Religious Land Use and Institutionalized Persons Act — Religious Liberty — Holt v. Hobbs

In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act[1] (RLUIPA) to apply a strict scrutiny standard of review[2] to generally applicable state laws that substantially burden religion in the context of land-use regulation[3] and institutionalized persons.[4] RLUIPA provides broad protection for the religious liberty of prisoners under the same standard applied by its sister statute, the Religious Freedom Restoration Act[5] (RFRA).[6] In 2005, the Supreme Court in *Cutter v. Wilkinson*[7] instructed lower courts to exercise some amount of deference to the expertise of prison officials in RLUIPA reviews, though the Court did not specify how and when this deference should apply.[8] Last Term, in *Holt v. Hobbs*,[9] the Supreme Court held that the Arkansas Department of Correction violated RLUIPA by "prevent[ing a prisoner] from growing a [half]-inch beard in accordance with his religious beliefs."[10] The Court rejected the near-absolute deference of the Eighth Circuit in this case, but declined to further articulate the contours of the deference owed to prison officials in religious-liberty cases going forward. As a result, inconsistent and unpredictable judicial review of prisons' administrative plans under RLUIPA likely will remain the status quo.

Gregory Holt is an Arkansas prison inmate in the custody of the Arkansas Department of Correction (Department).[11] Motivated by his Muslim faith, Holt requested an exception to the Department's policy of prohibiting inmates from growing beards, except for quarter-inch beards for approved dermatological reasons.[12] The Department re-

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[1] Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 1988, 2000cc to 2000cc-5 (2012)).

[2] Under the strict scrutiny standard, the government is prohibited from taking any action that substantially burdens religious exercise unless it can demonstrate that the action is the least restrictive means of furthering a compelling governmental interest. *See* 42 U.S.C. § 2000cc-1(a).

[3] *Id.* § 2000cc.

[4] *Id.* § 2000cc-1.

[5] Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 5 U.S.C. § 504, 42 U.S.C. §§ 1988, 2000bb to 2000bb-4 (2012)), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[6] The Supreme Court has recently read RFRA to provide broad protection for religious objectors by requiring religious exemptions to a generally applicable health care regulation in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014), and a generally applicable drug law in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 439 (2006).

[7] 544 U.S. 709 (2005).

[8] *See id.* at 722–23.

[9] 135 S. Ct. 853 (2015).

[10] *Id.* at 867.

[11] *Id.* at 859. The petitioner filed the lawsuit under the name Gregory Holt, but is also known as Abdul Maalik Muhammad. *Id.* This comment refers to him as Holt.

[12] *Id.* at 859–61.

fused Holt's request to grow a half-inch beard.[13] Holt then filed a pro se complaint in the U.S. District Court for the Eastern District of Arkansas, claiming that the Department's policy violated RLUIPA.[14] On October 18, 2011, the district court granted Holt a preliminary injunction — temporarily permitting him to wear a short beard — and sent the case to a magistrate judge for an evidentiary hearing.[15]

The magistrate judge recommended that the district court vacate the preliminary injunction and dismiss Holt's complaint for failure to state a claim.[16] The judge relied on the testimony of the warden of Holt's prison and the Department's Assistant Director, who claimed that prisoners could use short beards to introduce contraband into prisons.[17] Both administrators also expressed concerns about giving an inmate preferential treatment,[18] and the warden noted that a bearded inmate could change his appearance to help him escape.[19] The judge ultimately deferred to this testimony.[20]

In his recommendation, the magistrate judge emphasized that, in the context of prisoners' constitutional rights, prison officials are entitled to deference with respect to reasonable security concerns.[21] While admitting that RLUIPA elevated this reasonableness test to a compelling interest standard,[22] the judge still "afford[ed] a significant amount of deference to the expertise of prison officials" to determine if they met this statutory burden.[23] The judge found deference to the prison's policy appropriate even in the face of "some evidence as to the feasibility of implementing a less restrictive means of achieving prison safety," such as other jurisdictions permitting half-inch beards.[24] Thus, the

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[13] *Id.* at 861.

[14] *See id.*

[15] Holt v. Hobbs, No. 5:11-CV-00164 (E.D. Ark. Oct. 18, 2011) (order granting preliminary injunction).

[16] Holt v. Hobbs, No. 5:11-CV-00164, 2012 WL 994481, at *8 (E.D. Ark. Jan. 27, 2012) (recommendation of magistrate judge).

[17] *Id.* at *3 (recounting the witnesses' testimony that half-inch beards could "conceal razor blades, drugs[,] homemade darts," syringe needles, and cell phone SIM cards).

[18] *Id.* (explaining that such treatment could either make the inmate a target of other inmates or elevate the inmate's social status).

[19] *Id.*

[20] *See id.* at *4, *7.

[21] *Id.* at *5–7 (explaining that a prison regulation is valid, even if it infringes constitutional rights, "if it is 'reasonably related to legitimate penological interest[s],'" *id.* at *6 (quoting Gladson v. Iowa Dep't of Corr., 551 F.3d 825, 831 (8th Cir. 2009))).

[22] Under RLUIPA, if a petitioner shows that a prison policy "impose[s] a substantial burden on [his] religious exercise," then the burden shifts to the prison to demonstrate that its policy furthers a "compelling governmental interest" and "is the least restrictive means of furthering that . . . interest." 42 U.S.C. § 2000cc-1(a) (2012); *see id.* § 2000cc-2(b).

[23] *Holt*, 2012 WL 994481, at *6.

[24] *Id.* at *7 (quoting Fegans v. Norris, 537 F.3d 897, 905 (8th Cir. 2008)) (referring to evidence that the New York Department of Correction allows inmates to grow beards while preserving security by taking photos of inmates both with and without facial hair to help with identification).

judge agreed with the Department that its grooming policy was the least restrictive means for ensuring prison security.[25] The judge also concluded that Holt's religious exercise was not substantially burdened because he was given access to Islamic resources and permitted to observe certain Islamic customs.[26] After reviewing the record de novo, the district court adopted the magistrate judge's recommended disposition and findings in their entirety.[27]

The Eighth Circuit affirmed in a brief, unpublished opinion.[28] Like the district court, the Eighth Circuit relied on deference to prison officials to hold that the Department had met its burden under RLUIPA of showing that its grooming policy was the least restrictive means of advancing its compelling interest in prison security.[29] The court found deference appropriate in this case because there was not "substantial evidence in [the] record indicating that [the] response of [the] prison officials to security concerns [was] exaggerated."[30] The circuit court also agreed that Holt's evidence that prisons in other jurisdictions allow half-inch beards while also preserving security did not "outweigh" the deference given to expert prison officials who are more familiar with the security needs of "their own institutions."[31]

The Supreme Court reversed.[32] Writing for a unanimous Court, Justice Alito held that RLUIPA required the Department to allow Holt to grow a half-inch beard.[33] The Court began by finding that Holt "easily satisfied" his burden under RLUIPA to establish that growing a beard "is a dictate of his religious faith,"[34] and that the Department's grooming policy substantially burdened his religious exercise.[35] Therefore, the burden shifted to the Department to show that its prohibition

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[25] *See id.*

[26] *Id.*

[27] Holt v. Hobbs, No. 5:11-CV-00164, 2012 WL 993403, at *1 (E.D. Ark. Mar. 23, 2012) (opinion of district court).

[28] Holt v. Hobbs, 509 F. App'x 561, 562 (8th Cir. 2013) (per curiam).

[29] *Id.*

[30] *Id.* (citing Fegans v. Norris, 537 F.3d 897, 903 (8th Cir. 2008)).

[31] *Id.* (citing *Fegans*, 537 F.3d at 905).

[32] *Holt*, 135 S. Ct. at 859, 867.

[33] *Id.* at 867.

[34] *Id.* at 862 (noting that the Department did "not dispute the sincerity of petitioner's belief"). RLUIPA protects religious exercise even if it is "not compelled by, or central to, a system of religious belief," 42 U.S.C. § 2000cc-5(7)(A) (2012), or is inconsistent with the mainstream version of that religion, *cf.* Thomas v. Review Bd., 450 U.S. 707, 715–16 (1981). *See Holt*, 135 S. Ct. at 862–63.

[35] *Holt*, 135 S. Ct. at 862 (noting that the Department's grooming policy forced Holt to choose between shaving his beard — and thereby violating his religious belief — and facing "serious disciplinary action"). The Court also noted that the district court improperly relied on case law involving prisoners' First Amendment rights to conclude that a prisoner's ability to practice his religion in other ways is relevant. *See id.* Rather, "RLUIPA's 'substantial burden' inquiry" affords greater protection to Holt's ability to grow a half-inch beard, whether or not he can practice his Muslim beliefs through other means. *Id.*

of Holt's half-inch beard met RLUIPA's "compelling governmental interest" and "least restrictive means" tests.[36] The Department asserted two interests to justify its grooming policy — preventing prisoners from hiding contraband and disguising their identities — and the Court considered each in turn.

First, while the Court "readily agree[d] that the Department has a compelling interest in staunching the flow of contraband into" prisons, the Court found "hard to take seriously" the idea that Holt's half-inch beard could "seriously compromise[]" that interest.[37] The Court noted that almost no contraband would be small enough to fit in a half-inch beard, a prisoner would be hard-pressed to keep any contraband from falling out of so short a beard, and a prisoner could more easily hide objects in his more capacious clothing or head hair.[38] The Court cautioned that proper "respect" for prison officials should not cause courts to "abdicat[e]" their responsibility "to apply RLUIPA's rigorous [least restrictive means] standard."[39] Barring inappropriately extreme deference to the Department, the Court found it "hard to swallow the argument that denying" this beard affirmatively prevented contraband smuggling.[40] The Court further held that even if it believed that Holt's short beard could facilitate contraband transportation, there was still a less restrictive means for safety: "simply searching petitioner's beard."[41]

Second, while the Court also agreed with the Department that "the quick and reliable identification of prisoners" is a compelling interest, it found that enforcing the grooming policy against Holt was unnecessary to accomplish that goal.[42] The Court acknowledged that alteration to a prisoner's appearance caused by shaving one's beard may have "some effect on the ability of guards or others to make a quick identification."[43] But the Court concluded that "effective countermeasures" were available to allow both Holt's beard and prisoner identification.[44] Namely, the Department could require prisoners like Holt to be photographed without beards upon entering the facility, and then again after

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[36] *Id.* at 863 (quoting 42 U.S.C. § 2000cc-1(a)).

[37] *Id.*

[38] *Id.* at 863–64.

[39] *Id.* at 864 (explaining that the least restrictive means analysis requires a more searching inquiry into the policy and its alternatives, and does not allow the "unquestioning deference" that the lower courts showed in this case).

[40] *Id.*

[41] *Id.* (finding that "the Department has failed to prove that it could not adopt [this] less restrictive alternative," especially given the fact that it "already searches prisoners' hair and clothing, and it presumably examines" the beards it already permits for dermatological conditions).

[42] *Id.* at 864; *see also id.* at 864–65.

[43] *Id.* at 864–65.

[44] *Id.* at 864; *see also id.* at 865.

they have grown half-inch beards.[45] Additionally, this less restrictive dual-photo system is already employed by many other prison systems.[46]

The Court also found the grooming policy suspect due to its underinclusiveness and unusualness. The Department's policy was "substantially underinclusive" in permitting inmates to grow quarter-inch beards for medical reasons and more than a half-inch of hair on their heads even though these pose "similar" or greater contraband and identification risks compared to half-inch beards.[47] Further, "the vast majority of States and the Federal Government permit" prisoners to grow half-inch beards.[48] "While not necessarily controlling,"[49] the fact that "so many" prisons offer this accommodation — and that the Department was unable to "offer persuasive reasons" why it had to take a different course — "suggests that [it] could satisfy its security concerns" while also accommodating Holt.[50] Capping the level of deference properly due under RLUIPA, the Court emphasized that "[c]ourts must hold prisons to their statutory burden" by not deferring to their "mere say-so" that no less restrictive means exists.[51]

The Court concluded with a reassurance that RLUIPA, despite its potent protection for the religious exercise of prisoners, still allows prison officials to maintain prison security.[52] The Court highlighted three ways in which RLUIPA does not foreclose security maintenance: First, "courts should not blind themselves" to the context of analyses "conducted in the prison setting."[53] Second, when officials suspect that an inmate is using religion to disguise illegal behavior, they "may appropriately question whether a prisoner's religiosity . . . is authentic."[54] Third, even in the case of a sincere religious belief, a prison might be able to "withdraw an accommodation if the [inmate] abuses the exemption in a manner that undermines the prison's compelling interests."[55]

Justice Sotomayor filed the principal concurrence,[56] in which she claimed that *Holt* does not alter the holding of *Cutter v. Wilkinson* that

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[45] *Id.* at 865. Because Holt argued that the dual-photo system was a less restrictive alternative, *id.*, the Court had no need to engage in a comparison of the respective burdens of a religious prisoner shaving his beard once upon entering a prison versus keeping his beard constantly shaved.

[46] *Id.*

[47] *Id.*; *see also id.* at 865–66.

[48] *Id.* at 866.

[49] *Id.* (quoting Procunier v. Martinez, 416 U.S. 396, 414 n.14 (1974)).

[50] *Id.*

[51] *Id.* This limit effectively banned absolute deference to prison officials but left room for lesser degrees of deference.

[52] *Id.* at 866–67.

[53] *Id.* at 866.

[54] *Id.* at 867 (quoting Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005)).

[55] *Id.*

[56] Justice Ginsburg also filed a concurrence, joined by Justice Sotomayor, briefly stating that she joined the Court on the understanding that, unlike in *Hobby Lobby*, accommodating Holt's

"[c]ontext matters"[57] in the application of RLUIPA to "the dangerous prison environment."[58] Justice Sotomayor did not read the majority opinion to "preclude deferring to prison officials' reasoning . . . when [they] offer a plausible explanation for their chosen policy."[59] But she agreed with the Court that upholding the Department's policy against Holt in this case would have provided too much deference to the Department's "unsupported assertions" that it used the least restrictive means for prison security.[60] While a prison need not preemptively "refute every conceivable option," it must "[]adequately respond[] to the less restrictive policies" that a prisoner brings to its attention during the course of litigation.[61] The Department was unable to do so here.[62]

In *Holt*, the Court declined to articulate what degree of deference — short of unquestioning acceptance[63] — is owed to prison officials in religious liberty cases going forward. Although the facts of *Holt* did not require more than this minimalist holding, the Court's decision to refrain from providing any more guidance on how deference to prison officials should be incorporated into analysis of RLUIPA claims[64] means that lower courts will continue to have much leeway to diverge on this question. As a result, inconsistent and unpredictable judicial review of prisons' administrative plans under RLUIPA likely will remain the status quo.

RLUIPA's least restrictive means test, taken on its face, is a much stricter review of prison regulations than the Court's constitutional free exercise jurisprudence with respect to prisoners.[65] Under the First

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faith here "would not detrimentally affect others who do not share [his] belief." *Id.* (Ginsburg, J., concurring).

[57] *Id.* (Sotomayor, J., concurring) (alteration in original) (quoting *Cutter*, 544 U.S. at 723).

[58] *Id. Cutter* established that some deference is appropriate when lower courts evaluate prison policies under RLUIPA. *See* 544 U.S. at 723.

[59] *Holt*, 135 S. Ct. at 867 (Sotomayor, J., concurring).

[60] *Id.* at 868. Justice Sotomayor cited *United States v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011), for the proposition that prison officials do not have to show that they considered any alternatives at the time of the regulation — they just have to plausibly support their choice of regulatory scheme in the face of alternatives offered at litigation. *Holt*, 135 S. Ct. at 868 (Sotomayor, J., concurring).

[61] *Holt*, 135 S. Ct. at 868 (Sotomayor, J., concurring).

[62] *See id.*

[63] *See id.* at 866 (majority opinion) ("RLUIPA, however, demands much more" than "defer[ring] to these prison officials' mere say-so . . . ."); *see also id.* at 867 (Sotomayor, J., concurring) (explaining that the deference "extend[ed to] the experience and expertise of prison administrators does not extend so far that prison officials may declare a compelling governmental interest by fiat" (alteration in original) (quoting Yellowbear v. Lampert, 741 F.3d 48, 59 (10th Cir. 2014))).

[64] Both the majority and principal concurrence agreed that some deference should inform RLUIPA inquiries. *See id.* at 866–67 (majority opinion); *id.* at 867 (Sotomayor, J., concurring) (emphasizing that some "deference is due to institutional officials' expertise" (quoting Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005))). But neither opinion articulated how deference to prison officials should fit into RLUIPA scrutiny when that deference is due.

[65] *See* Marci A. Hamilton, *The Establishment Clause During the 2004 Term: Big Cases, Little Movement*, 2004–2005 CATO SUP. CT. REV. 159, 164–65.

Amendment standard, as set out in *Turner v. Safley*,[66] courts defer to prison policies that burden prisoners' free exercise rights as long as those policies are "reasonably related to legitimate penological interests,"[67] and thus are not "arbitrary or irrational."[68] RFRA originally purported to apply strict scrutiny[69] in the prison context, among others; but many courts applied the test with a gloss that resulted in doctrinal confusion regarding the amount of deference, if any, due to prison officials. Even when RFRA applied to state prisons, between 1993 and 1997,[70] courts largely "smuggl[ed] in some unspecified measure of expedienc[e] or practicality into the calculation of 'least restrictive means,'" converting strict scrutiny into a reasonableness determination.[71] Many courts, in the name of deference, accepted at face value prison officials' assertions that their policies were "necessary to effect" prison safety without requiring an exploration of less restrictive alternatives.[72] These courts asserted that the scrutiny required by RFRA did not alter "the judicial policy of deference to prison authorities"[73] and their "legitimate security matters."[74] Although many courts applied broad deference to prison policies under RFRA, "[a] few courts"

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[66] 482 U.S. 78 (1987).

[67] *Id.* at 89. The magistrate judge in *Holt v. Hobbs*, No. 5:11-CV-00164, 2012 WL 994481 (E.D. Ark. Jan. 27, 2012), correctly cited this standard, *id.* at *5–6, but was chided by the Supreme Court for applying this deferential pre-RLUIPA constitutional standard rather than the correct RLUIPA test, *see Holt*, 135 S. Ct. at 863–64.

[68] *Turner*, 482 U.S. at 90; *see also* O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (explaining that this deferential "'reasonableness' test [is] less restrictive than that ordinarily" used to determine whether "fundamental constitutional rights" are infringed); Sarah E. Vallely, Comment, *Criminals Are All the Same: Why Courts Need to Hold Prison Officials Accountable for Religious Discrimination Under the Religious Land Use and Institutionalized Persons Act*, 30 HAMLINE L. REV. 191, 208 (2007) (discussing *Turner*'s "rational basis standard of review").

[69] RFRA mandates strict scrutiny with language identical to RLUIPA's test. *See* 42 U.S.C. § 2000bb-1(b) (2012), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[70] As enacted in 1993, RFRA applied to the actions of state and local governments, in addition to the federal government. In 1997, the Supreme Court in *City of Boerne v. Flores,* 521 U.S. 507 (1997), held that RFRA exceeded Congress's authority in its application to state and local action. *See id.* at 536. RLUIPA — invoking congressional authority under the Spending and Commerce Clauses, *see* 42 U.S.C. § 2000cc(a)(2)(A)–(B) — was enacted in 2000 to protect religious exercise in state prisons. *See* Hamilton, *supra* note 65, at 164, 166.

[71] Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 551 (2005) (quoting Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 596 (1998)).

[72] See *id.* at 551 & n.225 for a sample of several courts applying some standard less than strict scrutiny in the name of deference to prisons despite the statutory text. *See also, e.g.*, Murphy v. Mo. Dep't of Corr., 372 F.3d 979, 987 (8th Cir. 2004).

[73] Mack v. O'Leary, 80 F.3d 1175, 1180 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997); Mack v. O'Leary, Nos. 95-1331, 94-1849, 1998 WL 416151 (7th Cir. June 17, 1998) (noting that *City of Boerne* invalidated RFRA as applied to the states, including state prisons, *id.* at *2 — an invalidation that only *increased* deference to prison officials before RLUIPA).

[74] Diaz v. Collins, 114 F.3d 69, 73 (5th Cir. 1997) (upholding hair-length restriction, due in part to the continued extension of "substantial deference to prison officials" under RFRA).

refused to "weaken[] . . . the strict scrutiny approach,"[75] adding to the inconsistency and confusion of the era.

RLUIPA similarly called for strict scrutiny in reviewing policies of state prisons; yet again, courts differed regarding when and how they should defer to such policies. After five years of uncertainty about whether deference had any place in RLUIPA review, the Supreme Court encouraged "due deference" in the context of prison policies. In 2005, *Cutter v. Wilkinson* provided a shallow victory for prisoners' statutory free exercise rights, upholding RLUIPA against an Establishment Clause challenge.[76] However, the unanimous Court emphasized that its holding assumed that the statute would be applied in "an appropriately balanced way,"[77] with "deference to the experience and expertise of prison and jail administrators."[78] *Cutter* — the only Supreme Court case before *Holt* to evaluate the RLUIPA standard[79] — cautioned that accommodations of religious practice should not be "elevate[d] . . . over an institution's need to maintain order and safety," warning that RLUIPA should be applied "with particular sensitivity to security concerns."[80] The Court emphasized both that prison security is a bona fide compelling interest and that deference is due to officials in this area.[81] And prisons may rightly "resist the imposition" of religious accommodations if they "become excessive," unjustly burden other inmates, or "jeopardize the effective functioning" of a prison.[82]

The lack of specificity in *Cutter* opened the door to lower courts' application of varying levels of deference to prison officials in RLUIPA cases between 2005 and 2015. Some courts have applied strict scrutiny with very little deference, cabining *Cutter*'s call to defer as merely applicable "to nudge a *questionable case* across the line," and not defer-

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[75] Gaubatz, *supra* note 71, at 551 n.225 (noting the inconsistent judicial application of deference under RFRA).

[76] 544 U.S. 709, 714 (2005).

[77] *Id.* at 722.

[78] *Id.* at 723 (quoting Letter from Robert Raben, Assistant Att'y Gen., to Senator Orrin G. Hatch, Chairman, Comm. on the Judiciary (July 19, 2000), *reprinted in* 146 Cong. Rec. 16,700 (2000)); *see also* Hamilton, *supra* note 65, at 168 (noting that the Court read the statute "to require *deferential* review of prison regulations").

[79] *See* John J. Dvorske, Annotation, *Validity, Construction, and Operation of Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C.A. §§ 2000cc et seq.)*, 181 A.L.R. Fed. 247 (Westlaw) (last updated 2015). One other case, *Sossamon v. Texas*, 131 S. Ct. 1651 (2011), evaluated RLUIPA's effect on state sovereign immunity, rather than the proper standard of deference to prisons' religious accommodation decisions. *Id.*

[80] *Cutter*, 544 U.S. at 722. Although the text of the statute does not call for such sensitivity beyond the strict scrutiny test, *see* 42 U.S.C. § 2000cc-1 (2012), the Court determined from RLUIPA's legislative history that the legislators responsible for RLUIPA "were mindful of the urgency of . . . safety[] and security in penal institutions," *Cutter*, 544 U.S. at 723.

[81] *See Cutter*, 544 U.S. at 725 n.13; Hamilton, *supra* note 65, at 168. Such further deference presumably would apply to least restrictive means determinations.

[82] *Cutter*, 544 U.S. at 726.

ring to the "government's bare say-so" in typical cases.[83] Others have deferred to reasonable penological policies as a default, objecting only when there is substantial evidence indicating that the prison's response to security concerns is exaggerated or irrational.[84] Some inconsistency among lower courts may be attributed to variation in the strength of evidence presented in each case,[85] but there also exists a varying approach to the role of deference in RLUIPA inquiries.

Holt provided the Supreme Court with an opportunity to resolve the inconsistent jurisprudential landscape by providing clearer guidance about the application of deference to RLUIPA's least restrictive means analysis. But *Holt* opted for a minimalist, fact-specific holding that did not bring clarity to this doctrinal confusion. The Court held merely that the Department's refusal to provide the inmate an exception from its grooming policy was not the least restrictive means — by a wide margin — of identification or contraband prohibition. The Department's position was so unreasonable that the Court decided that "deference" here would be "tantamount to unquestioning acceptance."[86] By refraining from providing much more guidance on how deference should be incorporated into RLUIPA analyses, however, the Court left open the door to inconsistent and unpredictable judi-

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[83] Yellowbear v. Lampert, 741 F.3d 48, 59 (10th Cir. 2014) (emphasis added) (acknowledging that *Cutter* read RLUIPA to "hold[] an unusual twist in the prison context," but noting that the compelling interest language for institutionalized persons is the exact same as in RFRA and RLUIPA land use contexts, in which courts afford almost no deference to the government (citing Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 432–33 (2006))). For other cases that applied strict scrutiny in the prison context with little deference — though paying lip service to prison officials' expertise — see, inter alia, *Lovelace v. Lee*, 472 F.3d 174 (4th Cir. 2006), which was characterized by its dissent as "[d]isregarding the deference historically accorded prison administrators," *id.* at 204 (Wilkinson, J., concurring in the judgment in part and dissenting in part), and "invit[ing] lower courts to substitute their own judgment for that of prison officials," *id.* at 211, despite the majority's lip service to *Cutter*'s call to defer, *see id.* at 190 (majority opinion). *Washington v. Klem*, 497 F.3d 272 (3d Cir. 2007), also noted that prison officials deserve "substantial deference," but refused to accept "conclusory statement[s]" or "mere assertion[s] of security or health reasons" for prison policies, *id.* at 283 (rejecting a prison's assertion that its tenbook limitation in prison cells was the least restrictive means of security, *id.* at 284–86).

[84] *See, e.g.*, Knight v. Thompson, 723 F.3d 1275, 1287 (11th Cir. 2013), *vacated*, 135 S. Ct. 1173 (2015) (refusing to exempt Native Americans from a prison haircut requirement despite other Departments allowing exceptions due to the court's hesitance to "second-guess the reasoned judgments of prison officials," *id.* at 1282–83); Fegans v. Norris, 537 F.3d 897, 903 (8th Cir. 2008) (upholding a similar hair-length restriction); Hoevenaar v. Lazaroff, 422 F.3d 366, 371–72 (6th Cir. 2005) (reversing a district court opinion that "failed to give proper deference to prison officials," *id.* at 372, because the district court had substituted its analysis of less restrictive means for prison security over the prison's security experts' "substantial evidence" to the contrary, *id.* at 371). See also the deference in the Eighth Circuit opinion in *Holt v. Hobbs*, 509 F. App'x 561, 562 (8th Cir. 2013) (per curiam).

[85] For example, the Third Circuit in *Klem* did not necessarily apply a different standard than the Sixth Circuit did in *Hoevenaar* — the defendant in the former made only "conclusory statement[s]," *Klem*, 497 F.3d at 283, whereas the defendant in the latter offered "substantial evidence" for its position, *Hoevenaar*, 422 F.3d at 371.

[86] *Holt*, 135 S. Ct. at 864.

cial application of *Cutter* deference. The outcome in *Holt* could have been reached by applying substantial deference to the Department, but requiring an exemption for Holt because the prison's explanation was not "plausible."[87] Or it could have been reached by assuming that deference is reserved for truly borderline cases — perhaps none applied here because the case was not difficult. Had either position, or another position consistent with the Court's holding, been articulated clearly, it could have provided more clarity to RLUIPA analysis.

Additionally, *Holt* included assurances that prison officials have "ample ability to maintain security" under RLUIPA,[88] but did not specify how courts' deference to prison officials' expertise — which is surely part of affording officials that ability — should be incorporated into their "least restrictive means" analyses. That lower courts "should not blind themselves"[89] to the context of prisons in cases involving inmate policies, and that a prison might be permitted to "withdraw an accommodation if the claimant abuses" it to undermine prison security[90] — as the Court noted toward the end of the opinion — seem to be mere reiterations of RLUIPA's standard.[91] The majority further stated that prison officials may reject accommodations if they reasonably "suspect[] that an inmate is using religious activity to cloak illicit conduct."[92] This remark may be interpreted as recognizing particular deference to prison officials in sincerity determinations, although it was not described as such by the Court. But there remains the problem of *how much* courts should defer to officials' determinations of religious sincerity.

While *Holt* outlined an upper bound on the deference to be applied under RLUIPA by rejecting the Eighth Circuit's deference in that case, it only ruled out "unquestioning" and "absolute" deference. This holding left plenty of room for lower courts to apply the law in inconsistent ways, allowing the problematic status quo to continue after *Holt* — just as in the wake of *Cutter*. Such ambiguity is harmful to the rule of law as lower courts attempt to apply *Holt* to cases across fifty states — many of which may have prison policies that present cases more difficult than the facts of *Holt*. The resulting inconsistency may ultimately disadvantage both prison officials as they make difficult religious accommodation decisions, and inmates as their rights are protected in varying degrees.

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[87] *Id.* at 867 (Sotomayor, J., concurring). *But see id.* at 864 (majority opinion) (asserting that there is less deference under RLUIPA than under the pre-statutory constitutional deference test).

[88] *Id.* at 866.

[89] *Id.*

[90] *Id.* at 867.

[91] *See* 42 U.S.C. § 2000cc-1(a) (2012) (allowing restrictions on religious exercise when it endangers compelling interests).

[92] *Holt*, 135 S. Ct. at 866–67 (citing Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005)).