No. 19-13745

In the United States Court of Appeals for the Eleventh Circuit

DURELL SIMS,

Plaintiff-Appellee,

v.

MARK INCH, SECRETARY OF THE FLORIDA DEPARTMENT OF CORRECTIONS,

Defendant-Appellants.

On Appeal from the United States District Court for the Northern District of Florida, No. 4:16-cv-49-RH-CAS

BRIEF FOR *AMICUS CURIAE* THE SIKH COALITION IN SUPPORT OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for *amicus curiae* certifies that the Sikh Coalition has no parent entities and does not issue stock. Counsel further certifies that, to the best of his knowledge, in addition to the persons listed in the briefs of Defendant-Appellant and Plaintiff-Appellee, the following persons may have an interest in the outcome of this case:

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INTERESTS OF THE *AMICUS CURIAE*[1]

The Sikh Coalition is a nonprofit, nonpartisan organization founded in the wake of the September 11th attacks to counter misconceptions, promote cultural understanding, and advocate for the civil liberties of all people, especially Sikhs. It is the largest Sikh civil-rights organization in the county, providing direct legal services and advocating for legislative change, educating the public about Sikhs and diversity, promoting local community empowerment, and fostering civic engagement amongst Sikh Americans. *See* Introduction to Sikhism, 1 Religious Organizations and the Law § 1:23 (treatise chapter extensively citing Sikh Coalition legal work). In its legal advocacy, the Sikh Coalition has worked extensively on both the underlying issue in this case (prison grooming policies) and access to the rights of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), codified at 42 U.S.C. §§ 2000cc to 2000cc-5.

[1] Counsel for plaintiff-appellee and defendant-appellant consent to the filing of this brief. No party's counsel authored the brief in whole or in part. No party or party's counsel, or any person other than *amicus curiae* and its counsel, contributed money intended to fund preparing or submitting the brief.

Sikhs wear an external uniform to unify and bind them to the beliefs of the religion and to remind them of their commitment to Sikh teachings at all times. These articles of faith distinguish a Sikh and have deep spiritual significance. They signify an individual's commitment to the Sikh faith and to the highest ideals of love and service to humanity. Unlike some other faiths where only the clergy are in uniform, all initiated Sikhs are required to wear external articles of faith. The Sikh Code of Conduct, called the *Rehat Maryada*, outlines the requirements for practicing the Sikh way of life, including wearing the articles of faith. *See, e.g.*, *Rehat Maryada* ch.10, Art. 16(t), *available in English at Textual Sources for the Study of Sikhism* 81 (W. H. McLeod ed. & trans., 1984).

One of the most commonly maintained articles of faith is unshorn hair (*kesh*). Maintaining *kesh* unshorn is rooted in the Sikh belief that hair is a divine gift, allowing an individual to live in harmony with the will of God. The *Rehat Maryada* explicitly forbids cutting or shaving any hair, as doing so weakens a Sikh's connection to the divine and to

the Sikh religious community. *Rehat Maryada* ch. 13, Art. 24(p), *in Textual Sources, supra*, at 84-85. In short, maintaining uncut hair is an essential part of the Sikh way of life.

All initiated Sikhs are religiously mandated to wear turbans and maintain *kesh*, lest they be deemed apostates. *See* 2 *The Encyclopaedia of Sikhism* 466 (Harbans Singh ed., 2d ed. 2001) ("My Sikh shall not use the razor. For him the use of razor or shaving the chin shall be as sinful as incest."). Guru Gobind Singh—the last of the ten founding Sikh gurus—proclaimed this central teaching of the Sikh faith centuries ago, echoing what all gurus before him had preached. *Id.* One's *kesh* must be honored at all times and places, even in prison. Accordingly, the Sikh Coalition has frequently filed before the Supreme Court of the United States and other federal courts in support of access to RLUIPA's full scope of rights and remedies in the grooming context—including in the *Holt* case, correctly applied by the District Court below. *See, e.g.*, Brief of the Sikh Coalition and Muslim Public Affairs Council, *Holt v. Hobbs*, No. 13-6827 (S. Ct.); Brief of the Sikh Coalition, *Knight v. Thompson*, No. 13-955 (S. Ct.); *see also* Brief of the Sikh Coalition, *FNU Tanzin v.*

Tanvir, No. 19-71 (S. Ct.) (scope of remedies for sister statute, Religious Freedom Restoration Act).

The Sikh Coalition has a profound interest in ensuring that access to the rights granted under RLUIPA are not frustrated by Florida's novel interpretation of the Prison Litigation Reform Act (PLRA). The Sikh Coalition asks the Eleventh Circuit to join the unbroken circuit consensus that has allowed Sikhs and other religious minorities to enter the courthouse doors once they have exhausted the prison grievance process set forth by the state.

STATEMENT OF THE ISSUES

(1) Whether an incarcerated religious plaintiff in Florida, seeking an individualized accommodation to exercise his sincerely held religious beliefs, may be barred from asserting his rights in federal court under the Religious Land Use and Institutionalized Persons Act, despite having exhausted Florida's three-step prison grievance process, until he initiates, and the state formally disposes of, a citizen petition for an agency-wide administrative rulemaking.

(2) Whether a rulemaking process that has no defined end-date, is not presented as an option in the official prison handbook that describes Florida's prison grievance procedures, is considered by some state legal authorities to be inapplicable to prisoner's grievances, and requirement of which would conflict with the agency's own regulations, is nevertheless an "available" administrative remedy under *Ross v. Blake*, 136 S. Ct. 1850 (2016).

(3) Whether the Florida Department of Corrections properly preserved its exhaustion defense. (*Not addressed by amicus.*)

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) to allow "redress for [state] inmates who encountered undue barriers to their religious observances," in light of state practices that set forth "'frivolous or arbitrary' barriers" to such practices. *Cutter v. Wilkinson*, 544 U.S. 709, 716–17 & n.5 (2005) (collecting examples). The Supreme Court has applied RLUIPA to strike a ban on half-inch beards, *Holt v. Hobbs*, 574 U.S. 352 (2015), and the District Court here properly applied *Holt* to allow the religious grooming accommodation requested by Durell Sims in this case. Indeed, the Florida Department of Corrections (hereafter the Department) does not challenge—even in the alternative—the District Court's substantive determination that RLUIPA protects Mr. Sims's religious practice.

Indeed, it would be difficult to rebut the District Court's thorough explanation of why Mr. Sims's entitlement to accommodation under RLUIPA is plain. Mr. Sims demonstrates his sincere Islamic faith daily through such practices as praying five times each day, engaging in religious study, and donning a *kufi*. *Sims v. Inch*, 400 F. Supp. 3d 1272,

1274 (N.D. Fla. 2019). Mr. Sims further "strives to maintain a diet consistent with his religious beliefs. He observes Ramadan by eating his meals before sunrise and after sunset and by praying more frequently with his peers." *Id.* "Mr. Sims's religion [also] requires him to grow a fist-length beard and to trim his moustache"; failing to do so "is a punishable sin." *Id.* But even though Mr. Sims "has been a near-model inmate" for his 13 years, Department policy inflexibly allows Mr. Sims a "half-inch beard or no beard at all." *Id.* After closely reviewing the Department's justifications for a ban "squarely in the minority" among prison systems, the District Court found "no reason to believe" accommodating Mr. Sims would harm the Department's asserted interests. *Id.* at 1280; *id.* at 1279–80 (noting the Department unsuccessfully invoked "the same interests" against half-inch beards prior to *Holt*, and its "witnesses generally concede" no harm resulted from its change in policy since).

The Department's only argument against granting the accommodation to which Mr. Sims is entitled is a contortion of the Prison Litigation Reform Act (PLRA). The Department contends the PLRA is not

merely a commonsense rule that weeds out frivolous claims by requiring prisoners to avail themselves of ordinary prison grievance procedures. Rather, it is a barrier of arbitrary and constantly shifting size, barring the courthouse door until every arguably possible process to alleviate the prisoner's injury is attempted—even where the process has never been successfully used, is never explained to prisoners, and is suggested by at least some state legal authorities to be inapplicable to prisoners. On this understanding, the Department insists that the PLRA required Mr. Sims to initiate, and patiently await the resolution of, a petition for administrative rulemaking under the Florida Administrative Procedure Act.

The Department's novel interpretation of the PLRA would have a seismic effect, particularly on prisoners of minority faiths. It would undermine most RLUIPA decisions in the Federal Reporter, suggesting that courts never should have reached the merits in those cases. Had the Department's rule been applied in *Holt v. Hobbs*, for example, the Supreme Court should never have reached the merits of the case that defined the scope of RLUIPA rights for all minority faiths, including

Sikhs. *See Holt*, 574 U.S. at 359 (Arkansas prisoner filed complaint following denial of prison grievance); Ark. Code § 25-15-204(d) (procedure for citizen petition for rulemaking).

Whether or not the Department preserved this argument,[2] that reading is not consistent with this Circuit's and the Supreme Court's explication of the PLRA's requirement to exhaust "such administrative remedies as are available." 42 U.S.C. § 1997e(a). And it runs against the consistent approach of the other United States Courts of Appeals in defining exhaustion with reference to "*intra*-prison administrative remedies." *Frederickson v. Landeros*, 943 F.3d 1054, 1065 (7th Cir. 2019) (emphasis added). This Circuit should embrace the broad consensus that where a prison grievance process exists, "the prison's requirements . . . define the boundaries of proper exhaustion." *Jones v. Bock*, 549 U.S. 199, 218 (2007).

[2] The Department concedes that ruling in its favor would require both deepening a circuit split on a preservation question, Appellant Br. 24, and opening a new circuit split on whether prisoners satisfy exhaustion by completing internal prison procedures, *id.* at 15–16. As explained below, *amicus* believes the Department understates the consensus on the latter question.

The contrary rule would install an arbitrary barrier to religious practice, in direct opposition to RLUIPA. Sikh prisoners frequently require accommodation for grooming, dress, and dietary requirements of their faith, and often find relief only through RLUIPA. *See, e.g.*, *Singh v. Goord*, 520 F. Supp. 2d 487, 501–05 (S.D.N.Y. 2007) (denying state agency motion for summary judgment on claims relating to prisoner desire to keep *Kanga* comb, lengthy turban, and *Khanda* pendant); *Haley v. Donovan*, 250 F. App'x 202, 203 (9th Cir. 2007) (reviewing complaint of Sikh prisoner "disciplined for refusing to cut his hair" before regulations changed in response to different RLUIPA challenge); *Basra v. Morgan*, No. 3:16-CV-06005-RBL-JRC, 2018 WL 278649 (W.D. Wash. Jan. 3, 2018) (denying summary judgment to prison on RLUIPA claim relating to Sikh prisoner's dietary needs). The courthouse doors must remain open to such claims.

ARGUMENT

I. MR. SIMS PROPERLY EXHAUSTED HIS ADMINISTRATIVE REMEDIES IN SEEKING PERMISSION TO PRACTICE HIS RELIGION.

Under the PLRA, prisoners must exhaust "such administrative remedies as are available" before seeking judicial review of agency action. 42 U.S.C. § 1997e(a). That is precisely what Mr. Sims did here. Mr. Sims filed an informal grievance, a formal grievance, and an appeal to the Secretary, pursuant to the grievance procedures of the Florida Department of Corrections. DE25:2–3. The Department denied each request, and admits that "Mr. Sims exhausted his prison's internal grievance procedures." Appellant Br. 3. No other administrative remedy was "available" to him.

But the Department argues that another process should be considered an "available" administrative remedy under state law: a petition to initiate an agency-wide rulemaking under Section 120.54(7) of the Florida Administrative Procedure Act. Fla. Stat. § 120.54(7)(a). The suggestion that prisoners must not only exhaust the Department's grievance procedures published under law, but must also attempt to *change* the law before being permitted to assert their *existing* religious liberty

rights under RLUIPA, contorts both Supreme Court and controlling Eleventh Circuit precedent.

Indeed, the Department's strained interpretation of the relationship between prison grievance procedures and administrative exhaustion under the PLRA runs contrary to that of every Circuit that has considered the question. Appellant Br. 15; *infra* at 18–19. Which is why, "at both the motion to dismiss stage and the summary judgment stage . . . the magistrate judge and the district court rejected [its] argument as a matter of law." Appellant Br. 24 (citations omitted). This Court should do the same.

A. The Department's Novel Interpretation of Administrative Exhaustion Requirements Under the PLRA Runs Contrary to Well-Settled Law.

The Department's interpretation of the relationship between administrative exhaustion requirements and prison grievance procedures under the PLRA runs contrary to that of every Circuit that has considered the question. Appellant Br. 15. For good reason: under the Department's strained reading of the PLRA, states could multiply administrative remedies endlessly, while still requiring prisoners to exhaust every remedy before accessing judicial review. Appellant Br. 14 ("Section

1997e(a) defers to the States to determine what administrative remedies to make available, and requires that prisoners comply with those procedures, whatever they are," with "no requirements"). The PLRA was enacted to promote judicial efficiency, but not by condemning prisoners to a Sisyphean exhibition of bureaucratic futility. *Woodford v. Ngo*, 548 U.S. 81, 89–90 (2006).

Perhaps the Department might agree that its reading produces absurd results, but contend that focusing on absurdities "elevate[s]" the statutory purpose over its text and governing precedent. Appellant Br. 16. That argument fares no better than the first. As the Department acknowledges, the Supreme Court has repeatedly indicated that administrative exhaustion under the PLRA is coextensive with exhaustion of prison grievance procedures. *E.g.*, *Jones*, 549 U.S. at 218 ("Compliance with prison grievance procedures . . . is all that is required by the PLRA to 'properly exhaust.'"); *see also Woodford*, 548 U.S. at 95 (exhaustion requires that "the prison grievance system is given a fair opportunity to consider the grievance"). The Department asserts that these statements should be read narrowly and in their "proper context"—that is, the statements should be disregarded because the Supreme Court made

them apparently without entertaining the Department's novel theory. Appellant Br. 17–18. The Supreme Court was not being incautious. The PLRA has always been understood to "make the exhaustion of administrative remedies mandatory" in order to free up court resources previously devoted to "matters that are relatively minor and for which the prison grievance system would provide an adequate remedy." 141 Cong. Rec. S7527 (daily ed. May 25, 1995) (statement of Senator Kyl).

Moreover, as this Court has previously explained, the exhaustion provision of the PLRA "merely requires inmates to complete the administrative review process *in compliance with the prison's grievance procedures*, so that there is 'time and opportunity to address complaints internally before allowing the initiation of a federal case.'" *Parzyck v. Prison Health Servs., Inc.*, 627 F.3d 1215, 1219 (11th Cir. 2010) (emphasis added) (quoting *Woodford v. Ngo*, 548 U.S. 81, 93 (2006)).

The Department quotes *Johnson v. Meadows* for the proposition that prisoners must use "all administrative options that the state offers." Appellant Br. 13 (quoting *Johnson v. Meadows*, 418 F.3d 1152, 1158 (11th Cir. 2005)). But the Department neglects the next sentence of *Johnson*: "[t]o exhaust remedies, a prisoner must file complaints and

appeals in the place, and at the time, the *prison's administrative rules* require." *Johnson*, 418 F.3d at 1158 (emphasis added) (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002)).[3]

Even within prison grievance procedures, this Court has made clear that a prisoner's "failure to comply with an *optional* administrative procedure does not amount to a failure to properly exhaust his remedies" under the PLRA. *Turner v. Burnside*, 541 F.3d 1077, 1083–84 (11th Cir. 2008) (exhaustion did not require use of available emergency grievance procedure when normal procedure was used). Like the emergency procedure in *Turner*, the petition process here (even if "available") would be a purely duplicative formality.

This Court has taken note that the Florida exhaustion process is not complete until the issue has been escalated to the top of the agency: "In Florida, a prisoner must: (1) file an informal grievance with a desig-

[3] Unpublished decisions of this Court also express that administrative exhaustion is "defined . . . by the prison grievance process itself." *Gipson v. Renninger*, 750 F. App'x 948, 951 (11th Cir. 2018) (per curiam) (citing *Jones*, 549 U.S. at 218).

nated prison staff member; (2) file a formal grievance with the institution's warden; and then (3) submit an appeal to the Secretary of the FDOC." *Dimanche v. Brown*, 783 F.3d 1204, 1211 (11th Cir. 2015).[4] Mr. Sims complied with all three exhaustion requirements in seeking permission to obey his religion's tenets. DE25:2–3. The Department had ample time and opportunity to address Mr. Sims's request internally. It declined to do so.

The PLRA also specifies that "[t]he failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title." 42 U.S.C. § 1997e(b). The Department makes much of Section 1997e(a)'s "administrative remedies" compared to Section 1997e(b)'s "administrative grievance procedure," arguing that the difference in wording belies Congress's intention to require exhaustion of remedies beyond the

[4] Though a Florida state prison case, *Dimanche* makes no mention of the petition-for-rulemaking procedure. The Department waves away this omission in *Dimanche* and other cases by saying "defendants frequently raise [the exhaustion] defense only with respect to prison grievance procedures," Appellant Br. 18–19, but it does not explain why Florida has so frequently passed over this defense.

prison grievance process, regardless of form, content, or notice. Appellant Br. 14. In the Department's words, "Congress knew how to refer to prison grievance procedures and declined to limit the scope of Section 1997e(a)." *Id.* at 12. But Congress's refusal to require prisoners to surmount a *minimum* number of administrative hurdles does not mean there is no *maximum* under the PLRA.

In arguing that Mr. Sims must file a petition to initiate rulemaking, and exhaust the rulemaking process before seeking judicial review of his religious liberty claim, the Department effectively asks this Court to accept what it has already rejected: a "hide-and-seek position on administrative remedies." *Goebert v. Lee Cty.*, 510 F.3d 1312, 1323 (11th Cir. 2007). In *Goebert*, this Court held that keeping a prisoner "in the dark about the path she was required to follow" should not allow a defendant to "benefit from [a prisoner's] inability to find her way." *Id.* "If we allowed jails and prisons to play hide-and-seek with administrative remedies, they could keep all remedies under wraps until after a lawsuit is filed and then uncover them and proclaim that the remedies were available all along." *Id.* Like the defendant in *Goebert*, the Department seeks to 'benefit from' confusion of its own creation, by setting out

particular grievance procedures for those in its custody but then insisting that wholly separate procedures must *also* be exhausted. The PLRA does not demand, nor does RLUIPA allow, religious-exercise claims to be subject to such "'frivolous or arbitrary' barriers." *Cutter*, 544 U.S. at 716.

The Department asks this Court to adopt a reading of the PLRA that is in tension not only with controlling precedent, but also with extensive persuasive authority in other Circuits. The Department dismisses one such case as "wrongly decided," but fails to engage with the weight of authority opposed to its novel argument. Appellant Br. 15–16 (citing *Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999)). In fact, *every Circuit* to consider the issue has described the relationship between prison grievance procedures and administrative exhaustion under the PLRA in the same way: if a state does set out prison grievance procedures, those procedures determine administrative exhaustion requirements for purposes of the PLRA. Appellee Br. 27–28 (citing cases); *see Acosta v. U.S. Marshals Serv.*, 445 F.3d 509, 512 (1st Cir. 2006) (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002)) ("To exhaust remedies, a prisoner must file complaints and appeals in the

place, and at the time, the prison's administrative rules require."); *Spruill v. Gillis*, 372 F.3d 218, 231 (3d Cir. 2004); *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 789–90 (5th Cir. 2012); *Frederickson*, 943 F.3d at 1065 (citing *Hernandez v. Dart*, 814 F.3d 836, 841 (7th Cir. 2016)); *Townsend v. Murphy*, 898 F.3d 780, 784 (8th Cir. 2018) (citing *Jones*, 549 U.S. at 218); *Akhtar v. Mesa*, 698 F.3d 1202, 1211 (9th Cir. 2012) (citing *Jones*, 549 U.S. at 218)); *see also Dabney v. Pegano*, 604 F. App'x 1, 3 (2d Cir. 2015) (holding that administrative exhaustion did not require administrative appeal of an adverse report extraneous to the prison grievance process).

Every Circuit to consider the question has come to this conclusion for good reason. It is well established that proper administrative exhaustion "means using all steps that the agency *holds out*." *Woodford*, 548 U.S. at 90 (emphasis added). In publishing its internal grievance procedures and the Inmate Orientation Handbook, the Department held out those internal procedures as the means to administrative remedy. Appellant Br. 21. Unlike those prison grievance procedures, which Mr. Sims properly exhausted, the agency rulemaking process is not held out

to prisoners as a potential remedy, either through the Inmate Orientation Handbook or through the internal prison grievance procedures. *Id.* It was not until Mr. Sims sought judicial review for his meritorious religious liberty claim that the Department raised the rulemaking process as an alternative administrative remedy.

The Sikh Coalition is particularly concerned with reinforcing this Court's admonition to not leave prisoners "in the dark" regarding administrative remedies, *Goebert*, 510 F.3d at 1323, in light of the specific challenges faced by the incarcerated Sikh community. The U.S. Census Bureau's 2014-2018 American Community Survey report found that approximately 41% (or 119,416) of reported Punjabi speakers in the United States do not speak English well.[5] A Sikh Coalition study in New York City found that 75% of Sikh adults—who number more than 500,000 nationally[6]—identified Punjabi as their national language, with

[5] U.S. Census Bureau, *Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over*, https://bit.ly/2UtaHOG (last visited June 12, 2020) (select 2018 5-Year Estimates).

[6] FEMA, *Engagement Guidelines: Sikh Leaders*, http://www.ndin.org/ndin_resources/tipsheets_partners/FEMA_Tip_Sheet-Engaging_Sikh_Leaders_v1.2.pdf (last visited June 12, 2020).

over 17% requiring assistance to understand English language forms.[7] When prisons publish established grievance procedures, prisoners for whom English is not their native language have a bounded set of information they can seek to decipher or have interpreted. Expecting them to not only incur the costs of and manage translating published procedures—which is at least plausible under some circumstances—but also the whole scope of state law, would effectively deny such prisoners judicial review.

It is not novel for a defendant to "argue that any remedy that is in place is 'available' to the inmate even if the inmate does not know, and cannot find out, about it." *Goebert*, 510 F.3d at 1322. But no Court has accepted that position. In *Goebert*, this Court aptly observed that this stance "could have been inspired by the Queen of Hearts' Croquet game, since there is nothing on this side of the rabbit hole to support it." *Id.* Where grievance procedures exist, administrative exhaustion under the PLRA only requires what Mr. Sims did here: exhaustion of those procedures. *See* Appellant Br. 3.

[7] The Sikh Coalition, *Making Our Voices Heard*, at 14 (Apr. 2008), http://www.sikhcoalition.org/documents/pdf/RaisingOurVoicesReport.pdf.

B. The Department's Double-Exhaustion Scheme Fails the 'Availability' Test Under Ross v. Blake.

Under the PLRA, prisoners need only exhaust administrative remedies that are actually available. 42 U.S.C. § 1997e(a). The Section 120.54(7) rulemaking petition process is not "available" for PLRA purposes. "[T]he ordinary meaning of the word 'available' is 'capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained.'" *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016). Availability operates as a meaningful limitation on exhaustion requirements. As a qualifier, it "has real content." *Id*.

In *Ross,* the Court offered three tests, any one of which, if satisfied, means an administrative remedy is "unavailable" to prisoners. *Id.* at 1859–60; Appellee Br. 31–38. While Appellee's brief persuasively explains why the Department fails all three tests, *amicus* provides further reasons why *Ross*'s "dead end" and "opacity" tests demonstrate that a petition to initiate rulemaking was unavailable to Mr. Sims.

i. The Department's Purported Exhaustion Requirement "Operates As a Simple Dead End."

Contrary to *Ross*'s dead-end test, the Department seeks to impose an exhaustion requirement on Mr. Sims that "operates as a simple dead

end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates." *Ross*, 136 S. Ct. at 1859. The Department claims that prisoners "routinely file petitions [to initiate rulemaking] under Section 120.54(7)," and so regularly avail themselves of this remedy. Appellant Br. 22. But the cases the Department cites for this proposition suggest otherwise. In fact, *none* of the cases cited by the Department indicate that a prisoner has *ever* filed a petition for rulemaking that has actually initiated a rulemaking, suggesting the Department has been "consistently unwilling to provide any relief" to such petitioners. *Ross*, 136 S. Ct. at 1859. It is not even clear from the cases whether a prisoner has filed a petition, successfully or not, in the last eighteen years. One case the Department cites goes so far as to state that the Florida Administrative Procedure Act "does not apply" to prisoners. *Caldwell v. State*, 821 So. 2d 374, 374–75 (Fla. Dist. Ct. App. 2002) (per curiam) ("Because the Administrative Procedures Act does not apply to him, Caldwell is not entitled to appellate review of the department's denial of his petition.").

Amicus filed a request for records with the Department, seeking evidence for the Department's claim that prisoners "routinely file petitions under Section 120.54(7)."[8] Appellant Br. 22. As of this filing, the Department has provided no such records.

For more than three years, the Department has been "consistently unwilling to provide any relief" to Mr. Sims. *Ross*, 136 S. Ct. at 1859. From the moment Mr. Sims first filed his grievance to when the Secretary denied his appeal, and continuing throughout this litigation, the Department has always maintained unexercised authority to initiate a rulemaking of its own initiative. Appellee Br. 33. The notion that Mr. Sims could have successfully petitioned the same Department to revise its rules—the *same* rules it has defended since Mr. Sims first brought suit, and now seeks to reinstate against Mr. Sims's religious practice on appeal—strains credulity. Requiring the rulemaking process to be exhausted in addition to the prison grievance procedures, then, would not

[8] *Amici* filed requests for Department of Corrections administrative records pursuant to Article I, Section 24 of the Florida Constitution and Florida's "Sunshine" Law (Fla. Stat. § 119.01) for records in the possession of the Florida state government. Those requests were filed on February 17, 2020.

simply ensure the agency has "time and opportunity to address complaints internally before allowing the initiation of a federal case," Appellant Br. 8 (quoting *Porter v. Nussle*, 534 U.S. 516, 524–25 (2002)). Rather, it would serve as an end run around judicial review for even concededly meritorious claims like Mr. Sims's.

Even supposing a prisoner could successfully petition to initiate a rulemaking, that would not demonstrate availability for PLRA purposes. Initiating a rulemaking subjects the prisoner's request to public challenge. Fla. Stat. § 120.54(3)(c)1. Agency consideration of objections from the general public is appropriate for administrative rulemaking, not adjudicating prisoners' civil rights. *See also* Appellee Br. 18-22 (further explaining why processes for modifying rules of general applicability do not suit individualized questions).

Moreover, the rulemaking process might well exceed the length of a prisoner's sentence, excluding some prisoners from RLUIPA protection entirely. After a petition to initiate rulemaking is filed under Section 120.54(7)(a) of the Florida Administrative Procedure Act, the Department has 30 days to deny the request or begin the rulemaking process. Fla. Stat. § 120.54(7)(a). The Department then has another 30

days to "hold a public hearing," then 30 more days to decide whether to initiate rulemaking. *Id.* § 120.54(7)(b). If the Department does initiate a rulemaking, it has 180 days to file a "notice of proposed rule." *Id.* § 120.54(7)(d). Thus after 270 days, a prisoner still may not have exhausted the rulemaking process. This is on top of the time taken by the ordinary prison grievance process. And if, after all that time, the Department still denies the prisoner effective relief, only then may he finally assert his religious rights in federal court.

Twenty-four percent of Florida prisoners released in the year ending June 30, 2018 served an average sentence of less than three years. *See* Fla. Dep't of Corr., *2017-18 Annual Report*, at 18 (2018), http://www.dc.state.fl.us/pub/annual/1718/FDC_AR2017-18.pdf. Eighty-four percent served, on average, less than five. *Id.* To require prisoners to exhaust a years-long administrative process just to start a years-long federal litigation process is, for many if not most prisoners in Florida, tantamount to denying any remedy at all.

The Department's position renders justice an unworkable Rube-Goldberg device. The Section 120.54(7) rulemaking process cannot be considered "available" to Mr. Sims, notwithstanding the Department's

contortions of Supreme Court and controlling Eleventh Circuit precedent. Availability "requires the possibility of some relief. When the facts on the ground demonstrate that no such potential exists, the inmate has no obligation to exhaust the remedy." *Ross*, 136 S. Ct. at 1859 (citation omitted). Mr. Sims properly exhausted his administrative remedies once denied permission to practice his religion through the prison grievance procedure.

ii. The Department's Purported Exhaustion Requirement Is "So Opaque That It Becomes, Practically Speaking, Incapable of Use," and Is Thus Unavailable.

A petition to initiate rulemaking was also unavailable to Mr. Sims under *Ross*'s opacity test. Requiring that prisoners exhaust prison grievance procedures *and* navigate the agency rulemaking process creates a scheme that "becomes, practically speaking, incapable of use." *Ross*, 136 S. Ct. at 1859. Florida prisons do not refer to Section 120.54(7) in their admissions materials—neither their prisoner orientation materials nor their internal grievance procedures—leaving prisoners without notice of the Department's purported exhaustion require-

ment. On the Department's telling, prisoners like Mr. Sims must be intimately familiar with the Florida Code to assert their right to practice their religion.

The Department misinterprets the *Ross* opacity test, suggesting that remedies are only unavailable if "no reasonable prisoner can use them." Appellant Br. 22 (citing *Ross*, 136 S. Ct. at 1859). As Mr. Sims indicates, Appellee Br. 38, *Ross* asks not whether *any* prisoner knows how to file a petition to initiate rulemaking, but whether "an ordinary prisoner in [Mr. Sims]'s situation" would know how to avail himself of the rulemaking process. *Ross*, 136 S. Ct. at 1862. A process "so confusing that no such inmate could make use of it" is not an "available" remedy for purposes of the PLRA. *Id.* However legally sophisticated some prisoners may be, courts should not expect ordinary prisoners to comprehend the nuances of state administrative law in order to vindicate their religious liberties. A remedy is "essentially 'unknowable,'" and so unavailable, if "no ordinary prisoner can make sense of what it demands." *Id. at* 1859 (citing *Goebert*, 510 F.3d at 1323).

The Department's double-exhaustion scheme is unknowable in precisely this way. As pointed out by the magistrate judge below and

Appellee's brief, relevant provisions of the Florida Administrative Code are inconsistent with the Department's argument. DE25:7; *see* Appellee Br. 38 (discussing other inconsistent prison forms). Section 33-103.011(4) of the Florida Code instructs that prison officials may request extensions of time to respond to grievances. If a prisoner "does not agree to an extension," that prisoner "shall be entitled to proceed with judicial remedies *as he would have exhausted* his administrative remedies." Fla. Admin. Code § 33-103.011(4) (emphasis added). So the Code positively indicates that Mr. Sims was *not* required to petition for rulemaking to "have exhausted his administrative remedies." *Id.*; *see* Appellee Br. 24-26.[9]

Combining the inherent complexity of administrative procedure with the Department's inconsistent positions, the purported exhaustion requirement fails *Ross*'s opacity test. Even if some kind of rulemaking

[9] The Department waves away this provision, suggesting so long as Mr. Sims "did not establish that" he was relying on this provision to not file a petition, he was not "thwart[ed]" by prison officials. *Ross*, 136 S. Ct. at 1860; *but see* Appellee Br. 34-36. But the Department does not explain why the provision would not *at least* make its exhaustion process opaque (and contradict its other claims).

petition requirement could be found elsewhere under Florida law, its inconsistency with Section 33-103.011(4) would render the claimed remedy "opaque." *Ross*, 136 S. Ct. at 1859. Ordinary prisoners cannot be expected to know that conflicting provisions in Florida law—which the Department has given them no notice of—would supersede the Department's own regulations. As this Court has affirmed, "[r]emedies that rational inmates cannot be expected to use are not capable of accomplishing their purposes and so are not available." *Turner*, 541 F.3d at 1084.

II. RLUIPA EXISTS TO SAFEGUARD PRISONERS' RELIGIOUS LIBERTY.

The Department presents this as a case about administrative procedure, thereby avoiding the real issue: Mr. Sims's liberty to freely exercise his religion. *See* Appellant Br. 24. This is understandable, because the Department cannot defeat the merits of Mr. Sims's religious liberty claims. In this appeal, the Department does not even argue that Mr. Sims is not entitled to the relief he seeks under RLUIPA, but instead insists only that he sought relief too early. This Court should not allow the Department to evade RLUIPA in this way.

The Department repeatedly notes that Congress passed the PLRA to limit judicial resources spent investigating "frivolous" claims. Appellant Br. 8–9 (citing *Alexander*, 159 F.3d at 1324). But Congress also enacted RLUIPA, four years after the PLRA, to make clear that claims of conscience rooted in sincere religious belief are *never* frivolous. For Sikh prisoners who believe that "on each and every hair, the Lord abides," prison grooming objections like Mr. Sims's are not trivial. *See The Guru Granth Sahib* 344 (Khalsa Translation), http://www.srigurugranth.org/0344.html (last updated July 2006). Rather, compliance with religious grooming mandates is a matter of avoiding "the direst apostasy," as evidenced by the many eighteenth-century Sikhs who chose torture and death over having their turbans torn and their hair cut. 2 *The Encyclopaedia of Sikhism* 466.

Sincere claims of religious conscience, like those of Mr. Sims and many Sikh prisoners, are precisely the claims Congress sought to protect against administrative procedures that "operate[] as a simple dead end," "so opaque [they] become[], practically speaking, incapable of use," particularly in the hands of administrators whose "machination, misrepresentation, or intimidation" works to "thwart inmates from taking

advantage of a grievance process" through which their claims of conscience might be heard. *Ross*, 136 S. Ct. at 1859–60.

Congress enacted RLUIPA to protect the religious exercise of prisoners like Mr. Sims against barriers. *See Holt*, 574 U.S. at 867 (Sotomayor, J., concurring) ("[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.") (alterations and citation omitted) (quoting S. Rep. No. 103-111, at 10 (1993)); *Cutter*, 544 U.S. at 716–17 (noting "three years" of hearings identifying "'frivolous or arbitrary' barriers" and the need to "secure redress for inmates who encountered [these] undue barriers to their religious observances.").

Congress intended that RLUIPA "provide very broad protection for religious liberty." *Holt*, 574 U.S. at 356 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014)). By defining "'religious exercise' capaciously to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief,'" Congress extended religious liberty protections beyond those available under the

First Amendment. *Holt*, 574 U.S. at 358. RLUIPA prohibits any "substantial burden on the religious exercise of [prisoners], even if the burden results from a rule of general applicability," unless the government can demonstrate that the burden "is the least restrictive means of furthering [a] compelling government interest." 42 U.S.C. § 2000cc-1(a). This least restrictive means test is exceptionally demanding. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) ("Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law."). Here, relying on the detailed record, the District Court found the restriction on Mr. Sims's religious practice advanced the Department's asserted "interests only marginally," and that other readily available approaches could accomplish the same ends. 400 F. Supp. 3d at 1276.

RLUIPA protects religious liberty in prisons, where government's coercive power is most extensive and freedom is limited most dramatically. 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (statement of Sen. Hatch) ("Institutional residents' 'right to practice their faith is at the

mercy of those running the institution.'"). RLUIPA "thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter*, 544 U.S. at 721. By protecting the religious exercise of prisoners, RLUIPA ensures that freedom of conscience extends even to the lawbreaker, the powerless, and the citizen whose religious practice lies far outside the mainstream.

The Department failed RLUIPA's exceptionally demanding test, and so seeks to avoid engaging Mr. Sims' claim on the merits. Affirming the judgment below will not only protect Mr. Sims, but will reaffirm RLUIPA's "humble commitment by one of the world's most powerful nations to use its strength not to coerce, but to *protect* the conscience of the members of our society who are seemingly the least worthy of such protection: prisoners." Derek Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provision*, 28 Harv. J.L. & Pub. Pol'y 501, 607 (2005); *cf. Hudson v. Palmer*, 468 U.S. 517, 523–24 (1984) ("[T]he way a society treats those who have transgressed against it is evidence of the essential character of that society."). America was founded on the conviction, shared by the Sikh community—

whose members have woven themselves into the fabric of American society for nearly 130 years—that all people are "endowed by their Creator" with certain inalienable rights, including the right to practice one's religion freely. Giving force to prisoners' claims under RLUIPA reinforces that founding conviction, by providing that rights of conscience may not be trammeled in prison.

This Court should dispense with Florida's attempt to wind the consciences of believers like Mr. Sims in an intractable tangle of red tape. RLUIPA exists for prisoners like Mr. Sims to vindicate their right to religious exercise, and the merit of Mr. Sims's RLUIPA claim is bolstered by the Department's refusal even to engage it. Moreover, the PLRA exists to *reform* prison litigation, not to *eliminate* it. This Court should therefore decline the Department's novel interpretation of the exhaustion requirement.

CONCLUSION

For all the foregoing reasons, the judgment of the District Court should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4, this brief contains 6,458 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

Dated June 15, 2020

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CERTIFICATE OF SERVICE

I certify that on June 15, 2020, I caused the foregoing brief to be filed electronically via the Court's electronic filing system, which then served it upon the following registered counsel of record for Plaintiff-Appellee and Defendant-Appellant.

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