No. 13-955

IN THE

Supreme Court of the United States

RICKY KNIGHT, ET AL.,

Petitioners,

v.

LESLIE THOMPSON, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE INTERNATIONAL CENTER FOR ADVOCATES AGAINST DISCRIMINATION, SIKH ALLIANCE, AND SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI[1]

Amici are the International Center for Advocates Against Discrimination, which empowers women and minorities to address structural discrimination in their legal systems; the Sikh Alliance, which champions the Sikh principle of global justice with pro bono representation in human-rights cases; and the Sikh American Legal Defense and Education Fund (SALDEF), which empowers Sikh Americans by building dialogue, promoting civic and political participation, and upholding social justice and religious freedom for all Americans.

These human-rights advocacy organizations submit this brief out of concern for the grave threat to religious liberty posed by the Eleventh Circuit's dilution of the Religious Land Use and Institutionalized Persons Act's strict-scrutiny standard. Moreover, the Sikh Alliance and SALDEF represent the Sikh community. Because the religious beliefs of Sikhs, like those of petitioners, dictate that followers maintain unshorn hair, and because some Sikh inmates have had their religious beliefs violated by grooming policies similar to the one upheld by the Eleventh Circuit below, the Sikh community's particular concern for religious liberty is implicated here.

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1 No person other than amici or their counsel authored this brief or provided financial support for it. All counsel for the parties received timely notice of this brief and consented to it via email.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici recognize that the Court recently granted review in *Holt v. Hobbs*, No. 13-6827 (pet. for cert. granted Mar. 3, 2014), which, as indicated in the petition here (at 31-32), presents similar issues regarding the application of RLIUPA's least-restrictive-means test. Although we believe that the Eleventh Circuit's decision below presents an ideal vehicle for plenary review now, *see* Pet. 32, at a minimum, the Court should hold the petition pending the disposition in *Holt*.

* * *

In a decision unmoored from the relevant statutory text and purpose, the Eleventh Circuit split with seven other circuits by holding that to satisfy its burden under the "least-restrictive-means" prong of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq*., the government need not actually demonstrate a sufficient basis for rejecting accommodations for religious practices. Pet. App. 19a-21a. Presented with facts indistinguishable from those confronted by other circuits, *see, e.g.*, *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005); *Couch v. Jabe*, 679 F.3d 197 (4th Cir. 2012), the Eleventh Circuit ignored those decisions and affirmed that the existence of alternatives to the prison's grooming policy was "beside the point." Pet. App. 10a.

In RLUIPA, Congress demanded that state and local governments satisfy "the highest standard the courts apply" to government conduct. 146 Cong. Rec.

S7778 (daily ed. July 27, 2000) (statement of Sen. Reid). But the Eleventh Circuit collapsed together RLUIPA's "compelling government interest" and "least-restrictive-means" prongs, *see* § 2000cc-1(a)(1)-(2), allowing the government to satisfy its burden by asserting only the importance of its interests without assessing the means by which it furthers them. As a result, the Eleventh Circuit's "beside the point" approach to the least-restrictive-means test will have broad implications for individuals of all religious denominations and a variety of religious practices.

First, individuals in state prisons, mental-health facilities, juvenile facilities, and state-run nursing homes will face unlawful restrictions on their access to group worship, religious meals, and their possession of religious objects. Without requiring that the government show that it considered available alternatives, the Eleventh Circuit turned RLUIPA's strict scrutiny into the brand of rational-basis review adopted in *Turner v. Safley*, 482 U.S. 78 (1987), and unanimously rejected by the Congress that enacted RLUIPA.

Second, the Eleventh Circuit's standard would allow state and local governments to burden religious exercise through land-use regulations without the government having to face the rigor of RLUIPA's least-restrictive-means analysis. Because disputes over land use tend to be complex and polycentric, less-restrictive methods of regulation—and evidence of their efficacy—are often available. But to the Eleventh Circuit, this type of evidence is irrelevant. *See* Pet. App. 20a-21a.

Third, the Eleventh Circuit's interpretation of RLUIPA's least-restrictive-means test necessarily would apply to any case involving the nearly identically worded Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1. That interpretation of RFRA would be incompatible with the Court's decision in *Gonzales v. O Centro Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). And, because RFRA applies to all federal government action, the Eleventh Circuit's diluted strict-scrutiny standard would allow the government to burden religious exercise in contexts far beyond RLUIPA.

ARGUMENT

I. By relieving the government of its duty to show it used the least-restrictive means to further its asserted interest, the Eleventh Circuit's interpretation of RLUIPA flouts congressional intent.

Strict scrutiny—"the highest standard the courts apply" to the actions of governments—is integral to RLUIPA's statutory scheme and essential to its continued success. 146 Cong. Rec. S7778 (daily ed. July 27, 2000) (statement of Sen. Reid). By supplying the firepower that wins "victories in courts" and inspires officials to "comply with the law," strict scrutiny under RLUIPA has helped "thousands of individuals and institutions" secure their right to "practice their faiths freely and without discrimination." U.S. Dep't of Justice, Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act 2 (Sept. 22, 2010) (DOJ RLUIPA Report), *avail-*

able at http://www.justice.gov/crt/rluipa_report_092210.pdf.

Where religious liberty is most vulnerable, strict scrutiny under RLUIPA steps in to protect it. Thus, when a state or local government confines people to its prisons and psychiatric hospitals, § 2000cc-1(a), or regulates the use of land, § 2000cc(a), any "substantial burden" it places on religious exercise must survive strict scrutiny. This standard requires the government to make two distinct showings. First, it must show that the burden furthers a "compelling government interest." § 2000cc(a)(1)(A); § 2000cc-1(a)(1). Next, it must show that it used the "least restrictive means of furthering" that interest. § 2000cc(a)(1)(B); § 2000cc-1(a)(2). Together, these requirements codify "the most demanding test known to constitutional law": strict scrutiny. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (discussing RFRA's identical language). The petition and this brief are concerned solely with what it means to show that "the least restrictive means" were used.

When a unanimous Congress enacted RLUIPA, 146 Cong. Rec. E1563-01 (daily ed. Sept. 22, 2000) (statement of Rep. Canady), it was the culmination of a decade-long conversation between the political branches and the judiciary about how to give "religious exercise heightened protection" while remaining "consistent with this Court's precedents" and the Constitution. *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). Ten years earlier, when *Employment Division v. Smith* held that the Free Exercise Clause did not mandate strict scrutiny of "neutral, generally appli-

cable law[s]" burdening religious exercise, 494 U.S. 872, 881-89 (1990), Congress responded with RFRA, a statute that did mandate strict scrutiny of such laws, § 2000bb(a), (b)(1).

With RFRA, Congress sought to protect religious liberty by extending the reach of this Court's strict-scrutiny precedents. Strict scrutiny "as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)," applied whenever a government—federal, state, or local—"substantially burden[ed]" religious exercise. § 2000bb(b)(1). Though RFRA took its strict-scrutiny standard from this Court's jurisprudence, it asked for more than the Fourteenth Amendment authorizes. *See City of Boerne*, 521 U.S. at 529. Congress could not subject every action burdening religious exercise taken by a state or local government to strict scrutiny. *See id.* at 532-36.

With RFRA limited, Congress enacted RLUIPA. The newer statute targets the "most obvious current threats to religious liberty" posed by state and local governments. 146 Cong. Rec. S7778 (daily ed. July 27, 2000) (statement of Sen. Kennedy). Though Congress addressed this Court's concerns by relying on different sources of constitutional power to enact a more focused statute, RLUIPA still uses RFRA's language to adopt the latter's strict-scrutiny standard. 146 Cong. Rec. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) ("Within this scope of application, [RLUIPA] applies [RFRA's] standard").

Thus, RLUIPA, like RFRA, uses the strict-scrutiny standard that this Court applied to free ex-

ercise in *Sherbert*. And to pass the least-restrictive-means test that *Sherbert* "set forth," § 2000bb(b)(1), the government must "demonstrate that no alternative forms of regulation" would further its asserted interest "without infringing First Amendment rights," 374 U.S. at 407.

RLUIPA's text could hardly be more emphatic about what strict scrutiny demands of the government. Unlike a judicial opinion interpreting the Constitution's general proscriptions, RLUIPA is a targeted statute that expressly requires strict scrutiny. Under RLUIPA, the government must "demonstrate[]" that it used the least-restrictive means to further its asserted interest. § 2000cc(a)(1)(B); § 2000cc-1(a)(2); § 2000cc-5(2) (defining "demonstrates").

The government can only meet this burden with evidence "that it has actually considered and rejected the efficacy of less restrictive measures." *Warsoldier v. Woodford*, 418 F.3d 989, 998-99 (9th Cir. 2005) (finding violation of institutionalized-persons provision); *see also Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F. 3d 548, 558-59 (4th Cir. 2013) (same with regard to land-use provision). Courts have overwhelmingly interpreted RLUIPA to require this showing from the government. *See* Pet. 11-20 (reviewing cases).

Under the Eleventh Circuit's ruling, however, the government need not "consider[] alternatives to its policy" to pass RLUIPA's least-restrictive-means test. Pet. App. 20a. And because the record below confirms that alternatives were never considered, the court of

appeals' decision was the perfect vehicle for announcing this deviant construction of strict scrutiny. Not only did the government concede that its officials had never "reviewed" the less-restrictive policies adopted by most peer institutions, its witnesses—including its own expert—were not even aware that alternative policies existed. *Id.* 7a-8a; Pet. 5-6.[2]

As the district court announced, and the Eleventh Circuit affirmed, alternatives are "beside the point." Pet. App. 10a. With evidence of alternative policies sidelined, the Eleventh Circuit allowed evidence that the challenged policy furthered compelling government interests to carry the government's burden on the least-restrictive-means test as well. *Id.* 5a-7a; 20a-21a.[3] And by relieving the government of its burden to demonstrate that it "actually considered and rejected the efficacy of less restrictive measures," *see id.* 20a-21a, the Eleventh Circuit contravened not only RLUIPA's text, but the meaning strict scrutiny has accumulated through decades of this Court's ju-

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2 Petitioners "offered undisputed testimony" that most U.S. jurisdictions—including "approximately 38 states" as well as the District of Columbia and the Federal Bureau of Prisons—"permit inmates to wear long hair, either generally or as an accommodation for religious inmates." Pet. App. 4a & n.2.

3 *See* Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 949 (2012) ("[T]he Eleventh Circuit's jurisprudence would enable prison officials to bypass liability by merely restating their penological interests and without providing the courts with particularized information substantiating these interests").

risprudence and the intent of a unanimous Congress. The Eleventh Circuit's approach should not be allowed to stand.

II. The Eleventh Circuit's approach to strict scrutiny under RLUIPA will have broad, detrimental effects.

If the Eleventh Circuit's "beside the point" approach to RLUIPA persists, state and local governments will be able to burden a host of religious practices within and without the Judeo-Christian mainstream without having to justify their actions with the rigor that Congress intended. RLUIPA's reach extends far beyond prison inmates' grooming regulations—it spans all religious denominations and involves a wide variety of religious practices. In the pages that follow, amici demonstrate how the Eleventh Circuit's diluted strict-scrutiny analysis would burden various modes of religious exercise not only for institutionalized people, but also in the land-use context and in any RFRA case.

A. Restrictions on the religious exercise of institutionalized people exist for all religious denominations and burden an array of religious practices.

Congress enacted RLUIPA's protection for "institutionalized persons" in response to examples of egregious restrictions on individuals' religious exercise. Before RLUIPA, prisoners' religious possessions, such as the Bible, the Koran, the Talmud, or religious items needed by Native Americans were frequently treated with contempt and were confiscated, damaged, or discarded by prison officers. *Cut-*

ter, 544 U.S. at 716 n.5 (citing RLUIPA's congressional record). Some prisons prohibited the lighting of Chanukah candles. *Id.* Authorities surreptitiously recorded a confession between a prisoner and a Catholic chaplain. *See Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997), *abrogated on other grounds*, *City of Boerne*, 521 U.S. 507. And some prison rules prevented prisoners from wearing religious jewelry, including crosses. *See Sasnett v. Sullivan*, 197 F.3d 290 (7th Cir. 1999). With RLUIPA, Congress sought to prevent these types of restrictions in the absence of a compelling government interest pursued through the least-restrictive means.

1. Since RLUIPA's enactment, most courts have held state and local governments to their high burden. When confronted with restrictions on prisoners' group worship, for example, courts rarely have found that an outright ban is the least-restrictive means of furthering a compelling government interest when the government did not show that it considered alternatives to its policy. In *Greene v. Solano County Jail*, for instance, a Christian inmate was denied the opportunity to attend group religious services under a policy that prohibited maximum-security inmates from participating. 513 F.3d 982, 985 (9th Cir. 2008). When Greene attempted to conduct Bible studies and morning prayer from his cell, he was ordered to stop. *Id.* at 985. Although the government had a compelling interest in jail security, the court nevertheless reversed the district court's grant of summary judgment, noting that Greene had offered alternatives to the complete ban: the jail's law library was nearby, and other maximum security inmates had been es-

corted there in the past and "left unattended in group settings without incidents" at least once a week for up to two hours. *Id.* at 988-90 (internal quotation marks omitted). Without showing that the government "actually considered and rejected the efficacy of [these] less restrictive measures," summary judgment was inappropriate. *Id.* at 989 (quoting *Warsoldier*, 418 F.3d at 999).

Similarly, in *Miles v. Moore*, the court considered a prison policy that allowed inmates to attend religious services only if they were on a "Master Pass List" established during an open-enrollment period. 450 F. App'x 318, 319 (4th Cir. 2011) (per curiam). Miles, a practicing Christian, was removed from the list when he was penalized for being in an unauthorized area. *Id.* When he returned from isolation, his request to be added to the list was denied because it was not made during an open-enrollment period. *Id.* The court could not conclude that the open-enrollment policy was the least-restrictive means of achieving a compelling interest and remanded the issue to the district court. *Id.* at 320.[4]

In both of these cases, under the Eleventh Circuit's approach, the existence of alternatives to the prisons' policies would have been irrelevant. The Eleventh Circuit would thus have allowed the gov-

4 *See also Lovelace v. Lee*, 472 F.3d 174, 190-92 (4th Cir. 2006) (least-restrictive-means test not met when removal of inmate from list of Ramadan participants left him with "no other options for congregational worship"); *Newby v. Quarterman*, 325 F. App'x 345, 351-52 (5th Cir. 2009) (discussing multiple alternatives to policy that caused effective ban on group worship).

ernment to continue burdening these religious exercises without demanding a showing that a suggested alternative would be ineffective in furthering the government's interests.

2. Other prison regulations have applied restrictions on group worship in a discriminatory manner. In *Newby v. Quarterman*, Newby wanted to hold group prayer meetings for fellow Buddhists, but the Texas prison regulations provided that religious services must be conducted by either a chaplain or an approved religious volunteer—not by inmates. 325 F. App'x at 347. Newby alleged, however, that Muslim inmates were exempted from the policy and were allowed to hold services without an approved religious volunteer and that the prison chaplain supervised a variety of Christian activities but would not supervise Buddhist gatherings. *Id.* at 352. In remanding the issue to the district court, the Fifth Circuit found that the "allegations of disparate application" could lead a fact-finder to conclude that the outside-volunteer policy was not the least-restrictive means of furthering a compelling government interest. *Id.*

So, too, in *Pugh v. Goord*, where the court found that the government had not satisfied its burden under the least-restrictive-means test because the plaintiff had presented evidence that the prison allowed for separate religious services for Catholics, Protestants, Native Americans, Rastafarians, and Seventh Day Adventists, but would not permit services for Shi'ite Muslims separate from Sunni Muslims. 571 F. Supp. 2d 477, 496, 505 (S.D.N.Y. 2008).

Although the existence of exceptions to the policies in both *Newby* and *Pugh* properly informed the courts' analyses regarding whether the government had used the least-restrictive means, the Eleventh Circuit below took the opposite approach, disregarding the differential treatment of female inmates under Alabama's policy and rebuking the policies of thirty-eight other states and the Federal Bureau of Prisons. Pet. 4; Pet. App. 21a; *see also* Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants at 21–22, *Knight v. Thompson*, No. 12-11926 (11th Cir.).

3. States have also denied religious groups specified meals, typically citing the drain on state resources as the compelling government interest. Although state funds and prison staff are not unlimited, under RLUIPA, the government must pursue its objectives through the means least restrictive on an inmate's religious rights.

A notable example is *Thompson v. Smeal*, 513 F. App'x 170 (3d Cir. 2013). There, the Pennsylvania Department of Corrections refused to allow Christian inmates to congregate for feasts to celebrate Christmas and Easter. *Id.* at 171. The Third Circuit held that summary judgment had been improperly granted in part because "[w]hile it [was] possible to envision that allowing these meals would drain prison resources, there [was] nothing in the record to support [that] determination." *Id.* at 173. Further, the court found persuasive the plaintiff's suggested alternative to an outright denial of his request: that the meals need not take place on Easter or Christ-

mas when the prison might be understaffed. *Id.* Any added cost for the accommodation would likely have been de minimis. *Id.*

Many courts also have confronted prison officials' denials of kosher meals to Jewish inmates. In *Moussazadeh v. Texas Department of Criminal Justice*, the defendant, citing cost, forced a Jewish inmate to pay for kosher meals rather than providing them for free. 703 F.3d 781, 794 (5th Cir. 2012). The court reversed a grant of summary judgment because it could not conclude that the defendant had satisfied the least-restrictive-means test when the plaintiff offered multiple alternatives to requiring that he pay for each meal. *Id.* at 795-76. For example, the prison could have supplemented the inmate's regular diet with prepackaged kosher meals or shipped meals from a kosher kitchen in another prison unit to the plaintiff's location. *Id.* at 796. The court instructed that, on remand, the district court consider whether any of the suggested "alternative, available" means would allow the prison to achieve its interest in cost minimization "while being less restrictive of Moussazadeh's ability to exercise his religion." *Id.*

In another case, a prison policy required that an outside entity verify an inmate's Jewish faith before officials would grant a request for kosher meals, but the plaintiff alleged that the policy was not enforced for white inmates. *Roberts v. Klein*, 770 F. Supp. 2d 1102, 1112-13 (D. Nev. 2011). Roberts, a black inmate, had not had his faith verified, and so was denied kosher meals. *Id.* at 1107. The court held that, even if the verification requirement furthered the in-

terest of avoiding increased costs, the prison had not shown that this requirement was the least-restrictive means of furthering that interest: the "obvious, easy alternative [was] for Defendants to provide a kosher diet to Plaintiff in the same manner" as the white inmates of Jewish faith. *Id.* at 1113.

4. State infringement on religious exercise has extended beyond prison walls. In *Sokolsky v. Voss*, a patient in a state mental-health facility was denied kosher-for-Passover meals because of their cost. 2009 WL 2230871, at *1 (E.D. Cal. July 24, 2009). The court found that because the state did not allege that it considered any other measures before denying the plaintiff his requested meal, it had not satisfied the least-restrictive-means test. *Id.* at *4.[5]

Just as in the group-worship cases, the Eleventh Circuit's "beside the point" approach to the least-restrictive-means test would demand a different result in each of these religious-meal cases. Without requiring that the government show that it actually considered available alternatives, the Eleventh Circuit relieves the government of its obligation to prove that its chosen policy is the least-restrictive means of furthering its interest, turning RLUIPA's strict scrutiny into the brand of rational-basis review adopted in *Turner v. Safley*, 482 U.S. 78 (1987), and unanimously rejected by Congress in RLUIPA.

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5 *See also* DOJ RLUIPA Report at 11-12 (discussing DOJ investigation of nursing home's failure to accommodate Sikh resident's religious practices).

B. Because land-use regulation is discretionary and land-use disputes are complex, RLUIPA cannot protect religious land use without a robust least-restrictive-means test.

The Eleventh Circuit's approach cannot be confined to state-run institutions. Indeed, because RLUIPA's institutionalized-persons and land-use provisions describe strict scrutiny with the same words, *see* § 2000cc-1(a); § 2000cc(a)(1), the Eleventh Circuit would read "least restrictive means" out of RLUIPA's "protection of land use as religious exercise" as well, § 2000cc. This would thwart Congress's intent to protect religious liberty wherever land-use is regulated—everywhere.

RLUIPA's drafters found "massive evidence" that discrimination against religious land use is a "nationwide problem." 146 Cong. Rec. S7774-75. Applying discretionary zoning laws, local-government officials give "vague and universally applicable reasons" like "traffic" and "aesthetics" to keep synagogues and churches out of communities. *Id.* S7774. These uses must be protected because religions need land "adequate to their needs" and structures "consistent with their theolog[y]" to exist. *Id.* And holding land-use decisions to a "heightened standard . . . directly respond[s] to the difficulty of [proving]" discrimination "in individual cases," making strict scrutiny essential to RLUIPA's protection of religious land use. *Id.* S7775.

1. Disputes about whether a lot will become a Costco or a non-denominational church, *see Cotton-*

wood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002), tend to be more complex than disputes about how long inmates may grow their hair. Thus, when land-use regulations are held to strict scrutiny under RLUIPA, more alternatives, and more evidence of their efficacy, tend to be available.

As one case illustrates, proceedings before zoning authorities produce no shortage of hard evidence, making the least-restrictive-means test critical to RLUIPA's success. With its Judaic studies curriculum suffering from lack of space, Westchester Day School applied to modify its permit to construct a new classroom building. *Westchester Day Sch. v. Vill. of Marmaroneck*, 417 F. Supp. 2d 477, 485-506 (S.D.N.Y. 2006). After those plans drew opposition from a small but influential group of neighbors, the zoning board, citing traffic as the "single most important element" in its decision, *id.* at 519, denied Westchester's application. *Id. at* 506-19, 551-52.

But the district court found plenty of "evidence in the record"—including expert testimony, traffic assessments accompanying the application, memoranda prepared by the board's consultants, and the board's earlier declaration of likely approval—that other measures could alleviate any new traffic. *Id.* at 551-52. Moreover, the same measures—retiming traffic lights, adding turn lanes, and capping Westchester's enrollment—were recommended by all three traffic experts. *Id.* These less-restrictive means, like the grooming policies of peer institutions ignored in the decision below, were thus "widely ac-

cepted." *See* Pet. i, 4-5. Because the board's "outright denial" of Westchester's application hinged on an "utter failure" to confront this evidence, it could not survive strict scrutiny under RLUIPA. *Westchester*, 417 F. Supp. 2d at 552-53.

But in the Eleventh Circuit, "utter failure" easily could translate into government victory. The board in *Westchester* could have denied the application while remaining willfully ignorant of alternatives disclosed by its own processes, no matter how widely accepted. Political pressure would have forced Westchester to sacrifice the quality of the Judaic studies curriculum that attracts students to the school. That is what RLUIPA seeks to prevent.

2. Other jurisdictions may provide the best evidence of alternatives that will accommodate religious land uses. Thus, as one court noted, if a land-use regulation "appears to have been drafted in a vacuum," alternatives may have been left unexplored. *Reaching Hearts Int'l, Inc. v. Prince George's Cnty.*, 584 F. Supp. 2d 766, 790 (D. Md. 2008). When a Seventh Day Adventist congregation bought residentially-zoned land that permitted churches, the Prince George's County Council nonetheless stopped the congregation from building its church with a new regulation. *Id.* at 772-76. Ostensibly enacted to ensure sanitary drinking water, the regulation reduced "lot coverage"—the percentage of surface-area that buildings, roads, or parking spaces may cover—to ten percent for non-residential uses within 2,500 feet of a drinking-water reservoir. *Id.* at 776. Though the regulation was facially neutral, its principal drafter

acknowledged that only the congregation's property was affected. *Id.*

Unable to build its church, the congregation challenged the regulation under RLUIPA. The Council failed to research "what other counties were doing" or discuss those alternatives before drafting the regulation. *Id.* at 789-90. The Council thus did not know that a neighboring county, despite draining more waste than Prince George's into the reservoir, had addressed the same problem without dramatic lot-coverage restrictions. *Id.* The neighboring county's ability to further an identical interest with less-restrictive means "undermine[d]" the Council's "contention that it explored any alternatives" that would have "achieved its goals," failing RLUIPA's least-restrictive-means test. *Id.* at 790-91. Enforcement of the regulation was enjoined by the district court. *Id.* The congregation could build its church. *Id.* at 796.

The congregation, however, never could have built its church if the Eleventh Circuit had decided *Reaching Hearts*. Measures taken by neighboring counties to further identical interests would be no more significant than the grooming policies of other prison systems in the decision below.

3. Not only zoning authorities, but also affected neighbors, often enforce regulations to prevent religious land use. *See Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309 (D. Mass. 2006). Those regulations might affect thousands of worshippers, *see Cottonwood Christian Ctr.*, 218 F. Supp. 2d at 1211-12, or one devout rancher, *see Anselmo v.*

Cnty. of Shasta, 873 F. Supp. 2d 1247 (E.D. Cal. 2012). And these regulations are not all zoning laws. States and localities must also satisfy RLUIPA when applying environmental-review statutes, *Fortress Bible Church v. Feiner*, 694 F. 3d 208, 215-17 (2d Cir. 2012), and exercising eminent domain, *Cottonwood Christian Ctr.*, 218 F. Supp. 2d at 1222 & n.9. RLUIPA thus protects religious uses of land from government interference in a variety of situations. But the Eleventh Circuit's approach would encourage that interference, thus compromising the religious liberty protected by RLIUPA on a vast scale.

C. The Eleventh Circuit's "beside the point" analysis also would affect all federal government restrictions on religious exercise under RFRA.

The Eleventh Circuit's interpretation of RLUIPA's strict-scrutiny standard also would apply in any case involving the nearly identically worded RFRA. This would run headlong into the Court's decision in *Gonzales v. O Centro Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

In *Gonzales*, the Court held that the federal government did not meet its burden to overcome a RFRA challenge to the Controlled Substances Act's ban on hoasca, a tea containing a hallucinogen used in communion ceremonies by the respondent church. *Id.* at 425-26. The Court emphasized that the government's "mere invocation of the general characteristics" of its concerns could not "carry the day." *Id.* at 432. The government's burden was to "'*show*[] that respondents' proposed less restrictive alternatives

are less effective'" than the government's generally applicable rule. *Id.* at 429 (emphasis added) (quoting *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004)). But the Eleventh Circuit would not require that the federal government actually show that its chosen restriction is the least-restrictive alternative because the government would not need even to consider any alternatives to its policy.[6]

Applying the Eleventh Circuit's standard to RFRA would produce troubling and unlawful results in a variety of circumstances. For example, in *Forde v. Baird*, the court concluded that a Bureau of Prisons policy authorizing male correctional officers to conduct routine searches of a Sunni Muslim female inmate was not the least-restrictive means of furthering compelling government interests. 720 F. Supp. 2d 170, 179-80 (D. Conn. 2010). The prison failed to present evidence that it considered any alternatives to the current system of cross-gender

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6 In *Gonzales*, the government failed to satisfy RFRA's compelling-government-interest prong. *Id.* at 439. In *Church of the Holy Light of the Queen v. Mukasey*, the court considered the same issue as that in *Gonzales*—a claim for a religious exception to the Controlled Substances Act—and found that the government failed to satisfy the least-restrictive-means test for many of the same reasons that *Gonzales* found compelling. 615 F. Supp. 2d 1210, 1220-21 (D. Or. 2009), *vacated in part on other grounds*, *Church of the Holy Light of the Queen v. Holder*, 443 F. App'x 302 (9th Cir. 2011). Notably, in *Church of the Holy Light*, the existence of an exemption for another Native American tribe indicated that means less restrictive than a complete ban were available. *Id.* at 1221.

searches. *Id.* at 180. The court thus concluded that it was "insufficient for [the warden] to simply say that something cannot be done without exploring alternatives." *Id.* And, in *Navajo Nation v. U.S. Forest Service*, the court found that the Forest Service had not satisfied the least-restrictive-means test for a proposed expansion of a ski area on mountains considered sacred by several Native American tribes. 479 F.3d 1024, 1045 (9th Cir. 2007), *vacated on other grounds on reh'g en banc*, 535 F.3d 1058 (9th Cir. 2008). The proposed expansion was not narrowly tailored to fit the government's safety concerns. *Id.*[7]

Because RFRA applies to all federal government action, the Eleventh Circuit's diluted strict-scrutiny standard would allow the government to burden religious exercise in contexts far beyond RLUIPA, which affects only institutionalized people and land-use regulations. *See, e.g.*, *Am. Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995) (RFRA challenge to Freedom of Access to Clinic Entrances Act of 1994); *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013) (RFRA challenge to Patient Protection and Affordable Care Act); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 457 (D.C. Cir. 1996) (RFRA challenge to Title VII). Thus, the Eleventh Circuit's "beside the point" approach would allow the federal government to avoid its burden under RFRA to demonstrate that its laws that burden relig-

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7 *See also United States v. Holmes*, 2007 WL 529830 (E.D. Cal. Feb. 20, 2007) (RFRA's least-restrictive-means test not met when cheek swab was a viable alternative to blood draw for parolee with bona fide religious objections).

ious exercise are pursued through the least-restrictive means.

* * *

If unchecked, the Eleventh Circuit's approach to RLUIPA, which effectively carves the least-restrictive-means test out of the statute, will allow state and local governments—and the federal government under RFRA—to impose burdens on religious exercise without having to actually prove that they have satisfied "the most demanding test known to constitutional law." *City of Boerne*, 521 U.S. at 509. The burdens imposed will extend far beyond prison grooming standards and could reach all religious denominations and an array of religious practices.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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