No. 20-17202

United States Court of Appeals for the Ninth Circuit

LAUSTEVEION DELANO JOHNSON,

Plaintiff-Appellee,

v.

RENEE BAKER, et al.,

Defendants-Appellants.

On Appeal from the U.S. District Court
for the District of Nevada (Las Vegas)
No. 2:15-cv-00884-JAD-NJK, Hon. Jennifer A. Dorsey

BRIEF OF *AMICUS CURIAE* MUSLIM PUBLIC AFFAIRS COUNCIL IN SUPPORT OF PLAINTIFF-APPELLEE

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RULE 26.1 DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1, the Muslim Public Affairs Council hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

June 8, 2021

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Interest of *Amicus Curiae*[1]

The Muslim Public Affairs Council (MPAC) is a community-based public affairs nonprofit organization that has worked since 1986 to foster a vibrant Muslim American identity and represent the interests of Muslim Americans. MPAC aims to increase public understanding of Islam and to improve policies affecting American Muslims, by engaging our government, media, and communities, and demonstrating that America is enriched by American Muslims' vital contributions. MPAC works diligently to offer the public a portrayal that goes beyond stereotypes, showing that Muslims are part of a vibrant American pluralism.

In the courts, MPAC regularly files *amicus curiae* briefs in cases raising issues of vital concern to the Muslim American community. *See, e.g.*, Brief of the Sikh Coalition and MPAC, *Holt v. Hobbs*, 574 U.S. 352 (2015) (No. 13-6827), 2014 WL 2465969 (brief supporting Muslim

[1] All parties consent to the filing of this brief. No party's counsel authored the brief in whole or part. No party or party's counsel contributed money intended to fund preparing or submitting the brief. No person other than MPAC or their counsel contributed money intended to fund preparing or submitting the brief. This brief was prepared in part by a clinic operated by Yale Law School, but does not purport to present the School's institutional views, if any.

prisoner's successful RLUIPA challenge to grooming regulation); Brief of MPAC *et al.*, *Agudath Israel of Am. v. Cuomo*, 141 S. Ct. 889 (2020) (No. 20A90) (brief supporting Jewish organizations' successful Free Exercise challenge to COVID-19 restrictions); Brief of Asian American Legal Defense and Education Fund *et al.*, *Hassan v. City of New York*, 804 F.3d 277, 288 (3d Cir. 2015) (No. 14-1688) 2014 WL 3572029 (MPAC-joined coalition brief supporting Muslim plaintiffs' discriminatory surveillance claim). In particular, MPAC is concerned with protecting the religious exercise of many of the more than 2 million persons incarcerated in the United States. With most incarcerated persons held in state prisons and jails, a robust application of RLUIPA is critical to ensuring that religious exercise is protected in these environments when feasible.

Introduction and Summary of Argument

Congress enacted the Religious Land Use and Institutionalized Persons Act ("RLUIPA") to provide robust protections for prisoners' free exercise rights—not even though they live in prison but *because* they live in prison. Congress recognized that Lausteveion Johnson and those like him are "at the mercy of those running their institution" when practicing their faith. 146 Cong. Rec. S7775 (July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy). Prior to RLUIPA, prisoners faced "'frivolous or arbitrary' barriers" to religious practice within prisons that were often hostile to free religious exercise. *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005). In an environment where believers need prison officials' permission to worship, Congress intervened to "secure redress for inmates who encountered undue barriers to their religious observances," *Cutter*, 554 U.S. at 716–17, by subjecting these burdens to strict scrutiny, 42 U.S.C. § 2000cc-3(g). In enacting RLUIPA, Congress directed that the statute, and its strict scrutiny test, be "construed in favor of a broad protection of religious exercise." 42 U.S.C. § 2000cc-3(g).

Mr. Johnson, a Muslim, requested a religious accommodation to store scented oil in his jail cell, in furtherance of his sincerely-held

religious belief that he must anoint himself prior to his five daily prayers. The Nevada Department of Corrections ("NDOC") does allow inmates to purchase a one-ounce bottle of scented oil for use during prayers; however, the bottle must be kept with the Chaplain and is made accessible to inmates for only one prayer a week. This leaves Mr. Johnson without access to prayer oil for 34 of his 35 daily prayers each week. Both RLUIPA's text and recent case law applying the Supreme Court's decision in *Holt v. Hobbs*, 574 U.S. 352 (2015), make it clear that Nevada has substantially burdened Mr. Johnson's religious exercise by refusing him access to scented oil that he understands as central to his worship practices.

Given that substantial burden, Nevada must offer a compelling government interest, and it must do so with particularity. The text, legislative history, and judicial interpretation of RLUIPA counsel against "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations." *Spratt v. Rhode Island Dept. of Corr.*, 482 F.3d 33, 39 (1st Cir. 2007) (quoting 146 Cong. Rec. at S7775 (2000)). Rather, Nevada must demonstrate that the compelling government interest test is satisfied by application to "the

particular claimant whose sincere exercise of religion is being substantially burdened." *Holt*, 574 U.S. at 363. Further, RLUIPA requires that "[w]here a prisoner challenges the [prison's] justifications, prison officials *must* set forth detailed evidence, tailored to the situation before the court, that identifies the failings in the alternatives advanced by the prisoner." *Warsoldier v. Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005) (quoting *May v. Baldwin*, 109 F.3d 557, 564–65 (9th Cir. 1997)).

Here, Nevada has failed on all counts. The district court found on the facts that the burden on Mr. Johnson was not justified by the security interests Nevada raised, and before this Court, the State has not shown clear error in those findings. Though Nevada suggests that allowing inmates to keep prayer oil in their cells would raise general security concerns, it has not connected those general concerns to the *specific* accommodation requested by Mr. Johnson—maintaining a half-ounce quantity of prayer oil in his cell. While maintaining order in prison is important, prison officials cannot "justify restrictions on religious exercise by simply citing to the need to maintain order and security in a prison." *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 989–90 (9th Cir. 2008).

Non-particularized security concerns deserve particular attention when, as here, they are used to justify special restrictions on Muslim and minority religious practices. Congress recognized that members of minority faiths are especially likely to face burdens in the prison environment, where officials unfamiliar with their traditions set the rules for their practice. Muslims, especially, have a history of being discriminated against and viewed as a security threat, inside and outside of prison. RLUIPA was designed to protect Muslim prisoners like Mr. Johnson by strictly scrutinizing the security rationales offered for limiting Islamic practice, and its enforcement is essential to protecting religious prisoners from all traditions.

The court below properly concluded that Nevada failed to meet its burden under RLUIPA, and should be affirmed.

ARGUMENT

I. Any Prohibition Of Sincerely Religiously Motivated Conduct Or Pressure To Amend Religious Practices Is A Substantial Burden Under RLUIPA.

Both RLUIPA's text and *Holt* make clear that identifying a substantial burden requires focusing on the burdened religious practice, *not* on other practices that remain available. RLUIPA's expansive

definition of "religious exercise" forbids courts from scrutinizing the degree of centrality or compulsion for a given worship practice within a person's faith. 42 U.S.C. § 2000cc-5(7)(A) ("any exercise of religion, whether or not compelled by, or central to, a system of religious belief"). RLUIPA asks whether *the specific practice* of this specific religious person has been burdened, without inquiry into the person's religious practice overall or the practice of some hypothetical coreligionist. Under *Holt* and this Court's precedents, Johnson's worship practice has been burdened by the Nevada Department of Corrections.

This Court has defined a substantial burden to include "a significantly great restriction or onus on any exercise of religion." *Warsoldier*, 418 F.3d at 995. Substantial burdens to prisoners' religious practices can be found where the threat of punishment is used to coerce abandonment or modification of a practice, *id.* at 996, where prisoners are faced with "substantial 'delay, uncertainty, and expense'" in the exercise of a practice, *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1068 (9th Cir. 2011) (citation omitted), or where a practice has been banned altogether, *Greene*, 513 F.3d at 988; *see* Appellee Br. 13.

In this case, Mr. Johnson faces an outright ban on engaging in a worship practice that he believes is an essential element of prayer—anointing his body with *scented* oils as the Prophet Muhammad is said to have done, see below—for 34 of his 35 formal prayers each week. While Mr. Johnson's worship practice would be protected even if not widely "shared," this practice is "by no means idiosyncratic." *Holt*, 574 U.S. at 362 (citation omitted); *see, e.g., Davis v. Powell*, 901 F. Supp. 2d 1196, 1230 (S.D. Cal. 2012) ("Here, a complete ban on prayer oil—a practice mandated by the Islamic religion—placed a substantial burden on Davis's exercise of his religion."); *Charles v. Verhagen,* 220 F. Supp. 2d 955, 957 (W.D. Wis. 2002) (granting summary judgment on RLUIPA claim where a Muslim prisoner who prayed daily with scented oil "was not allowed to possess prayer oil in his cell"). Islamic stores and bazaars around the world sell scented prayer oil for use in prayer, and many United States mosques have such oil available for worshippers who believe it will enhance their connection with God in prayer. *See, e.g.*, *Davis*, 901 F. Supp. 2d at 1207–08 (discussing vendors). Guidance about wearing scented oils for prayer is well-documented in the Hadith, especially for Friday prayer. Sahih Bukhari, *The Hadith*, Vol. 2, bk. 13,

n. 33 ("Anyone who takes a bath on Friday and cleans himself as much as he can and puts oil (on his hair) or scents himself; and then proceeds for the prayer […], all his sins in between the present and the last Friday will be forgiven."); *id.* at n. 8. And the Hadith also recounts that the Prophet himself was fond of anointing himself with scented oils on a daily basis, not merely Fridays. As shown in the case law, some Muslims, like Mr. Johnson, feel a religious duty to emulate what they understand to be the Prophet's example ("the Sunnah") on this point. Sahih Bukhari, *The Hadith*, Vol. 7, bk. 72, n. 806 (describing a recollection from the Prophet's wife Aisha that she would anoint him daily "until [she] saw the shine of the scent on his head and beard"); Sahih Muslim, *The Hadith*, 2330a (recounting that the Prophet always "smelt [of] ambergris or musk").

Nevada argues that Johnson's worship practice hasn't been substantially burdened because he could use in-chapel scented oils at the weekly Muslim group prayer service and use *unscented* oil—allowed in his cell in small quantities—at other times. Appellant Br. 30. Nevada's argument and its thin support were rejected directly by the Supreme

Court in *Holt*.[2] For example, Nevada cites *Curry v. California Department of Corrections*, No. C–09–3408, 2012 WL 968079, at *6 (N.D. Cal. Mar. 21, 2012), where the court found no substantial burden on the plaintiff's use of scented oil in prayer because "[h]e [wa]s able to carry out most nearly all other aspects of his religious faith including the thrice daily worship ritual in his cell." *Id.* Yet two years later in *Holt*, the Court considered and rejected a similar argument with respect to beards. 574 U.S. at 361–62 ("RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise […], not whether the RLUIPA claimant is able to engage in other forms of religious exercise."). The *Holt* rule governs Mr. Johnson's RLUIPA claim.

Nevada's argument betrays implicitly the view that the use of scented oil in *each* of Mr. Johnson's prayers is not really *that* important to his worship practice: a mere preference. *See* Appellant Br. 32 ("At most, the NDOC's policy prevents Johnson from 'engaging in worship in

[2] In fact, one of Nevada's authorities squarely supports Mr. Johnson's contention with respect to substantial burden. In *Anderson v. Vare*, the court found that a ban on the Native American religious practice of smudging, or burning sage, "create[d] a substantial burden on religious exercise." No. 2:07–cv–01117–RCJ–RJJ, 2010 WL 11623518, at *5 (D. Nev. Apr. 1, 2010).

[his] preferred manner by using scented oils.'"). But RLUIPA and *Holt* forbid that line of inquiry. *See Nance v. Miser*, 700 F. App'x 629, 631 (9th Cir. 2017) (quoting *Emp't Div. v. Smith*, 494 U.S. 872, 887 (1990)) ("[T]he Supreme Court has repeatedly warned that courts must not presume to determine the place of a particular belief in a religion.").

Nance directly supports Mr. Johnson's claims. In *Nance*, this Court reversed the district court's ruling that a ban on the use of scented oil in worship by a Muslim prisoner was not a substantial burden. *Id.* at 632. To be sure, Nance's particular religious practice was satisfied through access to scented oils in Friday chapel—because Nance's religious practice used the oil *only* "for a Friday weekly prayer." *See id.* at 631. Here, Mr. Johnson's worship practice is different from the religious practice at issue in *Nance*, requiring a different accommodation. But the core holding of *Nance*—that banning the use of scented oils in prayer imposes a substantial burden on a Muslim prisoner whose religious exercise requires their use—applies equally in this case.

Post-*Holt* precedential opinions in other circuits recognize that the position Nevada takes here contravenes *Holt*. The Sixth Circuit, faced with a prison "policy [that] prevent[ed] [a Wiccan inmate] from accessing

religious items found only in the chapel, [thereby] barring him from properly celebrating [festivals] in the way he believes he should," applied *Holt* and held that the policy imposed a substantial burden. *Cavin v. Michigan Dep't of Corr.*, 927 F.3d 455, 458–59 (6th Cir. 2019). Similarly, the Seventh Circuit has explained *Holt* as "specifically disapprov[ing] of the practice of offsetting against the burden imposed by the rule any other religious accommodations offered or the strength of the religious command." *Jones v. Carter*, 915 F.3d 1147, 1150 (7th Cir. 2019) (finding a substantial burden where a vegetarian diet was the only halal option and inmate's religious practice required some consumption of halal meat).

If Nevada is permitted to avoid strict scrutiny by simply recharacterizing Johnson's prayer practice as insubstantial—what *Nance* calls "improperly engag[ing] in evaluating the centrality" of a practice, 700 F. App'x at 632—it would displace black-letter law with uncomfortable and unconstitutional inquiries into correct and incorrect ways of practicing *this* religion or *that* religion, or whether *this* element or *that* one is substantial enough to merit protection. Such an inquiry would not just thumb its nose at Supreme Court precedent, but

contravene RLUIPA's plain text and defeat Congress's intent in passing RLUIPA—to protect religious exercise "whether or not compelled by, or central to, a system of religious belief." *Holt*, 574 U.S. at 360, 362 (rejecting claim that burden was theologically "slight") (citation omitted).

In sum, RLUIPA requires a narrow and individualized substantial burden inquiry that focuses on: (1) the specific practice and (2) the specific practitioner. Mr. Johnson adheres to the religious practice of anointing himself with scented oil before every prayer. Thus, a policy imposing "an outright ban" on such anointing 34 of 35 times every week—only excepting his once-weekly access to the chapel—represents a substantial burden of his worship practice. *Greene*, 513 F.3d at 988.

II. RLUIPA Requires Nevada To Show That Applying The Restrictive Policy To The Specific Plaintiff Is The Least Restrictive Means Available To Achieve A Compelling Government Interest.

A. The government's stated interest must be articulated and explained, not an appeal to a general "security" interest.

RLUIPA requires an inquiry "more focused" than a "categorical approach" in which the government must "justify[ ] the general applicability of [the] government mandate[ ]." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006); *see*

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 695 (2014). Prior to RLUIPA's enactment, Congress found that many prison officials unduly burdened religious exercise across the country and treated religious practices with hostility. For example, "[a] state prison in Ohio refused to provide Moslems [*sic*] with Halal food, even though it provided Kosher food, . . . Jewish inmates complained that prison officials refused to provide sack lunches, which would enable inmates to break their fasts after nightfall, . . . [and] prisoners' religious possessions, such as the Bible, the Koran, the Talmud or items needed by Native Americans . . . were frequently treated with contempt and were confiscated, damaged or discarded by prison officials." *Cutter*, 544 U.S. at 716 n.5 (summarizing Congressional testimony). Following "three years" of hearings identifying these "'frivolous or arbitrary' barriers" to religious practice, Congress enacted RLUIPA to remedy these wrongs and protect the religious liberties of prisoners' whose "right to practice their faith is at the mercy of those running the institution" and who "are therefore dependent on the government's permission and accommodation for exercise of their religion." *Id.* at 716, 721.

To this end, RLUIPA requires a particularized showing by prison officials that goes beyond general security concerns. *See Holt*, 574 U.S. at 362–63 (cleaned up) ("RLUIPA, like RFRA, contemplates a more focused inquiry and requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the person—the particular claimant whose sincere exercise of religion is being substantially burdened."); *id.* at 371 (Sotomayor, J., concurring) (cleaned up) ("[T]he deference that must be 'extended to the experience and expertise of prison administrators does not extend so far that prison officials may declare a compelling governmental interest by fiat.' Indeed, prison policies 'grounded on mere speculation' are exactly the ones that motivated Congress to enact RLUIPA."). Thus, under RLUIPA, the government may not satisfy the compelling interest test by pointing to a general interest—it must show a *particularized* interest in burdening *this individual* in *this specific* way. *See id.* at 363; *see also Williams v. Annucci*, 895 F.3d 180, 190 (2d Cir. 2018) ("[T]he government must justify its conduct by demonstrating not just its general interest, but its particularized interest in burdening the individual plaintiff in the precise way it has chosen.").

Just this Term, the Supreme Court has reiterated that general claims of compelling state interests cannot justify blanket restrictions on religious exercise. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam), the Court found that restrictions on houses of worship adopted to mitigate COVID-19 that were "far more restrictive than [those in prior cases], much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus" did not employ the least "restrictive rules that could be adopted to minimize the risk to those attending religious services." *Id.* at 67; *see also id.* (noting that the state offered "no evidence that the applicants [in *Diocese of Brooklyn* and *Agudath Israel*] have contributed to the spread of COVID–19"). Accordingly, the Court concluded that, without evidence from the state justifying its specific restrictions, the attendance caps could not stand. *Id.* at 68–69; *see also Tandon v. Newsom*, 141 S. Ct. 1294, 1297–98 (2021) (collecting five subsequent Supreme Court injunctions of California restrictions).

Similarly, in *Dunn v. Smith*, 141 S. Ct. 725 (2021), the Court declined to vacate an Eleventh Circuit injunction halting an Alabama

execution where the state had excluded the prisoner's pastor from the execution chamber. Alabama justified its prohibition by asserting its general interest in allowing in the execution chamber only "those whom the warden has found 'trustworthy.'" *Id.* at 726. But Justice Kagan, joined by Justices Breyer, Sotomayor, and Barrett, explained that the state "cannot . . . simply presume that every clergy member will be untrustworthy—or otherwise said, that only the harshest restriction can work." *Id.* (Kagan, J., concurring in denial).

In the present case, Nevada presents little more than general security interests not applied specifically to Mr. Johnson. Nevada outlines three categories of security concerns: (1) institutional security, (2) disciplinary issues, and (3) health concerns. None of these categories directly relates or applies to Mr. Johnson. In the first category, each institutional security concern is speculative. *See* Appellants' Br. 13–14 ("Oils *could be* used to create a slippery surface . . . It *can* be used to make tattoo inks . . . it *can* be used to cover body odors") (emphasis added). Under the second category, Nevada expresses concern for bartering, but fails to engage with the district court's findings of fact—after considering the testimony restated in its brief—that its value was "similar[ ]" to

permitted items and could be further reduced by the half-ounce system. 1ER00007. Nevada cannot show clear error by restating testimony that merely "hypothesized it would make him a target." Appellants' Br. 14–15.

Finally, the asserted health concerns similarly run into the district court's factfinding. Though Nevada professes a concern that the scented oils could be used for tattoo ink, *see* Appellants' Br. 17, the district court found that "there is no evidence in the record that the oils contain dye or carry enough natural color to turn them into tattoo ink." 1ER00007. The remaining concerns premised on the threat that the scented oil will be bartered similarly do not engage with the court's findings discussed above. Though maintaining security (in the abstract) may be a compelling interest, Nevada has not demonstrated a *particularized* interest in burdening Mr. Johnson in this *particular* way.

B. The government must show that its compelling interest is served by denying an accommodation in the specific case at hand.

RLUIPA requires a showing that the "imposition of the burden *on that person*" advances a compelling government interest by the least restrictive means. 42 U.S.C. § 2000cc-1. Courts must "scrutiniz[e] the

asserted harm of granting specific exemptions to particular religious claimants and . . . look to the marginal interest in enforcing the challenged government action in that particular context." *Holt*, 574 U.S. at 363 (internal quotations omitted). Thus, to demonstrate a compelling interest, the government must prove a particularized interest in preventing a risk posed by the particular claimant. While Nevada asserts concerns with administrative cost and security, nothing in its brief disturbs the district court's conclusion that it did not meet its burden to show either are implicated by this accommodation.

First, in addressing concerns related to administrative costs, Congress stated that RLUIPA "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." 42 U.S.C. § 2000cc-3(c). And when cost containment is the asserted interest, the government must address the additional cost of the *single* accommodation—not the speculative costs of future hypothetical requests. *See e.g.*, *Hobby Lobby Stores*, 573 U.S. at 732 (rejecting a cost-containment argument in the RFRA context that requiring religious exemptions to the contraceptive mandate would "lead to a flood of religious objections"); *Ali v. Stephens*, 822 F.3d 776, 796 (5th

Cir. 2016) (rejecting the cost containment argument that "every Muslim inmate will wear a kufi if Ali is permitted to wear one" as "pure conjecture"). In fact, the Court in *Holt* rejected the government's argument that numerous inmates might request religious accommodation as a "classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Holt*, 574 U.S. at 368 (quoting *O Centro*, 546 U.S. at 436).

Courts throughout the country, including this Circuit, have consistently recognized that administrative costs alone are an insufficient basis to refuse to accommodate an inmate's religious beliefs.

In *Shakur v. Schriro*, the Arizona Department of Corrections denied kosher meals to a Muslim inmate, claiming a compelling government interest in "avoiding the prohibitive expense of acquiring Halal meat for all Muslim inmates or providing these inmates with kosher meat." 514 F.3d 878, 889 (9th Cir. 2008). But this Court refused to affirm the district court's finding that the cost would be probative given that there was "no competent evidence as to the additional cost of providing Halal or kosher meat to [the prison's] Muslim prisoners," *id.* at 890, and "no indication that other Muslim prisoners" would also require

the same accommodation. *Id.* at 887. As *Shakur* shows, it is insufficient for a state to claim generally that granting an accommodation might give rise to more accommodations; it must demonstrate why *this particular accommodation* will be administratively infeasible without relying on potential future requests that may (or may not) arise.

Similarly, in *Jones*, the Indiana Department of Corrections refused to subsidize or underwrite a Muslim inmate's kosher meal because it feared escalating costs. 915 F.3d 1147. The Seventh Circuit discounted the argument because the case was "not a class action," just a particular inmate's request for kosher meals already provided to other inmates. *Id.* at 1152. The court refused to "opine on a hypothetical situation" of many inmates coming forward to request the same religious need. *Id.* Similarly, in *United States v. Florida Department of Corrections*, Florida cited cost containment as a reason to deny kosher meals to inmates. 828 F.3d 1341 (11th Cir. 2016). In concluding that the evidence failed to prove prohibitive costs, the Eleventh Circuit found that "the Secretary failed to do more than 'simply utter the magic word[ ]' 'costs.'" *Id.* at 1348 (quoting *Davila v. Gladden*, 777 F.3d 1198, 1206 (11th Cir. 2015)).

Here, Nevada offers the "classic rejoinder" that the Court thoroughly rejected in *Holt*. 574 U.S. at 368 (citation omitted). Nevada argues that it would be infeasible "to have oil delivered by staff for inmates to personally use for prayer five times daily." Appellants' Br. 18. However, Nevada was required to show why delivering prayer oil to *Mr. Johnson* would be infeasible, not why it would be infeasible to deliver the prayer oil to *all* inmates who *might* request prayer oils at some point in the future. It has not provided any such evidence, asserting only that personal delivery to many inmates would be impractical. *Id.* Nevada further claims that increasing security for Mr. Johnson due to the potential of targeting would require additional staffing and monitoring, but it omits evidence of how costly it would be to accommodate *just* Mr. Johnson (even if it had done the work of persuading the district court that such targeting was likely). *See id.* at 18–19. It is not sufficient to rely on hypothetical expenses or simply utter the magic word "costs," without substantiation.

Second, when a State seeks to establish a compelling interest premised on a security concern, it cannot "justify restrictions on religious exercise by simply citing to the need to maintain order and security in a

prison." *Greene*, 513 F.3d at 990. Rather the prison must provide "detailed evidence, tailored to the situation before the court, that identifies the failings in the alternatives advanced by the prisoner." *Warsoldier*, 418 F.3d at 1000 (quoting *May*, 109 F.3d at 564–65). Nevada was required to show the security burden of Respondent's *half ounce* of scented oil—specifically designated for religious purposes—not some untold quantity of any type of oil moving in circulation throughout the prison. The district court found the government's concerns "mitigate[d]" by the half-ounce amount. 1ER00008. And as explained above, the claims that the item would become valuable in bartering or draw targeting were undercut by the evidence—credited by the district court—from Nevada's witnesses "that many items available for prisoners to purchase and keep in their cells are similarly valuable." *Id*. As Johnson's brief explains, the Nevada brief asserts disputed factual claims resolved against Nevada as facts, with no showing of clear error. Appellee Br. 12.

Nevada's attempt to justify denial of Mr. Johnson's accommodation on the grounds that the scented oil is powerful enough to mask the smell of contraband or drugs also fails. *See* Appellants' Br. 13–14. Nevada failed to "present detailed evidence" that a half-ounce quantity would be

enough to mask the smell. 1ER00007. And the district court credited Mr. Johnson's evidence that "one would need to 'drench' his cell using much more than the half ounce [Mr. Johnson] is requesting, in order to cover the smell of any contraband." 1ER00007. Accordingly, the district court concluded that the government "fell short of its burden to present detailed evidence refuting this potential alternative." 1ER00008. In other words, Nevada provided no *particularized* interest sufficient to support denial of Mr. Johnson's request for a religious accommodation.

RLUIPA recognizes the importance of security in prisons, but still subjects asserted security concerns to strict scrutiny. A real security interest can be named with particularity, can show the infeasibility of alternatives, and can be defended against robust inquiry. RLUIPA demands that robust inquiry. Too often, "security" has been invoked as a catch-all excuse for prison administrators to constrict free exercise. Congress intended RLUIPA to require a more-thorough explanation from prison officials. Nevada's explanation for denying Johnson's accommodation was not satisfactory in the district court, and Nevada shows no clear error today.

C. In employing the least restrictive means, the government may not treat comparable secular items better than religious items.

The Supreme Court recently reaffirmed in *Tandon v. Newsom* that, under the First Amendment, a government cannot treat secular activity better than comparable religious exercise. 141 S. Ct. 1294. Anytime a government "treat[s] *any* comparable secular activity more favorably than religious exercise," strict scrutiny is triggered, and the government must demonstrate that "measures less restrictive of the First Amendment activity could not address its interest." *Id*. at 1296 (emphasis in original). If it cannot do so, then "precautions that suffice for other activities suffice for religious exercise too." *Id*. at 1297.

The strict scrutiny standards articulated in *Tandon* apply even more forcefully for inmate accommodations because, under RLUIPA, all substantial burdens—not just those resulting from uneven policies—are subject to strict scrutiny. In *Holt*, inmates were allowed to grow hair longer than half an inch and yet were prohibited from growing beards beyond half an inch, despite their religious beliefs. 574 U.S. 352. Though the government claimed a security interest in preventing the smuggling of contraband, the Court expressed skepticism because the policy did not

apply with equal force to hair. *See id*. at 364 ("Since the Department does not demand that inmates have shaved heads or short crew cuts, it is hard to see why an inmate would seek to hide contraband in a 1⁄2-inch beard rather than in the longer hair on his head.").

Here, Nevada treats items used for secular purposes more favorably than the scented oil Mr. Johnson requested, even though those secular items pose many of the risks the prison cited in denying Mr. Johnson's request. Nevada claims that a half ounce of scented oils raises security concerns because it may cause a slippery surface or may be heated and used as a weapon. Appellants' Br. 13–14. Yet the prison allows inmates to maintain *fourteen-ounce* bottles of baby oil in their cells. 1ER00007. As *Tandon* explains, a state cannot satisfy strict scrutiny in a restriction on religious exercise where it places lighter restrictions on comparable secular activity. 141 S. Ct. at 1296 (also noting that such disparate treatment invokes strict scrutiny under the Free Exercise Clause, even where RFRA or RLUIPA is not at issue). And Nevada has not shown that a half ounce of scented oil poses unique risks that a fourteen-ounce bottle of baby oil does not.

Nevada's claim that the scent of the oil may be so strong as to cover the smell of contraband, Appellants' Br. 15, similarly fails strict scrutiny under *Tandon*. In contrast to its odor-based objection to a half ounce of scented oil, the prison allows inmates access to other scented products including deodorant, dryer sheets, scented lotions, and cosmetics (such as nail polish) that raise the same (alleged) concern. 1ER00007. As the district court concluded, "[i]f an inmate wanted to cover the scent of body odor or contraband, there are several products already available to him to do so." *Id*. So Nevada has failed to show that "the religious exercise at issue is more dangerous than those [secular] activities." *Tandon*, 141 S. Ct. at 1297.

III. Muslims And Practitioners Of Minority Faiths Are Particularly Likely To Be Burdened By Insincere Assertions Of Compelling Government Interests.

Since its passage, RLUIPA has become particularly important for Muslim prisoners and other religious minorities, who are forced to rely on it more often than adherents of more familiar faiths. Recognizing that the religious minorities' rights were uniquely vulnerable, Congress sought to protect their religious practices. *See, e.g., Protecting Religious Freedom After* Boerne v. Flores*: Hearing Before the Subcomm. on the*

Const. of the H. Comm. on the Judiciary, 105th Congress (1997); *Protecting Religious Freedom After* Boerne v. Flores *(Parts II & III): Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary,* 105th Congress (1998). The application of strict scrutiny to prison security interests is especially important to groups whose very existence in prison is treated as presenting a security problem.

A. Muslims and practitioners of minority faiths are more likely to need and request accommodations to engage in religious practices.

In the restrictive environment of prison, where nearly every action (and thus nearly every religious practice) must be pre-approved, prisoners with religious practices unfamiliar to administrators face an uphill battle. They must explain and request accommodation for each aspect of their religious practice, where followers of better-known religions may already have had accommodations for their parallel practices as of right. RLUIPA protects these followers of "nonmainstream religions." *Cutter*, 544 U.S. at 712; *see also id.* at 716 (noting "three years" of Congressional hearings identifying "'frivolous or arbitrary' barriers" to religious practice in prison).

In monitoring the enforcement of RLUIPA, the Department of Justice has found an "unsurprising reality" that "RLUIPA claims in institutional settings are most often raised by people who practice minority faiths," and thus "the majority of the cases the Department has pursued involv[e] religions other than Christianity." DOJ, *Report on the Twentieth Anniversary of the Religious Land Use and Institutionalized Persons Act*, 25–26 (Sept. 22, 2020), https://www.justice.gov/crt/case-document/file/1319186/download; *see also* DOJ, *Update on the Justice Department's Enforcement of the Religious Land Use and Institutionalized Persons Act: 2010–2016*, 10 (2016), https://www.justice.gov/crt/file/877931/download ("The Department has found that many jurisdictions continue to restrict practices that must be accommodated under RLUIPA's strict scrutiny analysis.").

Muslim prisoners, often *pro se*, have, through RLUIPA, requested access to all the things necessary to the practice of their faith. *See, e.g., Larry v. Goldsmith*, 799 F. App'x 413 (7th Cir. 2020) (the ability to pray at the appropriate times); *Smith v. Cruzen*, No. 14-CV-04791, 2017 U.S. Dist. LEXIS 178733 (N.D. Cal. Oct. 26, 2017) (the ability to pray communally); *Ali v. Quarterman*, 434 F. App'x 322 (5th Cir. 2011) (the

right to grow a beard); *Holt*, 574 U.S. 352 (same); *Henderson v. Muniz*, 196 F. Supp. 3d 1092 (N.D. Cal. 2016) (the right to appropriately celebrate Ramadan); Order Granting Consent Injunction, *Prison Legal News v. Berkeley Cnty. Sherriff's Office*, No. 2:10-02594-MBS (D.S.C. Jan. 13, 2012), ECF 201 (copies of the Qu'ran); *Turner-Bey v. Maynard*, No. JFM-10-2816, 2012 WL 4327282 (D. Md. Sept. 18, 2012) (halal meat); *Ajala v. West*, 106 F. Supp. 3d 976 (W.D. Wis. 2015) (kufi prayer caps); *Davis*, 901 F. Supp. 2d. 1196 (access to scented prayer oil); *see also Shaw v. Norman*, No. 6:07-cv-443, 2009 U.S. Dist. LEXIS 52461, at *8 (E.D. Tex. June 19, 2009) ("[The Plaintiff] testified that he could not say his prayers without his prayer rug and prayer beads. He could not study his Koran. The confiscation of these items took away the very items he needed to practice his religion."). RLUIPA has been essential to Muslim prisoners' equal right to practice their religion, and must be enforced with the strength that Congress intended. Without RLUIPA's pressure, many more Muslim prisoners would lack the ability to practice essential elements of their faith.

B. Muslims and practitioners of minority faiths are more likely to have security interests invoked in defense of restrictions on their religious practice.

The Nevada Department of Corrections has justified its intrusion on Johnson's religious practice as a necessary security precaution. As explained, *supra* Section II, this security justification is belied by the facts. Such mismatches between the security interest at issue and the restrictions on Muslims that result is a familiar problem for the Muslim community, which faces heightened scrutiny and discrimination in a variety of contexts inside and outside of prisons.

Non-particularized security-based rationales for restricting Islamic practices in prison may also reflect—or unintentionally encourage—a more pernicious view of Muslims generally as an inherent security threat. In 2017, 48% of American Muslims reported recalling at least one incident of discrimination in the previous year.[3] Muslims are

[3] Findings from Pew Research Center's 2017 Survey of U.S. Muslims, Pew Forum, 6 (July 26, 2017) https://www.pewforum.org/wp-content/uploads/sites/7/2017/07/U.S.-MUSLIMS-FULL-REPORT-with-population-update-v2.pdf.

disproportionately targeted by hate crimes.[4] Mosques are targeted both through threats and zoning discrimination.[5]

And in the aftermath of the 9/11 tragedy, Muslims have experienced law enforcement surveillance, coercion, and profiling. *See Tanzin v. Tanvir*, 141 S. Ct. 486 (2020); Abu B. Bah, *Racial Profiling and the War on Terror*, 29 Ethnic Stud. Rev. 76 (2006); Craig Considine, *The Racialization of Islam in the United States*, 2017 Religions 165.[6]

Such views may well influence determinations impacting Muslim inmates' free exercise rights. Even where decisions do not reflect

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[4] Katayoun Kishi, Assaults Against Muslims in U.S. Surpass 2001 Level, Pew Research Center (Nov. 15, 2017), https://www.pewresearch.org/fact-tank/2017/11/15/assaults-against-muslims-in-u-s-surpass-2001-level/.

[5] DOJ Report, *supra*, at 15 ("The largest number of filings involved Islamic mosques and schools […]. Court action by the Department on behalf of these Jewish and Islamic groups has often been necessitated by an unwillingness by local governments to take voluntary corrective action, and these cases have been more likely to involve allegations of discriminatory animus."); Nationwide Anti-Mosque Activity, ACLU (Oct. 2020), https://www.aclu.org/issues/national-security/discriminatory-profiling/nationwide-anti-mosque-activity (collecting data including threats).

[6] Andrea Elliot, After 9/11, *Arab-Americans Fear Police Acts, Study Finds*, N.Y. Times (June 12, 2006), https://www.nytimes.com/2006/06/12/us/12arabs.html; Amanda Holpuch, *NYPD Settles Lawsuits Over Surveillance of Muslims and Agrees to Reforms*, Guardian (Jan. 7, 2016, 3:17 PM), https://www.theguardian.com/us-news/2016/jan/07/new-york-police-settlement-muslim-surveillance-program.

purposeful bias, when Muslim religious practices are singled out for prohibition while nearly identical conduct is allowed, it nonetheless reinforces a belief held by many Muslims around the United States: that the practice of Islam *itself* is considered a "security threat" in prison. For example, in *Holt*, the Court dismissed as absurd the idea that a half-inch beard could be used to hide contraband, 574 U.S. at 363–64, and noted the selectivity with which prisons seem to view excess hair as a threat, *id.* at 367 ("[Mustaches and head hair] could also be shaved off at a moment's notice, but the Department apparently does not think that this possibility raises a serious security concern."). The cases litigating where and when prisoners must be permitted to wear kufis, or Muslim prayer caps, are also illustrative. Prison officials have defended policies banning kufis on the grounds that they can be used to hide contraband, even when the facility allows inmates to wear knit beanies or stocking caps. *See Hogan v. Idaho State Bd. of Corr.*, No. 1:16-CV-00422-CWD, 2018 U.S. Dist. LEXIS 82582, at *16 (D. Idaho May 15, 2018); *Marshall v. Corbett*, No. 3:13-CV-02961, 2019 U.S. Dist. LEXIS 134520, at *21 (M.D. Pa. Aug. 8, 2019). Officials have also argued that kufis create a danger of gang signaling even where all kufis are restricted to one color. *See Harris v.*

Wall, 217 F. Supp. 3d 541, 558 (D.R.I. 2016). And most concerning of all, some prison officials have defended bans on kufis *simply because* a kufi signals that a person is Muslim, and the public acknowledgment of Muslim identity can make the wearer vulnerable to "harassment or a physical altercation" or open them up to targeting. *Id.*; *see also Hogan*, 2018 U.S. Dist. LEXIS 82582, at *16–17. Such arguments make clear the implicit association of "Muslims" with "security problems" in the minds of many prison administrators—and the consequent importance of courts examining prison security arguments carefully to ensure they meet the high standards of RLUIPA.

All religious minorities benefit from a strong RLUIPA that demands more than superficial invocations of security. Other religious minorities, such as Jewish and Sikh prisoners, have benefited from the same RLUIPA precedents as Muslims concerning dietary restrictions, beard growth, and others. *See, e.g.*, *United States v. Sec'y, Fla. Dep't of Corr.*, 2015 U.S. Dist. LEXIS 56911 (S.D. Fla. Apr. 30, 2015) (securing access to kosher meals). And some minority religions that have been effectively banned based on concerns about gang activity have used RLUIPA to secure rights and recognition. *See, e.g.*, *Alvarez v. Cate,* No. C

11-2034 JSW (PR), 2013 U.S. Dist. LEXIS 32577, at *16 (N.D. Cal. Mar. 8, 2013) (addressing an Uto-Aztecan practitioner, finding the security rationale to be a "simple assertion" that could "not establish how the confiscated drawings [of religious symbols and the Nahuatl language] in this case would have led to further gang violence or illicit activity"). Many minority faiths have practices that can seem burdensome or threatening to those who are unfamiliar with them, and all members of these faiths benefit when RLUIPA is used to apply the appropriate degree of scrutiny to prison officials' decisions not to accommodate these practices.

CONCLUSION

This Court should uphold the decision below—not only for Mr. Johnson, but for the many Muslim prisoners who rely on a strong RLUIPA for access to the practices of their faith.

Respectfully submitted,

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This Brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and Circuit Rule 32-1(a) because it contains 6,893 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This Brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it has been prepared in a proportionally spaced typeface using the Microsoft Word 2016 word processing system in 14-point Century Schoolbook font.

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I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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