No. 13-6827

In the Supreme Court of the United States

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

v.

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

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

1. Petitioner Gregory Holt, a/k/a/ Abdul Maalik Muhammad, respectfully submits this supplemental brief pursuant to Supreme Court Rule 15.8 to inform the Court of new matter bearing on his pending petition for a writ of certiorari. Filed *pro se* and *in forma pauperis* on September 27, 2013, the petition correctly identifies a circuit split over the proper interpretation of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA").

There have been two new developments since the petition was filed. First, petitioner is now represented by counsel. Petitioner has retained Professor Douglas Laycock of the University of Virginia to represent him, and Professor Laycock has accepted the representation.

Second, the Eleventh Circuit has denied *en banc* rehearing in *Knight v. Thompson*, 723 F.3d 1275 (11th Cir. 2013), *en banc rehearing denied* (Nov. 8, 2013) (No. 12-11926), further solidifying the circuit split described in the petition in this case.

The circuits disagree about how to apply RLUIPA's compelling-interest standard to prison regulations. This is the most fundamental question about the meaning of RLUIPA's provisions on institutionalized persons, and the disagreement among the circuits extends to all applications of these provisions.

More specifically, circuits are split over whether a prison system must actually consider less restrictive measures before rejecting them, see Pet. 6-7, 10, and whether a prison system must demonstrate that it cannot grant religious accommodations that other prison systems have successfully granted or that other prison systems have

allowed to all prisoners. See Pet. 7-9.

2. The Eleventh Circuit acknowledged that "some of our sister courts" hold that, under RLUIPA, "prison administrators must show that they 'actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.'" *Knight*, 723 F.3d at 1285 (quoting *Warsoldier v. Woodford,* 418 F.3d 989, 999 (9th Cir. 2005), and citing *Spratt v. Rhode Island Department of Corrections,* 482 F.3d 33, 41 (1st Cir. 2007), and *Washington v. Klem,* 497 F.3d 272, 284 (3d Cir. 2007)); see also *Jova v. Smith*, 582 F.3d 410, 416 (2d Cir. 2009) (following *Warsoldier* and *Washington* on this issue); *Couch v. Jabe*, 679 F.3d 197, 203 (4th Cir. 2012) (state must "acknowledge and give some consideration to less restrictive alternatives")). Nevertheless, the Eleventh Circuit held that the "more strict proof requirement" of these other Circuits is "not the law in this circuit." *Knight*, 723 F.3d at 1285-86.

3. The Eleventh Circuit also rejected any requirement that the government must demonstrate why it cannot adopt religious accommodations that other prison systems have successfully implemented. "[T]he policies of other jurisdictions," the court held, "are not controlling;" rather, the government can make "a calculated decision not to absorb the added risks that its fellow institutions have chosen to tolerate." *Id*. at 1286. But see *Warsoldier*, 418 F.3d at 999 (government failed strict scrutiny where "[p]risons run by the federal government, Oregon, Colorado, and Nevada all meet the same penological goals without such a policy"); *Spratt*, 482 F.3d at 42 (government failed strict scrutiny "in the absence of any explanation . . . of significant differences" between defendant's prison and federal prisons with less restrictive policies);

Washington, 497 F.3d at 285 (government failed strict scrutiny where its "other institutions" made the requested accommodation); *Garner v. Kennedy*, 713 F.3d 237, 247 (5th Cir. 2013) (finding it "persuasive that prison systems that are comparable in size to Texas's—California and the Federal Bureau of Prisons—allow their inmates to grow beards, and there is no evidence of any specific incidents affecting prison safety in those systems due to beards").

The Eleventh Circuit has now refused en banc review to consider its explicit disagreement with the other circuits on each of these issues.

4. Somewhat less crisply formulated is an underlying circuit split over whether prison officials in RLUIPA cases actually have to "demonstrate" anything. The statute requires defendants to "demonstrate[]" compelling interest and least restrictive means—to meet "the burdens of going forward with the evidence and of persuasion" on these issues. 42 U.S.C. §§ 2000cc-1, 2000cc-5(2) (2006). But the Eighth Circuit effectively puts the burden of persuasion on plaintiffs, requiring "substantial evidence in record indicating that response of prison officials to security concerns is exaggerated." *Holt v. Hobbs,* 509 F. App'x 561, 562 (8th Cir. 2013) (citing *Fegans v. Norris*, 537 F.3d 897, 903 (8th Cir. 2008)).

Other circuits give reasonable deference to prison officials' expertise without abdicating the judicial role or effectively negating the statute. Prison officials must explain their judgments in terms that are not conclusory, speculative, or implausible. Thus the Fourth Circuit says that "a court should not rubber stamp or mechanically accept the judgments of prison administrators." *Couch*, 679 F.3d at 201 (quoting

Lovelace v. Lee, 472 F.3d 174, 190 (4th Cir. 2006)). The First Circuit says that "We do not think that an affidavit that contains only conclusory statements about the need to protect inmate security is sufficient to meet [defendant's] burden under RLUIPA." *Spratt*, 482 F.3d at 40 n.10. The Fifth Circuit says that "speculative testimony" is not enough. *Garner*, 713 F.3d at 246.

5. The Eighth Circuit's brief opinion in this case took the most deferential position on each of these issues. The court summarized defendants' testimony in wholly conclusory terms. 509 F. App'x at 562. The court did not require respondents to actually consider alternatives suggested by petitioner, or to explain why they had not considered or adopted those alternatives. The court rejected evidence that other institutions "have been able to meet their security needs while allowing inmates to maintain facial hair," because that evidence "does not outweigh deference owed to expert judgment of prison officials who are more familiar with their own institutions." *Ibid.* The court did not require respondents to explain how their prison was different from these other prisons. The court did not assess respondents' evidence with attention to the difference between its *Fegans* precedent, in which the prisoner wanted to grow his hair and beard apparently without limit, 537 F.3d at 900, and this case, in which petitioner seeks to grow only a half-inch beard.

6. In sum, the Eleventh Circuit's denial of *en banc* rehearing in *Knight* solidifies a widespread and acknowledged circuit split over RLUIPA's meaning and over its application to prison grooming policies and to beards in particular. Compare the decision below (upholding ban on even a half-inch beard under RLUIPA), and

Muhammad v. Sapp, 494 F. App'x 953 (11th Cir. 2012) (upholding no-beard rule under RLUIPA), with *Garner*, 713 F.3d at 244-48 (striking down no-beard rule under RLUIPA), and *Couch*, 679 F.3d at 201-04 (reversing summary judgment that had upheld no-beard rule under RLUIPA).

The Court should grant the petition in this case to resolve that disagreement. Granting certiorari on Questions I and II as stated in the petition would fairly include all the subsidiary questions on which the circuits are split. Questions III and IV present the parallel First Amendment issues. Question V restates the circuit split. Question VI explicitly presents the least-restrictive-means question that is also fairly included in Questions I and II.

Respectfully submitted,

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