.243/4. GDOC argued that it could not allow any religious exemption beyond its general policy of half-inch beards, however, because of concerns over safety, security, uniformity, minimizing the flow of contraband, identification of inmates, hygiene, and cost. Doc.243/4. GDOC's witnesses were Ahmed Holt ("Holt"),[2] its Deputy Director of Field Operations, Doc.243/6, and its expert Ronald Angelone ("Angelone"), a former Director of the Virginia Department of Corrections, Doc.236/10, who also worked in prisons in Illinois, Oklahoma, Texas, and Nevada. Doc.243/5. Smith called his rebuttal expert John Clark ("Clark"), a former administrator with the Federal Bureau of Prisons, who worked at six federal prisons over a 44-year career in corrections. Doc.243/6.

B. The District Court's Factual Findings

[2] This witness bears no known relation to petitioner Gregory Holt in *Holt v. Hobbs*.

After trial the district court issued lengthy findings and conclusions. The following summarizes the court's factual conclusions, and supporting evidence, on several key issues.

The policies of other states

The district court found that "Georgia is among a small minority of states that restricts beards to one half-inch or less and does not allow any religious exemptions." Doc.243/3. The evidence established that, at the time of Smith's trial, 37 states, the District of Columbia, and the BOP all allowed inmates to grow beards without any length restriction, either by their standard policy or through an exemption. Doc.243/3, 10 (citing Doc.236/162-63; Doc.176/2; Doc.213/13). The BOP allows inmates to grow their head and beard hair to any length. Doc.243/3. The number of states permitting untrimmed beards has increased since the trial as the Virginia Department of Corrections—the very department in which GDOC expert witness Angelone implemented a prohibition on beards when he served as Department Director, Doc.236/33[3]—recently changed its policy to allow prisoners to grow untrimmed beards. *See Greenhill v. Clarke*, 944 F.3d 243, 248 (4th Cir. 2019).

The district court found that "[n]otwithstanding GDOC's numerous assertions that beards lead to more violence, contraband smuggling, and security issues, GDOC

[3] Inmates who refused to comply with the policy implemented by Angelone were placed in restricted housing. Doc.236/30.

offered no evidence showing that states that allow beards experience more of these issues." Doc.243/14 (citations omitted).

Smith's expert witness Clark testified that he worked with "the most dangerous prisoners in the federal prison system" during his time at the BOP, yet "it just didn't come up, that beards presented a safety problem." Doc.236/120. Clark also testified that he has "no memory" of beards creating security issues. Doc.236/140. Clark elaborated that there is "a wonderful kind of grapevine network within the corrections world" and stated that prison officials across the country communicate their security successes and failures to each other without fear of sharing what Angelone called their "dirty laundry"—a concern Clark describes as being "totally contrary to [his] experience." Doc.236/54, 126-27.

GDOC also failed to identify any material difference between its operations and the operations of prison systems that successfully accommodate untrimmed beards. Holt "ha[d] no information on the percentage of violent inmates in other prison systems, gang membership in other prison systems, or inmates serving a life sentence in other prison systems." Doc.243/14 (citing Doc.235/146-48). Holt testified that he was unaware of any reason why hygiene issues would be worse in Georgia prisons than other prisons, and he acknowledged that he "would imagine" that other prison systems have similar problems with gangs, violence, contraband, and jealousy. Doc.235/117–18, 146.

Angelone similarly testified that although he did not know the exact percentages of violent offenders in different prison systems, he guessed that the percentage in "a lot of the states might come close to" Georgia's percentage. Doc.236/83. He also testified that "[t]here is nothing different between" Georgia and other Southern states that permit untrimmed beards in prison. Doc.236/80-81. When pressed to explain what makes Georgia different than those states that have successfully accommodated untrimmed beards, Angelone testified only that it is "the administration's choice that this is the way they want to run their institutional system to be healthy and safe." Doc.236/81.

In contrast, Clark testified that "in comparison with the [BOP], [GDOC's inmate to staff ratio is] about the same. [GDOC is] staffed just slightly better than the [BOP]." Doc.236/133 (noting that GDOC's inmate-to-staff ratio is "about four to one" and that BOP's ratio is "more like 4.3 to 1"). He testified that "both Georgia and the [BOP] are right about in the middle" of prison systems nationwide in terms of inmate-to-staff ratio. Doc.236/134. He also testified that he does not "think there's probably a huge difference in terms of general violence between" BOP's inmate population and GDOC's inmate population. Doc.236/135.

Ultimately, the district court concluded that GDOC "has not even attempted to determine how other states manage inmates with beards." Doc.243/14 (citing Doc.235/148).

Concerns about contraband

Angelone testified that when he was in Virginia officers had found a variety of contraband, including handcuff keys and drugs, hidden in inmates' beards. Doc.236/27. Although Holt stated that GDOC's contraband issues are "leveling off," Doc.235/121, he also testified that GDOC has found handcuff keys in an inmate's beard. Doc.235/45. Holt testified that nonetheless "there is no major need" to conduct routine beard searches and that beards are not part of GDOC's regular search process. Doc. 235/153.

Clark testified that he was "shocked" to hear Holt's testimony that GDOC does not conduct searches of inmates' beards and that he "understood why" GDOC inmates would hide contraband in beards if the beards are not searched. Doc. 236/124-25. He explained that inmates "tend to hide things where they think they're going to be safest," and that the BOP has not experienced problems with contraband hidden in beards because the beards are searched routinely. Doc.236/125, 178. Searches are a "great deterrent," Clark explained, and as a result "inmates are going to put their contraband somewhere else." Doc.243/8 (citing Doc.236/125). Clark also described the search method used by the BOP, as well as most other prison systems

and law enforcement agencies nationwide, for beards. The prisoner is required to "vigorously frisk" his own beard, as well as twist it from side to side and lift it up for inspection. Doc.234/6 (citing Doc.236/117). Clark explained that the self-search method works with untrimmed beards, is used "every time a police department or any other law enforcement agency arrests somebody or books somebody" with a beard, is "so common . . . that it's being portrayed on TV dramas," and takes "maybe three seconds." Doc.236/117-19; *see also* Doc.243/6-7.

GDOC's witness Holt conceded that there is nothing unique about beards as a potential hiding place for contraband—that inmates hide contraband "[e]verywhere … in their clothing, in their hair, under their arms, in their orifices, … inside their dorms, … under their beds and behind toilets, … in the window seals …" Doc.243/7 (quoting Doc.235/51). Angelone confirmed "that contraband in beards does not present different risks or dangers than contraband in clothes—'[t]hey're all the same.'" Doc.243/8 (quoting Doc.236/44).

The district court credited Clark's testimony and found that GDOC "has not shown that its concerns about contraband in beards cannot be addressed by simply searching beards." Doc.243/8. The district court further found that GDOC's "grooming policy on its face is underinclusive" because the same concerns about inmates hiding contraband "would exist regardless of whether an inmate has a beard." Doc.243/6.

Concerns about safety and violence

GDOC's witnesses expressed concerns about the potential that a beard could be grabbed and cause injury to an inmate. *See* Doc.243/8. But Holt "provide[d] no basis for this opinion," *id.*, and Angelone conceded that he had no statistical evidence showing more incidents of violence in prisons that allow prisoners to grow beards, Doc.236/78-79.

Clark testified that "in the real world" the prison systems that permit untrimmed beards have experienced no difficulties with violence or safety, Doc.243/8 (quoting Doc.236/121-22), and that the length of an inmate's beard has nothing to do with whether or not the beard is dangerous, Doc.236/138-39. Clark also cited "studies that showed" that encouraging and assisting prisoners to practice their religion yields good results "in terms of self-development and recidivism" and "also makes prisons easier to manage," and he testified that allowing "people with a sincerely held religious belief . . . to grow an untrimmed beard" would "enhance the prison safety and general management." Doc.236/141-42. Clark's testimony was grounded in his experience working in prisons that permitted untrimmed beards, including as the warden of federal prisons that "had the most dangerous prisoners in the federal prison system," some of whom "have killed [prison] staff and who have killed inmates." Doc.236/120, 139-40.

The district court credited Clark's testimony, finding that "it could very well be that GDOC's interests in prison safety and security would be furthered if it allows *longer* beards." Doc.243/14 (emphasis added). The district court also noted again that GDOC's policy appeared to be underinclusive because "[b]eards do not appear to present any more of a problem than longer head hair or clothes." Doc.243/10 (citing *Holt*, 135 S. Ct. at 865); *see also* Doc.243/8 (finding that "if long hair is dangerous in this way, then it would be at least as dangerous for female inmates who can grow their head hair to any length and prison staff, who are allowed beards.")

GDOC's witnesses also expressed concerns for the safety of guards who might have to search beards. Doc.243/5. The district court found that those concerns were misplaced because, again, the record evidence "does not indicate that guards would have to physically search inmates' beards face-to-face and expose themselves to being struck." *Id.* To the contrary, the district court found that "GDOC has offered no logical explanation as to why it could not use the method currently employed by BOP and other states for searching a beard," and that "the record shows that officers should use the safest method of searching, which is to require a vigorous self-search" as described by Clark. Doc.243/12, 7. The district court concluded that the evidence "persuasively indicates that officers do not have to put themselves in danger to effectively search a beard as implied by GDOC." Doc.243/7.

Concerns about inmate identification

Angelone testified that facial hair can facilitate an escape if a previously bearded inmate shaves in order to alter his appearance. *See* Doc.243/12. Angelone further "hypothesized that taking photos when an inmate's appearance changes would be expensive and that there would be no place to store them." *Id.*

The district court recognized that the Supreme Court had rejected a very similar argument in *Holt.* Doc.243/13 (citing *Holt*, 135 S. Ct. at 858). The court also found that GDOC policy already requires that inmates' photos be taken annually and whenever an inmate's appearance changes, and that those photos are stored digitally. Doc.243/12 (citing Doc.235/142-43; Doc. 183-22/68-69). "Thus it appears that GDOC's concerns about identifying inmates could be addressed by enforcing the policy that GDOC already has and making improvements." Doc.243/13. The district court credited Clark's testimony that similar policies have been "'successfully implemented around the country,'" *id.* (quoting Doc.236/115), and noted that even if GDOC made inmates shave periodically to take a new clean-shaven photograph, that would still be "a less restrictive alternative than the current policy prohibiting beards longer than a half-inch," *id.* (citing *Holt*, 135 S. Ct. at 858).

Holt also conceded that inmates are allowed to change their appearances in a variety of different ways that are not addressed by GDOC policies. Doc.235/144-45.

Concerns about jealousy, gang affiliation, and hygiene

Holt testified that longer beards will be a source of jealousy if some inmates are allowed to have them as a religious accommodation. Doc.243/8 (citing Doc.235/62). The district court found that Holt's testimony was "pure conjecture" because GDOC has no actual experience with longer beards, and that "[p]reventing hypothetical inmate jealousy hardly seems compelling." Doc.243/9. The district court also noted that a similar concern could be raised about *any* religious accommodation or even about "rewards for a clean dorm." *Id.* (citing Doc. 235/61-62, 73, 139). The court credited Clark's testimony by finding that allowing beards for religious reasons would not cause "violent jealousy." Doc.243/9 (citing Doc.236/129-30).

At trial (as in this Court) GDOC repeatedly raised a concern that Muslim prisoners act like a gang[4] and that beards will make it easier for them to identify with each other. Doc.243/2, 9. The district court found that those concerns were both implausible and underinclusive because Muslim inmates are freely allowed to wear kufis. Doc.243/9 (citing Doc. 235/131). Furthermore, the district court found that Muslim self-identification "may not be as important" to Muslim inmates "as GDOC

[4] GDOC compares Muslim inmates to gang members despite the fact that Islam is not a "security threat group." Doc.235/130. Furthermore, Smith is not a validated security threat group member. *Id.* "Security threat group" is the formal term for "gang" used by GDOC. Doc.235/27.

implies" since not all Muslim inmates choose to wear kufis, and those who do choose to wear kufis do not wear them at all times. Doc.243/9 (citing Doc. 235/111).

GDOC argued at trial that beards could present hygiene issues and conceal medical problems. Doc.235/72; Doc.236/25, 29, 63. But Holt testified that hygiene issues are not unique to beards. Doc. 235/116. The district court found that head hair presents exactly the same issues, that GDOC had explained how those issues are managed, and that any similar issues presented by beards could be managed in the same ways. Doc.243/9-10. The district court accordingly found that GDOC's ban on beards longer than one-half inch is both underinclusive and not "the least restrictive means of furthering its compelling interests in hygiene, especially as applied to Smith"—who testified in his deposition that "'neatness and cleanliness is another tenet of [his] religion.'" Doc.243/10 (citing Doc.183-22/6; Doc.183-3/25).

Concerns about Smith individually

GDOC presented evidence, and the district court found, that Smith is a close security inmate who "has been found guilty of numerous disciplinary offenses." Doc.243/2. But GDOC did not conduct any individualized assessment of Smith's dangerousness or eligibility for a beard accommodation, since its blanket policy has been to refuse *all* requests for a beard longer than one-half inch. Doc.235/109, 111. GDOC admitted that "there is no process by which an inmate can request consideration for a religious exception to the grooming policy that might result in

some inmates being allowed to grow an untrimmed beard for religious reasons." Doc.177-5/2. The record also shows that Smith's most recent physical altercation at the time of the trial was September 20, 2012, over seven years ago and before GDOC began permitting half-inch beards. Doc. 235/114-15.

Both of GDOC's witnesses acknowledged that the disciplinary process can and should be used to resolve instances of impermissible beard uses by inmates. Doc.235/135-36; Doc.236/37-38. Clark also testified that, based on his experience working in prisons with violent and dangerous offenders, a prison can "apply a restriction to a beard . . . if there was a beard-related disciplinary problem, not a general disciplinary problem." Doc.236/166.

Potential alternative accommodations

The district court found as a fact that Smith "has a sincere belief in the tenets of Islam, including the tenet that he not trim his beard and that, if he must trim it, to maintain at least a fistful of beard hair." Doc.243/3 (citing Doc.183-3/25). The primary focus of the trial was whether any compelling state interest identified by GDOC genuinely required it to refuse Smith's preferred remedy of an untrimmed beard.

However, the alternatives of three inches or fist-length were discussed numerous times before trial—including affirmatively by GDOC. In GDOC's brief in support of its motion for summary judgment, GDOC argued that Smith would

refuse to comply "should a certain beard length, such as fist-length, be permitted." Doc.183-1/26. Citing Smith's deposition, GDOC's statement of material facts attached to its motion for summary judgment states that "Smith believes that Muslims can trim their beards after having a fistful in length for legitimate reasons." Doc.183-2/¶29. And the magistrate's report and recommendation recommending denial of summary judgment identified both three inches and a "fistful" as possible alternative remedies. Doc.209/5. In its objections to that report and recommendation, GDOC asserted that neither "a three inch beard" nor one "a fistful in length" were feasible remedies for Smith. Doc.210/14-15.

Accordingly, there was significant discussion at trial of GDOC's policy for head hair, which permits male inmates to grow three inches of hair and female inmates to grow hair of any length. Doc.243/3. At trial, GDOC's counsel asked Holt: "Does GD[O]C have concerns with beards that may be limited to three or four inches?" Doc.235/78. That was the only question GDOC's counsel asked about any specific beard length. Smith's counsel asked Angelone a line of questions beginning with a question about GDOC's three-inch head-hair policy and culminating with: "So if someone had three inches of hair on their beard, it could be used but it wouldn't be as dangerous, correct?" Doc.236/70-71. GDOC's Proposed Findings of Fact and Conclusions of Law also proposed a finding that "[t]hree inches of head hair is different than untrimmed beards." Doc.240/12.

C. The District Court's Legal Conclusions

The district court held that GDOC's policy forbidding all beards longer than a half-inch was "inconsistent and underinclusive" and not the least restrictive means of pursuing any of the compelling interests GDOC had identified. Doc.243/5-10. The court rejected much of GDOC's evidence as "speculative" and "pure conjecture," and even concluded that "it could very well be that GDOC's interests in prison safety and security would be furthered if it allows *longer* beards." Doc.243/8, 9, 14 (emphasis added). Accordingly, it found GDOC's half-inch beard policy violates RLUIPA.

Nonetheless, the district court limited its remedy by requiring GDOC to permit beards of up to only three inches. The court found that "Smith has testified that although it is preferable in his religion not to trim his beard, he must maintain 'at least no minimum than a fistful… to be able to grab a fistful of [] beard,'" Doc.243/17 (quoting Doc.183-3/25), and that "case law indicates that between three and four inches" is an appropriate estimation of fist-length, Doc.243/17 (citations omitted).

To explain its choice of remedy, the district court reasoned that "[w]hile three inches of head hair is manageable, it is plausible that a beard of unlimited length could be much more difficult for GDOC to manage" given "its ability to be used to cause harm in the more violent male facilities, its ability to hide contraband more

easily, the added difficulty in searching an untrimmed beard, and its ability to disguise a face." Doc.243/11. The district court concluded that "'with due deference to the experience and expertise of prison and jail administrators,'" GDOC had offered "persuasive reasons why it cannot allow untrimmed beards at this time for which deference is due." Doc.243/11 (quoting *Knight v. Thompson*, 797 F.3d 934, 944 (11th Cir. 2015) ("*Knight II*")). It then stated that "the same reasons are not nearly as persuasive when applied to a three-inch beard," without identifying what those "persuasive reasons" *are*. Doc.243/11. Indeed the district court immediately reiterated its prior finding that "GDOC has offered no logical explanation as to why it could not use the method currently employed by BOP and other states for searching a beard"—a method that BOP and those states use for untrimmed beards, and that the district court had already found would eliminate any need for officers to search inmates face-to-face. Doc.243/5, 12. The court reasoned that identification concerns "may be presented by an untrimmed, belt-buckle-length beard," and noted that "three inches of beard hair is distinct from an untrimmed beard" in that it "cannot be easily grabbed, it can be safely searched, it can be periodically shaven to address inmate identification concerns, and it can be regularly cut to detect hygiene issues." Doc.243/12-13. But the court did not identify any evidence that untrimmed beards present meaningfully different risks. Instead the court actually reiterated its findings that all these issues can be mitigated with appropriate search and photography

practices, that "GDOC offered no evidence showing that states that allow beards experience more of these issues," and that "it could very well be that GDOC's interests in prison safety and security would be furthered if it allows longer beards." Doc.243/14.

The district court then turned to an analysis of GDOC's argument "that Smith's criminal history and disciplinary issues while incarcerated may be grounds to deny him an exemption." Doc.243/15. The court acknowledged that "[i]t is plausible that allowing a close security inmate like Smith an untrimmed beard could be dangerous for prison security," but concluded that "GDOC's argument is unpersuasive in the context of allowing a three-inch beard because GDOC has presented little evidence that a three-inch beard is a significant security concern, and it already allows three-inch head hair." Doc.243/15. The court also held that GDOC could address its concerns by "enforc[ing], and amend[ing] if necessary, the disciplinary policies it has for rules violations" in light of the court's finding, based on Clark's testimony, that "if prisoners violate rules with their facial hair, GDOC should not allow it." Doc.243/16 (citing Doc.236/128-29).

D. The District Court's Injunction

The district court held that a permanent injunction requiring Georgia to accommodate three-inch beards would serve the public interest and is narrowly drawn to correct the violation of Smith's right to grow a beard consistent with

RLUIPA. Doc.243/17. The injunction allows GDOC's blanket policy to remain in place as modified to permit three-inch beards for prisoners who qualify for a religious exemption, "subject to revocation based on the inmate's behavior and compliance with the revised grooming policy." Doc.243/18.

E. Proceedings On The Stay

The district court denied GDOC's motion for a stay, holding that it "cannot find that Defendant has a substantial likelihood of success on the merits." Doc.264/1, 3. It emphasized that GDOC "did have advanced notice that a beard length shorter than an untrimmed beard was at issue, and [it] was provided a fair opportunity to defend against this alternative remedy." Doc.264/4.

The district court further clarified that its holding had been that GDOC's blanket policy "itself violates RLUIPA" as applied to prisoners with a sincere religious need to grow a beard, not merely that the policy "is being unconstitutionally applied to [Smith]." Doc.264/6. The court reminded GDOC that "the public interest is served by GDOC having a policy in place that comports with RLUIPA." Doc.264/7 (citing *Democratic Exec. Comm. Fla. v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019)).

GDOC then moved this Court to stay the district court's order pending resolution of this appeal. Appellant's Motion for Stay, Nov. 15, 2019. This Court denied the stay as to Smith but granted the stay as to the requirement that GDOC

issue a statewide change to its grooming policy. Order, Dec. 27, 2019. A majority of the panel held that GDOC had shown a substantial case on the merits that: (1) the relief "extends further than necessary to correct the violation of Smith's federal rights, contrary to the Prison Litigation Reform Act" and (2) GDOC was "not given notice and a full opportunity to refute that the district court's mandated three-inch beard policy was not the least restrictive means of furthering the compelling state interests. . . ." *Id.* at 2.

Judge Robin Rosenbaum would have denied the stay "because Appellant has not demonstrated a substantial case on the merits on this record," particularly when "federal prisons allow untrimmed beards." Order, Dec. 27, 2019 (Rosenbaum, J., concurring in part and dissenting in part).

SUMMARY OF ARGUMENT

An appropriate application of the governing law to the district court's factual findings would have granted Smith a right to an untrimmed beard, not a remedy limited to three inches. GDOC was unable to explain why it must take a different course from 37 states, the District of Columbia, and the Federal BOP, all of which either allow untrimmed beards for all inmates or as a religious accommodation. "[W]hen so many prisons offer an accommodation, a prison *must, at a minimum*, offer persuasive reasons why it believes that it must take a different course." *Holt*, 135 S. Ct. at 866 (emphasis added). GDOC's failure to persuasively distinguish itself

from the prison systems that successfully accommodate untrimmed beards—a strong majority nationwide—is dispositive.

The district court systematically and correctly *rejected* the evidence that GDOC offered to show that untrimmed beards would present insoluble problems with contraband, safety, identification, hygiene, or anything else. Thus, the district court's conclusion that it was "plausible" that untrimmed beards might present more significant challenges than three-inch beards is not sufficient to satisfy GDOC's burden under RLUIPA.

Nothing about Smith's personal situation or history justifies any limitation on the relief to which he is entitled. RLUIPA does not permit prison officials to deny accommodations based on overbroad generalizations and stereotypes. As the Supreme Court explained in *Holt*, "an institution might be entitled to withdraw an accommodation if the claimant abuses the exemption in a manner that undermines the prison's compelling interests." 135 S. Ct. at 867.

At a minimum, the district court's injunction requiring GDOC to permit three-inch beards should be affirmed. GDOC's policy of denying any religious accommodation clearly violates RLUIPA, and its argument that the district court failed to give sufficient deference to the judgment of prison officials is inconsistent with the Supreme Court's leading precedent. In *Holt*, the Court explained that "RLUIPA . . . does not permit such unquestioning deference," and that officials'

particular expertise or familiarity with their own institutions "does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard," which "demands much more" than deferring to "prison officials' mere say-so." 135 S. Ct. at 864, 866.

GDOC argues on appeal that it somehow was unfairly surprised by the relief the district court ordered. Three inches and fist-length were obvious alternatives given Smith's deposition testimony and GDOC's three-inch policy for head hair, and both were discussed throughout the litigation—including in GDOC's own questions and filings. GDOC's argument also transparently seeks to impose a Hobson's choice: either Smith must make a positive case for various insufficient and second-best alternatives and thereby invite arguments that the full requested relief is unnecessary, or forfeit the right to *any* accommodation by holding firm to what his religious beliefs actually require.

Finally, the district court's injunction requiring GDOC to change its grooming policy for all similarly situated prisoners satisfies the requirements of both RLUIPA and the PLRA. It correctly holds that GDOC failed to justify any blanket ban on beards shorter than three inches, but expressly permits GDOC to revoke beard privileges "based on the inmate's behavior and compliance with the revised grooming policy." Doc.243/18. A rule that no injunction can require corrections officials to change a general policy, despite a binding adjudication that the policy is

unlawful, also would perversely hinder rather than promote "the purpose of the PLRA to reduce the quantity of inmate suits." *Jones v. Bock*, 549 U.S. 199, 223 (2007).

STANDARD OF REVIEW

A district court's legal conclusions are reviewed de novo, while its factual determinations are reviewed for clear error. *Knight II*, 797 F.3d at 942. A factual finding is clearly erroneous "if the record lacks substantial evidence to support it or [the court is] otherwise left with the impression it is not the truth and right of the case—a definite and firm conviction that a mistake has been committed." *Id.* (internal quotation marks omitted).

ARGUMENT

Section 3 of RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise" of an institutionalized person unless the government demonstrates 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." 42 U.S.C. § 2000cc–1(a). That standard is "'exceptionally demanding'" and requires the government to "'sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y].'" *Holt*, 135 S. Ct. at 864 (citation omitted). Courts should "respect t[he] expertise" of prison

officials, but RLUIPA "does not permit … unquestioning deference" to their views or allow judges to "abdicat[e] the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard." *Id.*

Under a correct application of those principles, GDOC failed to justify its restriction of Smith's religious liberty. The district court correctly enjoined GDOC from enforcing its grooming policy against inmates with a religious need to grow beards, and indeed should have awarded the full relief Smith requested.

I. SMITH ESTABLISHED A RIGHT TO AN UNTRIMMED BEARD, NOT ONE LIMITED TO THREE INCHES.

The district court found that GDOC's half-inch beard policy is "inconsistent and underinclusive," rejected much of GDOC's evidence as "speculative" and "pure conjecture," and even concluded that "it could very well be that GDOC's interests in prison safety and security would be furthered if it allows *longer* beards." Doc.243/5, 8, 9, 14 (emphasis added). Nonetheless, the district court limited the scope of its remedy by requiring GDOC to permit beards of up to only three inches, finding it "*plausible* that a beard of unlimited length could be much more difficult for GDOC to manage" and that three-inch beards are "a reasonable less restrictive alternative of furthering GDOC's compelling interests." Doc.243/11, 17 (emphasis added).

In a case where religious liberty and security are purportedly competing, it is understandable that a judge might seek a compromise remedy. But the wisdom of

King Solomon rested in recognizing that splitting the baby is neither wise nor just. *1 Kings 3:16-28*. Determinations that permitting three-inch beards is "a less restrictive" alternative and that untrimmed beards present "plausible" management problems are facially insufficient under RLUIPA. The statute requires GDOC to prove, with evidence, that its rules substantially burdening sincere religious belief are *the least* restrictive means to serve genuinely compelling interests. GDOC failed to carry that burden. To the contrary, the record establishes that GDOC can accommodate religious exemptions for untrimmed beards, subject to individualized revocations of that privilege if it is abused.

A. GDOC Failed to Prove Any "Persuasive Reason" Why It Cannot Permit Untrimmed Beards When Most Prison Systems Do.

Although the practices of other jurisdictions alone are not dispositive, if a "vast majority" of prison systems allow a particular religious exemption, it "suggests that the Department could satisfy its [interests] through a means less restrictive than denying" that exemption. *Holt*, 135 S. Ct. at 866. "[W]hen so many prisons offer an accommodation, a prison *must, at a minimum*, offer persuasive reasons why it believes that it must take a different course." *Id.* (emphasis added). GDOC has offered no such persuasive reasons.

The district court found that, at the time of trial, 37 states, the District of Columbia, and the BOP allowed inmates to grow untrimmed beards either as a matter of standard policy or through an exemption. Doc.243/3, 10. The number has

increased since trial as the Virginia Department of Corrections recently changed its policy to allow prisoners to grow untrimmed beards in the face of an RLUIPA lawsuit from a Muslim prisoner whose faith obligates him to grow his beard to fist-length, which he understands to be four inches. *See Greenhill*, 944 F.3d at 247-48. The district court found that "[n]otwithstanding GDOC's numerous assertions that beards lead to more violence, contraband smuggling, and security issues, GDOC offered no evidence showing that states that allow beards experience more of these issues." Doc.243/14 (citing Doc.236/78-79; Doc.235/149-50).

GDOC also failed to identify any material difference between its operations and the operations of prison systems that successfully accommodate untrimmed beards. The district court found that Holt "ha[d] no information on the percentage of violent inmates in other prison systems, gang membership in other prison systems, or inmates serving a life sentence in other prison systems." Doc.243/14 (citing Doc.235/146-48). Holt testified that he was unaware of any reason why hygiene issues would be worse in Georgia prisons, and acknowledged that other prison systems probably have similar problems with gangs, violence, contraband, and jealousy. *Supra* 9-10. The district court found that GDOC "has not even attempted to determine how other states manage inmates with beards." Doc.243/14 (citing Doc.235/148). Without making inquiries to prison systems that permit untrimmed

beards, it is difficult to imagine how GDOC could ever explain why it must take a different path than those prisons, as *Holt* requires.

Consistent with the district court's conclusions, Angelone guessed that the percentage of violent offenders in other prison systems might come close to GDOC's percentage. *Supra* 10. He also testified that there is nothing different between Georgia and Southern states that permit untrimmed beards. *Id*. When pressed to explain what makes Georgia different than those states that accommodate untrimmed beards, Angelone stated only that it is "the administration's choice that this is the way they want to run their institutional system to be healthy and safe." Doc.236/81.

Also supporting the district court's findings, Clark explained that GDOC's inmate-to-staff ratio is actually slightly better than BOP's and that, among prison systems nationwide, both GDOC and BOP are in the middle of the pack in terms of inmate-to-staff ratio. *Supra* 10. He also testified that there probably is not a huge difference between BOP and GDOC in terms of the violence of the inmate populations. *Id.*

GDOC's failure to offer "persuasive reasons" distinguishing the 37 states, the District of Columbia, and the federal system that successfully accommodate untrimmed beards means that GDOC failed to carry its burden, and the district court

correctly ruled that GDOC's beard policy violates RLUIPA. *See Holt*, 135 S. Ct. at 866.

B. GDOC Did Not Prove That Any Blanket Limitation On Beard Length Is The Least Restrictive Means Of Furthering Any Compelling Interest.

Notwithstanding its ruling that the half-inch beard policy violates RLUIPA, the district court pointed to various ways that untrimmed beards are "distinct" from three-inch beards, and reasons why it was "plausible" to conclude that "beard[s] of unlimited length could be much more difficult for GDOC to manage." Doc.243/11, 13. But it was GDOC's burden to "prove" and "demonstrate" that rejecting Smith's requested exemption to grow an untrimmed beard is *the least* restrictive means of furthering a compelling interest. *Holt*, 135 S. Ct. at 863-64. GDOC did not carry that burden, and the district court's ruling allows GDOC to apply yet another policy "grounded on mere speculation" and "exaggerated fears," in violation of RLUIPA. *See Knight II*, 797 F.3d at 944 (quoting *Rich*, 715 F.3d at 533).

1. GDOC Did Not Prove That Untrimmed Beards Pose An Unmanageable Danger Of Violence Or Injury.

The district court noted the obvious truth that a three-inch beard "cannot be easily grabbed" and poses no more danger in a fight than three-inch head hair. Doc.243/13. But GDOC presented no real evidence, and the district court made no real finding, that untrimmed beards pose a material risk of violence or injury.

The district court dismissed Holt's testimony that a beard can be grabbed and cause injury to an inmate as "speculative" and noted that Holt "provide[d] no basis for this opinion." Doc.243/8. Indeed, the district court found all of Holt's opinions about the supposed dangers of untrimmed beards to be "pure conjecture as [GDOC] has no experience with beards and has not sought to inquire about [concerns] with states that allow beards." Doc.243/9. Angelone similarly testified that he had no statistical evidence on violence in prisons that allow prisoners to grow beards. Doc.236/78-79.

By contrast, Clark testified that prison systems that permit untrimmed beards have experienced no difficulties with violence or safety. Doc.236/121-22. As detailed *supra* at 13, Clark also cited various studies to support his testimony that permitting untrimmed beards for religious inmates would enhance prison management and safety.

Clark's testimony was grounded in his experience working in federal prisons with violent and dangerous inmates. *Supra* 13. His significant experience working in prisons permitting untrimmed beards makes his testimony inherently more credible than Holt's or Angelone's. *See Ali v. Stephens*, 822 F.3d 776, 782 (5th Cir. 2016) (finding Angelone less credible than witnesses with "significant experience working in prisons" that allow beards). For that reason, the district court correctly credited Clark's testimony, finding that "it could very well be that GDOC's interests

in prison safety and security would be furthered if it allows *longer* beards." Doc.243/14 (emphasis added).

The evidence also showed that restrictions on beard length are an underinclusive means to address concerns about inmates grabbing something in a fight. Holt acknowledged that inmates can grab plenty of other things, including clothes and hair. Doc.235/141. When the government's "'proffered objectives are not pursued with respect to analogous nonreligious conduct,' [it] suggests that 'those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree." *Holt*, 135 S. Ct. at 866 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993)).

The district court found that GDOC's successful accommodation of long head hair among female inmates was not necessarily dispositive, due to "differences between the small, less violent female population and the large, more violent male population." Doc.243/11. But even if male inmates are generally more violent than female inmates, GDOC never established any connection between violence and beard length. The district court specifically dismissed Holt's testimony that a beard can be grabbed and cause injury as "speculative." Doc. 243/8. Therefore, restricting beard length on the basis that there is a connection between beard length and violence is to impermissibly embrace a "polic[y] grounded on mere speculation." *Knight II*, 797 F.3d at 944 (quoting *Rich*, 716 F.3d at 533). Similarly, the court's

finding that it remains "*plausible*" that untrimmed beards "could be much more difficult for GDOC to manage" because of their "ability to be used to cause harm in the more violent male facilities," Doc.243/11 (emphasis added), is insufficient under RLUIPA. GDOC failed to *prove*, with credible evidence, that requiring Muslim prisoners to cut their beards to any length is the least restrictive means to further any compelling interest in prisoner safety.

2. GDOC Did Not Prove That Limiting Beard Length Is Necessary To Detect Or Prevent Contraband.

The district court speculated that prisoners presumably can hide contraband "more easily" in an untrimmed beard than a three-inch beard, and posited some "added difficulty in searching an untrimmed beard." Doc.243/11. Again, however, the district court was searching for a compromise rather than holding GDOC to its burden. Here, as in *Holt*, GDOC "failed to establish that it could not satisfy its security concerns by simply searching [inmates'] beard[s]." 135 S. Ct. at 864.

When assessing the record evidence, the district court correctly found that GDOC "failed to demonstrate why beards would pose a contraband problem if they were searched" and had "not shown that its concerns about contraband in beards cannot be addressed by simply searching beards." Doc.243/8. The district court specifically found that the record evidence "persuasively indicates that officers do not have to put themselves in danger to effectively search a beard" and "should use the safest method of searching, which is to require a rigorous self-search."

Doc.243/7. The court also recognized that GDOC's purported concerns about contraband in beards are obviously underinclusive in a manner forbidden by RLUIPA. Doc.243/7-8.

The evidentiary record supporting those findings, which applies to beards of any length, is overwhelming. It is grounded in the practical experience of law enforcement and prison systems around the country that require inmates and detainees to self-search. The district court credited Clark's testimony by finding that "it would take only seconds to include a beard in a search," Doc.243/14 (citing Doc.236/117), found that "GDOC has offered no logical explanation as to why it could not use the method currently employed by BOP and other states for searching a beard," Doc.243/12, and found that GDOC's concerns about added costs are "unpersuasive" in light of Clark's testimony and GDOC's failure to "produce evidence" on that issue, Doc.243/16. (The district court also correctly noted that RLUIPA may require a government to incur costs in order to avoid substantially burdening religious exercise. Doc. 243/16 (citing 42 U.S.C. § 2000cc-3(c)).) Those findings necessarily establish that GDOC's concerns about contraband could be managed while permitting untrimmed beards, as the BOP and most states do, and that a shorter limit is not the least restrictive alternative available to GDOC.

The district court was led astray by an analogy to GDOC's current three-inch policy for head hair. Certainly, that policy all but establishes that GDOC can and

must accommodate *at least* three-inch beards. *See Holt*, 135 S. Ct. at 865-66 ("Hair on the head is a more plausible place to hide contraband than a [] beard"). It does not, however, support any conclusion that GDOC can accommodate *at most* three-inch beards. The validity of GDOC's head-hair policy was not litigated here, and GDOC did not prove that it is the least restrictive way to pursue compelling interests.

3. GDOC Did Not Prove That Restricting Beard Length Is Necessary To Facilitate Inmate Identification.

The district court correctly recognized that GDOC's concerns about facial identification of inmates could be accommodated "by enforcing the policy that GDOC *already has*," requiring periodic photographs, "and making improvements" such as a potential requirement that inmates periodically shave to take a new clean-shaven picture.[5] Doc.243/13 (emphasis added). The Supreme Court endorsed that periodic-photograph approach in *Holt*. *See* 135 S. Ct. at 865. But although the district court found that "GDOC has not shown that it could not effectively implement a three-inch beard policy and still successfully identify inmates after they shave," the court speculated that "these concerns may be presented by an untrimmed, belt-buckle-length beard." Doc.243/12.

[5] Smith does not advocate for this since it would require shaving, but he acknowledges that this is less restrictive than a policy requiring him to constantly keep his beard trimmed to one-half inch (or any other length) at all times.

Again, the district court's distinction between untrimmed and three-inch beards appears to be an arbitrary compromise without actual record support. The court's observation that a three-inch beard "can be periodically shaven to address inmate identification concerns," Doc.243/13, is true of untrimmed beards as well. The appropriate interval for such photographs would depend on how quickly age (or, potentially, weight changes, illness, or injury) substantially changes an inmate's clean-shaven appearance. It is implausible, and GDOC offered no evidence, that the right interval necessarily precludes beards longer than three inches. Nor is there any record support for the district court's speculation that shaving an untrimmed beard makes an inmate unrecognizable when shaving a three-inch beard would not.

Finally, a blanket ban on untrimmed beards is obviously underinclusive here, too. Holt testified that inmates can change their appearances in a variety of different ways that are not addressed by GDOC policies. Doc.235/144-45. In *Ali*, the Fifth Circuit held that the prison could not reject the inmate's request for a four-inch beard based on identification concerns, "[b]ecause of the various ways an inmate can permissibly change his appearance." 822 F.3d at 790.

4. GDOC Did Not Prove That Restricting Beard Length Is Necessary To Prevent Jealousy And Gang Affiliation Or To Promote Hygiene.

The district court correctly concluded that preventing "inmate jealousy hardly seems compelling." Doc.243/9. The district court also credited Clark's testimony in

making its finding that permitting beards for religious reasons would not cause "violent jealousy." *Id.* And, yet again, GDOC's blanket prohibition on untrimmed beards is underinclusive since jealousy concerns could be raised about *any* religious accommodation or even about "rewards for a clean dorm." *Id.*

The district court found that GDOC's gang affiliation concerns were both implausible and underinclusive because Muslim inmates are already permitted to wear kufis, but do not wear them consistently. *Id.*

The district court also correctly concluded that GDOC's ban on beards longer than one-half inch is both underinclusive and not "the least restrictive means of furthering its compelling interests in hygiene." Doc.243/10. Holt testified that hygiene issues are not unique to beards. Doc.235/116. And the district court reasonably found that any hygiene issues presented by beards could be dealt with in the same manner as hygiene issues created by head hair. Doc.243/9-10.

5. Any Legitimate Concerns Can Be Addressed Individually If Beard Privileges Are Abused.

Finally, allowing inmates to grow untrimmed beards and only restricting beard length if that privilege is abused is a less restrictive means of furthering GDOC's interests. The Supreme Court recognized in *Holt* that, rather than denying an accommodation initially, "an institution might be entitled to withdraw an accommodation if the claimant abuses the exemption in a manner that undermines the prison's compelling interests." 135 S. Ct. at 867. Similarly, the Fifth Circuit

recently held that a Texas prison's blanket ban on kouplocks[6] was impermissible; rather, RLUIPA required that an accommodation permitting the growth of kouplocks be granted but permitted withdrawal of the exemption if prisoners used their kouplocks for a "prohibited purpose." *Davis*, 826 F.3d at 272. *See also Greenhill*, 944 F.3d at 248 (noting that the Virginia Department of Corrections permits untrimmed beards unless the inmate has specifically used a beard to threaten a penological interest). Both of GDOC's witnesses acknowledged that the disciplinary process can and should be used to resolve instances of impermissible beard uses by inmates. *Supra* 18.

C. No Individual Characteristics Unique To Smith Justify Limiting His Relief To Three Inches On This Record.

The district court noted that "[i]t is plausible that allowing a close security inmate like Smith an untrimmed beard could be dangerous for prison security" and mentioned some of Smith's other individual characteristics, including that he is serving a life sentence for murder and has been written up for a number of disciplinary infractions. Doc.243/15. To the extent the court limited its remedial order for reasons individual to Smith, that limitation was unjustified. GDOC has not

[6] A kouplock is a "one inch square section of hair at the base of the skull" that is a common practice in Native American religions. *Davis v. Davis*, 826 F.3d 258, 263 (5th Cir. 2016).

carried its burden to demonstrate that any limitation of Smith's beard is the least restrictive means to pursue any Smith-specific compelling interest.

First, GDOC did not conduct—and could not have conducted—any individualized inquiry whatsoever as to Smith since it indiscriminately rejects all requests for religious exemptions to its beard policy. *Supra* 5. Any Smith-specific arguments are thus necessarily "post-hoc rationalizations" rather than applications of any actual judgment about least restrictive means as to Smith. *Knight II*, 797 F.3d at 944 (quoting *Rich*, 716 F.3d at 533).

Second, the principal post-hoc rationalization that GDOC has urged throughout this litigation, continuing on appeal, is that Smith's beard length should be restricted because Muslim inmates act like gang members. *See, e.g.*, Doc.235/11 ("Muslim inmates, while they're not validated gang members, [a]re behaving like gangs."). RLUIPA "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged" policy to "the particular claimant." *Holt*, 135 S. Ct. at 863 (quoting *Hobby Lobby*, 573 U.S. at 726). That stringent requirement cannot be satisfied by stereotypes analogizing the adherents of a major world religion to gang members. And it especially cannot be satisfied here given that Smith is, in fact, *not* a validated security threat group member. *Supra* 16 n.4.

Third, the district court did not hold GDOC to its burden or make the findings that would be necessary to conclude that denying Smith an untrimmed beard was the least restrictive means to pursue any Smith-specific compelling interest. The court found only that it was "plausible" that allowing Smith an untrimmed beard could be dangerous. Doc.243/15.

Finally, none of Smith's personal characteristics could justify a prophylactic decision to deny him even a chance to grow an untrimmed beard. The district court concluded as much with regard to GDOC's purported interest in hygiene, observing that GDOC's beard policy is not the least restrictive means of furthering its interest in hygiene "*especially* as applied to Smith" because his faith requires neatness and cleanliness and because there is no evidence that Smith has had hygiene issues. Doc.243/10 (emphasis added). The district court did mention Smith's crime, sentence, security level, and general disciplinary history. Doc.243/15. As noted *supra* at 40, however, the case law indicates that religious accommodations should be withdrawn *for individual abuse of that accommodation*, not denied *ex ante* on the basis of broad generalizations. The Fifth Circuit held that a prisoner was entitled to an RLUIPA exemption to grow dreadlocks even though he was serving two concurrent 40-year sentences for two counts of sexual battery. *Ware v. La. Dep't of Corr.*, 866 F.3d 263, 266 (5th Cir. 2017). That same court also affirmed a judgment granting an exemption to grow a four-inch beard to a prisoner in a maximum-security

facility. *Ali*, 822 F.3d at 780. As detailed at *supra* 18, Clark testified that a prison could apply a restriction to a beard only if there was specifically a *beard-related* problem. Doc.236/166. Clark's testimony is supported by the recent Virginia Department of Corrections decision to permit untrimmed beards unless the inmate has specifically used a beard to threaten a penological interest. *Greenhill*, 944 F.3d at 248.

Smith has never been given a chance to grow an untrimmed beard, so GDOC's speculation that he will abuse that privilege has no evidentiary foundation. If anything, the record indicates that Smith would *not* abuse any religious accommodation. At the time of trial, Smith's most recent physical altercation was September 20, 2012, before GDOC began permitting half-inch beards. *Supra* 18. GDOC's unsupported concern about Smith's supposed violent tendencies is also tangential at best. Smith could not harm anyone by grabbing *his own* beard in a fight, and GDOC did not introduce any evidence that others would be more likely to grab it than anything else.

II. THE DISTRICT COURT CORRECTLY APPLIED RLUIPA AND DID NOT EXCEED ITS STATUTORY AUTHORITY.

Although the district court should have required GDOC to permit Smith (and others similarly situated) to grow untrimmed beards, the district court did not err or exceed its statutory authority in ordering that Smith, and others similarly situated, are entitled under RLUIPA to grow at least a three-inch beard.

A. The District Court Gave Proper Weight To The Practices Of Other Jurisdictions And Proper Deference To Prison Officials.

GDOC argues (at pages 41-49 of its brief) that the district court gave too little deference to GDOC's officials and too much weight to the practices of other jurisdictions.

First, GDOC's plea for deference is inconsistent with *Holt v. Hobbs*, the leading case interpreting RLUIPA. In *Holt*, the Eighth Circuit had rejected the RLUIPA claim of a Muslim inmate in Arkansas who wished to grow a beard, reasoning that "'courts should ordinarily defer to [prison officials'] expert judgment' in security matters unless there is substantial evidence that a prison's response is exaggerated" and that the fact that other prisons permit facial hair "'does not outweigh deference owed to [the] expert judgment of prison officials who are more familiar with their own institutions.'" 135 S. Ct. at 861 (quoting *Holt v. Hobbs*, 509 F. App'x 561, 562 (8th Cir. 2013)). The Supreme Court reversed the lower court and pointedly rejected both of those propositions. The Court explained that "RLUIPA . . . does not permit such unquestioning deference" to prison officials and that prison officials' particular expertise or familiarity with their own institutions "does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard," which "demands much more" than deferring to "prison officials' mere say-so." *Id.* at 864, 866.

GDOC relies extensively on this Court's decision in *Knight II*. That decision was overwhelmingly written before *Holt* and does not cite the Supreme Court's decision in *Holt*. After the Supreme Court vacated this Court's decision in *Knight I* and remanded for further consideration, this Court issued an opinion explaining its conclusion "that *Holt* does not dictate a change in the outcome of this case," and reinstated its prior opinion in *Knight I* as *Knight II*, changing only two sentences. *Knight v. Thompson*, 796 F.3d 1289, 1291 (11th Cir. 2015) ("*Knight Explanatory Opinion*"). That conclusion is easy to understand since the district court in *Knight* made extensive findings of fact in favor of the Alabama policy after a bench trial and, on appeal, the plaintiffs "merely mount[ed] an attack on the District Court's factual findings and choice to credit the testimony of the ADOC's witnesses." *Knight v. Thompson*, 723 F.3d 1275, 1284 (11th Cir. 2013) ("*Knight I*"). Prior to *Holt*, this Court held that "this attack must surely fail as, the detailed record developed during the trial of this case amply supports the District Court's factual findings," *id.*, and nothing in *Holt* demonstrated that those findings were clearly erroneous. But GDOC's efforts to cherry-pick language from what is essentially a pre-*Holt* opinion should be approached with caution. *Knight II* has to be read together with *Holt*, not as an alternative to *Holt* or some kind of corrective to it.

In reading *Knight II* together with *Holt*, it is crucial to understand what this Court did *not* hold in *Knight*. In the *Knight Explanatory Opinion*, this Court stated

that, on the basis of the factual record in that case, it was not clear that other prison systems actually permitted the religious accommodation sought by the prisoner and that, in any event, the district court had not deferred unquestioningly to prison officials. 796 F.3d at 1292-93. But this Court made no holding whatsoever as to the quantum of evidence required when, as here, the district court makes a well-supported factual finding that a vast majority of prisons systems *do* permit the religious accommodation sought by the inmate. The Supreme Court was quite clear on that point: A prison "*must, at a minimum*," offer "*persuasive* reasons" why it cannot offer the accommodation if a vast majority of prisons do. *Holt*, 135 S. Ct. at 866 (emphasis added).

Regardless, GDOC fails to grapple with the critical distinction between *Knight II* and this case: Here, the extensive record-based findings of fact, and the clear error standard on appeal, cut entirely the other way from *Knight*. Specifically, GDOC's brief asserts (at 45-46) that it "showed" various things at trial and that the district court "seemingly disregarded" GDOC's expert testimony "without providing any objective reason to do so." But in *Knight I* and *II*, this Court emphasized that "[p]laintiffs point out that their witnesses offered competing testimony, but the District Court, as the finder of fact, remained free to reject it" and "[w]e cannot say that the District Court clearly erred in its material factual findings with regard to male inmate hair-length." 723 F.3d at 1284; 797 F.3d at 945. Further, "a District

Court may weigh competing expert testimony" and decide which is more credible and persuasive. *Knight II*, 797 F.3d at 942. GDOC's argument simply challenges the district court's assessment of the relative weight and credibility of the expert testimony—issues committed to the district court's sound discretion. *U.S. v. Else*, 743 F.3d 1465, 1474 (11th Cir. 1984) (overruled on other grounds by *U.S. v. Blankenship*, 382 F.3d 1110 (11th Cir. 2004)) (finding argument that the district court erred in disregarding expert opinion "borders on the frivolous").

And, as the district court explained in its order denying GDOC's motion for stay, contrary to GDOC's assertions, "the Court did not ignore the opinion testimony of GDOC's expert Ronald Angelone, but expressly considered his testimony throughout its order." Doc.264/3. The district court's opinion directly quoted Angelone and expressly considered his expert testimony at multiple points. Doc.264/3-4. It was only after considering all of the evidence and weighing competing expert testimony that the district court "discredited only those portions [of Angelone's] testimony that were speculative or contradicted by the record." Doc.264/4. And the district court was not the first court to weigh another expert's testimony as more credible than Angelone's testimony. *See Ali*, 822 F.3d at 782.

Second, GDOC has no real response to the district court's well-supported findings that GDOC failed to distinguish itself from the numerous other prison systems that permit untrimmed beards. GDOC asserts that "there is no evidence in

the record" that those jurisdictions accommodate untrimmed beards *successsfully*. Opening Br. 43. That claim is indefensible.

Clark testified that beards did not present safety or security issues when he worked with dangerous federal-prison inmates. *Supra* 13. And he explained in great detail the self-search method used by the BOP and other jurisdictions nationwide, testifying that it is easy, quick, and highly effective. *Supra* 11-12. GDOC's premise that a growing majority of prison systems nationwide have implemented policies that are secretly failing is implausible on its face.

GDOC claims it was "undisputed" below that "departments of corrections do not like airing their dirty laundry." Opening Br. 43. That characterization of the record is incorrect. Clark disputed that precise claim, testifying that GDOC's notion that prison systems were not sharing beard-related incidents with each other would be "totally contrary to [his] experience." Doc.236/126. Clark elaborated that prison officials across the country freely share their security successes and failures with each other without fear of airing their "dirty laundry." *Supra* 9.

GDOC's observation that "20 of those states provide the department the option to restrict beards based on safety and security concerns," and that, therefore, "it is not apparent" that Smith ultimately would be permitted to grow a beard in those jurisdictions, is a *non sequitur*. Opening Br. 42. The district court's order leaves GDOC free to revoke beard privileges on an individualized basis, but no one has

made such an individualized determination about Smith, and this record would not support one. *Supra* § I(C).

GDOC also misses the mark by asserting that the district court's observations that GDOC's witnesses had not investigated the practices in other jurisdictions were somehow the "same arguments [that] were rejected in *Knight II*, after the remand." Opening Br. 42. In *Knight*, this Court held that the inmate's failure to offer meaningful evidence about other jurisdictions was a reason to *affirm* the detailed factual findings made by the district court. *Knight Explanatory Opinion*, 796 F.3d at 1293. Here, the district court held that Holt's and Angelone's relative ignorance about jurisdictions that accommodate untrimmed beards was a reason to find Clark's testimony more persuasive—since he had extensive experience working in such jurisdictions. Doc.243/9. That is not remotely the "same argument" this Court rejected in *Knight*. Nor did the district court require that GDOC must necessarily experience some tragic event before instituting rules designed to prevent it. *See* Opening Br. 48. The district court simply credited the most knowledgeable witness at the trial, who testified that the great majority of prison systems in this country have successfully accommodated untrimmed beards for many years and have found any security and contraband concerns easy to manage with an appropriate search methodology. (That is why the district court saw no need to extensively discuss

Angelone's testimony about finding handcuff keys in beards and a black widow spider in head hair. *See* Opening Br. 46-48).

B. The District Court's Three-Inch Remedy Was Not Unfair To GDOC.

1. The Three-Inch Remedy Was Clearly Foreseeable.

Smith is not a fan of the district court's three-inch compromise, and he believes the record does not support that limitation on his relief. But GDOC's suggestion that it was somehow sandbagged by that ruling is inconsistent with the record of this case.

GDOC argues at length that RLUIPA does not require prison officials to consider or refute alternatives that the prisoner has not proposed. We agree that GDOC has no obligation to "'dream up'" "'every conceivable option'" that might partially accommodate a prisoner's religious needs. Opening Br. 22 (citations omitted). In *Walker v. Beard*, 789 F.3d 1125 (9th Cir. 2015), the prisoner claimed that it violated his religion to force him to share a cell with a non-white cellmate. The Ninth Circuit held that, after rejecting his demand for an exception to the race-neutral cell assignment policy, the prison had no obligation to speculate about "every possible way of mitigating that practice's negative effects." 789 F.3d at 1137. In *Fowler v. Crawford*, prison officials made extensive efforts to find a middle-ground accommodation and gave up only after the prisoner had explicitly rejected "anything short of a sweat lodge *a minimum* of 17 times a year." 534 F.3d 931, 940 (8th Cir.

2008). The Eighth Circuit held that prison officials had no obligation to anticipate Fowler's "belated[]" request in litigation for a transfer to another facility. *Id.*

The principle that prison officials need not "dream up" creative left-field solutions like the ones that were disregarded in *Walker* and *Fowler* does not mean they have no obligation to consider a partial accommodation of what the prisoner has asked for. When a prisoner asserts a religious need to attend services twice a week, no great act of "judicial imagination," *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011), is required to identify that once-a-week might be a less restrictive alternative to a total denial. And when a prisoner claims a religious need to grow a beard longer than the prison's half-inch policy permits, preferably untrimmed but at least fist-length, it imposes no "herculean burden," *Fowler*, 534 F.3d at 940, to expect prison officials to consider how long a beard must be to genuinely pose any compelling risk.

The case law establishes that "[*a*]t *a minimum*, the government must address those alternatives of which it *has become aware* during the course of litigation" to satisfy its RLUIPA burden. *United States v. Christie*, 825 F.3d 1048, 1061 (9th Cir. 2016) (citing *Wilgus*, 638 F.3d at 1289) (emphasis added). Here, GDOC was clearly aware that three inches was a possible alternative, and that it was under consideration by the district court.

The district court's holding was that Smith requested, in the alternative, at least a "fist-length" beard, and that case law indicates fist-length to be three or four inches. Doc.243/17; *see also* Doc.181/31 (Smith's testimony that some Muslim teachings permit a fist-length beard); *Sims v. Jones*, 2018 U.S. Dist. Lexis 174436, at *18, 38 (N.D. Fla. Aug. 8, 2018) (ordering that the plaintiff be permitted to grow a three-inch beard where the plaintiff requested a fist-length beard and the plaintiff described a fist-length beard as being "3 inches or a little more"); *Ali*, 822 F.3d at 780 (describing a fist-length beard as "approximately four inches"); *Greenhill*, 944 F.3d at 247 (plaintiff describing a fist-length beard as approximately four inches). GDOC's brief effectively concedes its awareness of Smith's alternative request for at least a "fist-length" beard, *see* Opening Br. 11 n.7, 32, and the only question GDOC's counsel asked about any specific beard length was about beards "limited to three or four inches," Doc.235/78, perfectly tracking the case law's understanding of "fist-length." GDOC can hardly complain that the district court chose to depart from Smith's request *in GDOC's favor* by specifying three inches.[7]

As detailed *supra* 18-19, the record contains numerous references both pre-trial and at trial to three inches or fist-length—including references affirmatively made by both GDOC and the court. GDOC's own three-inch head-hair policy also

[7] To be clear, Smith contends the relevant hadith references a fist-length beard, Doc. 181/30, so specifying three inches is not equivalent to fist-length.

made three-inch beards an obvious alternative for consideration, particularly given the Supreme Court's analogy to head hair in *Holt*. *See Holt*, 135 S. Ct. at 865-66. GDOC's claim (at 36) that it "was not given the opportunity to refute the three-inch beard policy" is thus refuted by the record. There was no unfair surprise whatsoever.

GDOC cites *Greenhill* (at 23 of its brief) for the proposition that the government must "demonstrate that it considered and rejected those alternatives set forth by [the plaintiff] both prior to litigation as part of the prison grievance process and through the course of litigation in the district court." *Greenhill*, 944 F.3d at 251. *Greenhill* explains that this means the government must adequately respond "to the less restrictive policies that [the inmate] brought to the [government's] attention during the course of the litigation." *Id.* (quoting *Holt*, 135 S. Ct. at 868 (Ginsburg, J., concurring)). Because GDOC concedes it was on notice, it fails the test it proposes for itself.

2. Smith Does Not Have To Concede That A Three-Inch Beard Is Fully Consistent With His Beliefs To Be Granted That Relief.

GDOC also argues that the district court's three-inch order is inappropriate because any trimming of his beard violates Smith's beliefs. GDOC contends (at 23-25) that it has no obligation to consider alternatives the claimant will not "accept," and (at 33) that "an alternative that still violates the plaintiff's religious beliefs cannot be a less restrictive alternative." This argument could be recast as: "If the court is not going to order the full relief requested by an inmate, it might as well

order no relief at all." That logic is inconsistent with Smith's actual testimony about what Islam requires, *see* Doc.181/30, and overly simplistic. Every belief system recognizes degrees and distinctions, and most acknowledge that an effort to comply with religious obligations in part has value even when full compliance is impossible. If a Catholic inmate believes that his faith requires him to attend Mass every week, an accommodation permitting him to attend Mass once a month would still violate his beliefs—but would anyone seriously argue that the alternative is somehow not less restrictive than a complete prohibition against attending Mass?

GDOC's arguments also seem insidiously designed to eliminate the government's obligation to consider and rebut *any* alternatives to the maximum relief the claimant desires—or, even worse, to force the claimant to weaken his claim for full relief by conceding that his religion also permits some lesser alternative. The RLUIPA claimant is stuck in a Catch-22. If he maintains that his religion truly requires the full requested relief, the prison will say that any compromise possibility is not actually less restrictive. If he acknowledges that his religion makes any room for a compromise position, the prison will argue that denial of the full relief is not actually a substantial burden, even though RLUIPA defines religious exercise to include any religious practice, "whether or not compelled by one's religion." 42 U.S.C. § 2000cc-5(7)(A). The claimant in *Holt* appears to have taken a very conservative approach to the relief he actually wanted, because of this problem. *See*

Brief for Petitioner at 7, *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (No. 13-6827) ("Throughout the grievance process and ensuing litigation, petitioner took a conservative approach to relief. Although he understands *hadith* to require him to leave his beard entirely uncut, he sought permission to grow only a half-inch beard.") (citations omitted).

The history of this litigation demonstrates the same trap. Smith made clear in his complaint that his faith requires him to grow an untrimmed beard. Doc.1. At that time, GDOC required prisoners to be clean-shaven, and Smith was allowed to maintain an eighth-inch of facial hair owing to folliculitis. *See* Doc.181/16-18 Nearly two years after initiating his lawsuit (but still before *Holt*), Smith indicated that an "alternative for both parties" would be to revise GDOC's beard policy to permit prisoners to grow quarter-inch beards—relief he clearly should have been entitled to, given GDOC's then-policy of permitting quarter-inch beards for some medical reasons. Doc.117-1/3; Doc.124/3. But, after *Holt*, GDOC tried to punish Smith for proposing that alternative. The last time this case was before this Court, GDOC argued that Smith's claim to an untrimmed beard was moot because GDOC had changed its policy to permit all inmates to grow half-inch beards, and Smith supposedly had conceded that his religious beliefs require no more than a quarter-inch beard. Brief for Appellee at 12-13, *Smith v. Owens*, 848 F.3d 975 (11th Cir.

2017) (No. 14-10981). This Court correctly rejected GDOC's mootness argument, *Smith*, 848 F.3d at 978, and it should not accept GDOC's similar gambit now.

3. Even If The Three-Inch Remedy Is Impermissible, GDOC's Current Beard Policy Is Unenforceable.

Finally, even if GDOC were right that the district court erred by ordering GDOC to accommodate three-inch beards, the result would not be that GDOC somehow wins this case and can continue enforcing its half-inch policy. On the basis of the evidentiary record and after conducting a two-day bench trial, the district court concluded that GDOC's half-inch policy violates RLUIPA. Doc. 243/18. GDOC therefore has no beard policy that it can lawfully enforce.

GDOC also effectively concedes, as it must, that it had notice and an appropriate opportunity to litigate Smith's request for a fist-length beard. GDOC failed to demonstrate that preventing Smith from growing at least a fist-length beard is the least restrictive means of pursuing any compelling interest, and none of GDOC's procedural or notice objections present a reason not to grant Smith that relief. At a bare minimum, therefore, Smith would be entitled to an injunction permitting him to grow a fist-length beard.

C. The District Court's Injunction Satisfies The Requirements Of Both The PLRA And RLUIPA.

GDOC also argues (at 37-38) that the district court violated RLUIPA and the Prison Litigation Reform Act ("PLRA") by requiring that GDOC change its

grooming policy for all similarly situated prisoners, rather than just for Smith himself. Those arguments misunderstand the statutes, the relief the district court ordered, and the record of this case.

First, GDOC argues (at 38-40) that the district court's injunction prevents GDOC from engaging in the individualized inquiry required by RLUIPA. GDOC is of course correct that RLUIPA requires an individualized inquiry, but GDOC's newfound concern for this requirement is ironic to say the least, since GDOC has always refused to make *any* individualized determinations. Regardless, nothing in the district court's injunction prohibits GDOC from properly considering under RLUIPA whether the application of its policies *to individual inmates* is justified going forward. The district court simply held that GDOC failed to prove that any *blanket* limitation on beard length shorter than three inches is the least restrictive means of furthering any compelling interest. The injunction leaves GDOC free to grant more to individual inmates when the circumstances support it, and explicitly permits GDOC to revoke beard privileges "based on the inmate's behavior and compliance with the revised grooming policy." Doc. 243/18.

The district court's remedy also responded to the case that GDOC put on at trial. GDOC vigorously (if ineffectively) defended its categorical prohibition against all beards longer than one-half inch. All of GDOC's arguments and evidence were directed at proving that setting across-the-board limits on beard length is the least

restrictive means of furthering various compelling interests. Against that backdrop, the district court properly held that GDOC had failed to justify any across-the-board rule shorter than three inches. It does not violate RLUIPA's requirement of individualized consideration for the district court to order a scaling-back of GDOC's unjustifiable and non-individualized blanket rules—particularly when the injunction leaves GDOC free to make appropriate individual modifications going forward.

Second, the PLRA requires that relief granted in prisoner litigation be "narrowly drawn" and extend "no further than necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). The Supreme Court has explained that this language means that "[t]he scope of the remedy must be proportional to the scope of the violation." *Brown*, 563 U.S. at 531. But GDOC's position on appeal is that the remedy here should have been substantially *narrower* than the scope of the violation found by the district court after trial. That is not the law, and the rule GDOC promotes would serve no purpose other than to multiply wasteful relitigation of issues already settled.

Again, GDOC built its trial strategy around defending its categorical prohibition against beards longer than a half-inch. That strategy failed, and the district court concluded that GDOC's "policy limiting inmates' beard length to one-half inch" violates RLUIPA. Doc.243/18. The district court explained in its order denying GDOC's motion for stay that the court's holding was that GDOC's blanket

policy "itself violates RLUIPA" as applied to prisoners with a sincere religious need to grow a beard, not merely that the policy "is being unconstitutionally applied to [Smith]." Doc.264/6. Since the policy was the violation, an injunction against enforcement of the policy is perfectly consonant with the scope of that violation. And if the district court had simply prohibited GDOC from enforcing that policy, GDOC would have been left with no beard policy enforceable against inmates seeking religious accommodations. Instead, the court issued a more narrowly tailored injunction: allowing GDOC's blanket policy to remain in place as modified to permit three-inch beards for prisoners who qualify for a religious exemption, "subject to revocation based on the inmate's behavior and compliance with the revised grooming policy." Doc.243/18.

GDOC argues that the PLRA prevents the district court from ordering relief that extends beyond the litigants literally before the court, but the Supreme Court specifically rejected that notion in *Brown*. There, the government argued that an injunction designed to limit prison overcrowding should not have applied system-wide, but instead should have been limited under the PLRA to provide relief only to the litigating class then before the court. The Court acknowledged that "[t]he scope of the remedy must be proportional to the scope of the violation, and the order must extend no further than necessary to remedy the violation," but held that the PLRA's limiting language "means only that the scope of the order must be determined with

reference to the constitutional violations established by the specific plaintiffs before the court." 563 U.S. at 531. The Court held that although they were not members of the present litigating class, inmates who would become sick in the future are not "remote bystanders in California's medical care system" but the system's "next potential victims," and that "[r]elief targeted only at present members of the plaintiff classes may therefore fail to adequately protect" them. *Id.* at 532.

Other circuits have upheld injunctions in RLUIPA cases against similar PLRA arguments, even when the injunction required a policy change that applied beyond the litigants or narrow setting of the case. In *Native American Council of Tribes v. Weber*, the Eighth Circuit reviewed the district court's decision that the South Dakota Department of Corrections' ("SDDC") policy banning tobacco use (including use by Native American inmates) violated RLUIPA. 750 F.3d 742, 744-45 (8th Cir. 2014). The district court did not limit its injunction to the plaintiffs before the court; it required SDDC to amend its tobacco policy to ensure that *all* inmates participating in Native American religious ceremonies are afforded the opportunity to use tobacco during ceremonies. The Eighth Circuit held that the district court's remedial order "extends no further than necessary to remedy the violation of inmates' rights under RLUIPA," and therefore complied with the PLRA. *Id.* at 754 (citing *Brown v. Plata*, 563 U.S. 493 (2011)). *See also Crawford v. Clarke*, 578 F.3d 39, 42-44 (1st Cir. 2009) (upholding an injunction requiring the

Massachusetts Department of Corrections to provide the plaintiffs with broadcasts of Jum'ah services by closed circuit television in any special management unit in which they are housed in the future, not just the original unit at issue).

Here, as in *Brown*, the district court tailored its remedy precisely to the violation found. And the practical impact of awarding relief that is substantially *narrower* than the violation—as GDOC advocates—would be to frustrate rather than advance the judicial economy purposes behind the PLRA. The collateral estoppel effect of the district court's order is that every GDOC inmate with a sincere religious need for a three-inch beard is entitled to one, subject to revocation if that privilege is abused. That would be true even if the court's formal injunction were limited to Smith himself. It does not make sense to require each inmate to file suit separately to receive that relief. Such a requirement would subvert "the purpose of the PLRA to reduce the quantity of inmate suits." *Jones v. Bock*, 549 U.S. 199, 223 (2007).

CONCLUSION

This case should be remanded with instructions that Smith and others similarly situated have a right to grow untrimmed beards.

Respectfully submitted,

s/ J. Scott Ballenger
J. Scott Ballenger
Sarah Shalf
Raymond Gans (Third Year Law Student)
Timothy Whittle (Third Year Law Student)
Appellate Litigation Clinic
UNIVERSITY OF VIRGINIA SCHOOL OF LAW
580 Massie Road
Charlottesville, VA 22903
202-701-4925
sballenger@law.virginia.edu

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