No. 22-3076

United States Court of Appeals for the Third Circuit

FERNANDO NUÑEZ, JR.,

Plaintiff–Appellant,

v.

TOM M. WOLF, GEORGE LITTLE, TABB BICKELL,

Defendants–Appellees.

Appeal from the United States District Court
for the Middle District of Pennsylvania,
No. 3:15-cv-01573
(Judge Jennifer P. Wilson)

BRIEF FOR PLAINTIFF-APPELLANT FERNANDO NUÑEZ, JR.

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INTRODUCTION

Since his conversion two decades ago, Mr. Nuñez has been a devout and practicing Muslim who avidly studies Islamic texts, laws, and rituals. A decade after his conversion, Mr. Nuñez participated, while incarcerated, in a wedding ceremony. Due to prison policy, however, at the time of the ceremony, Mr. Nuñez could not consummate his marriage in a manner consistent with his religious beliefs—that is, he could not lead his partner in congregate prayer[1] and then engage privately in acts of intimacy. In fact, Mr. Nunez could not engage in congregate prayer at all, whether in a private room or the visiting room, and also could not obtain a circumcision. Not long after the ceremony, Mr. Nuñez resolved to seek religious accommodations to change that.

Mr. Nuñez ultimately made three requests to prison officials, all in accordance with his religious beliefs. *First*, Mr. Nuñez requested that prison officials permit him to engage in congregate prayer—a prayer involving two or more Muslims. *Second*, he requested conjugal visits to allow him to consummate his marriage. *Third*, Mr. Nuñez requested a

[1] In Islam, "a valid 'congregational prayer' consists of two or more Muslims gathering to pray." JA042 (Am. Compl. at 3 n.1).

religious-based circumcision. To all, the prison said no, citing general safety and security concerns. On appeal, the Secretary's Office of Inmate Grievance and Appeals did the same, upholding the prison's determination.

Having hit a dead end, Mr. Nuñez—in the shadow of the just announced, seminal decision in *Holt v. Hobbs*, 574 U.S. 352 (2015)—turned to federal court. Mr. Nuñez brought suit under the Religious Land Use and Institutionalized Persons Act (RLUIPA), seeking declaratory and injunctive relief. The district court (Judge Mannion) ultimately denied the Pennsylvania Department of Correction's (DOC's) motion to dismiss for all three requests. JA0063. Over two years later, the district court (now Judge Wilson)—in an opinion that cited *Holt* only in setting up the legal standard and failed to cite the Supreme Court's months-old opinion in *Ramirez v. Collier*, 142 S. Ct. 1264 (2022)—granted summary judgment to DOC on all three requests. JA001.

DOC's arguments, like the district court's opinion, are fundamentally flawed, resting on an outdated understanding of RLUIPA that fails to apply its plain text or the Supreme Court's recent cases interpreting it. Indeed, DOC's motion for summary judgment failed to cite—even

once—the Court's opinion in *Holt*. This resulted in errors that, though elementary in nature, are grievous in effect. Remarkably, for example, though RLUIPA "replaced" the "legitimate penological interest" test with the more onerous "compelling interest test," DOC's declarations from its Chief of Security and Chief of Health Care Services put forward at summary judgment asserted only "legitimate penological interest[s]." *Warsoldier v. Woodford*, 418 F.3d 989, 998 (9th Cir. 2005); *Holt*, 574 U.S. at 362; *see, e.g.*, JA240–41 (Woodring Decl. ¶¶ 42–44).

Beyond this blunder, DOC also repeatedly claimed that it could not grant Mr. Nuñez's requests because it would then have to accommodate requests from all inmates, stretching its resources too thin. But the Supreme Court has explained that this argument—"If I make an exception for you, I'll have to make one for everybody, so no exceptions"—is nothing more than the "classic rejoinder of bureaucrats throughout history" that it has rejected time and again. *Holt*, 574 U.S. at 368.

DOC's arguments on RLUIPA's least-restrictive-means test suffered from many of the same flaws. Though RLUIPA forbids DOC from infringing Mr. Nuñez's religious practice except as a "last resort," DOC consistently failed to consider numerous obvious alternatives to a

wholesale ban on Mr. Nuñez's religious practice. So too, once again evincing a misunderstanding of what RLUIPA requires, DOC claimed that its denial left Mr. Nuñez with "adequate alternatives," not that it had used the *least restrictive* alternative when burdening his religious exercise. *See Holt*, 574 U.S. at 361–62. The district court only compounded these errors, routinely reasoning that DOC had met its burden because *Mr. Nuñez* had failed to "refute" DOC's position on the least restrictive means. But as the Supreme Court made clear in *Ramirez*, this gets RLUIPA's test "backward." 142 S. Ct. at 1281. It is the government's burden, not Mr. Nuñez's, to show that its policies are "the least restrictive means of furthering [a] compelling governmental interest." *Id.*

For all three of Mr. Nuñez's requests, DOC's analysis offers a smorgasbord of error. And the district court, seemingly disinterested in *Holt* and *Ramirez*, only cements those errors. Now, almost a decade after his wedding ceremony and nearly eight years since he filed his original complaint, it is past time for Mr. Nuñez to be granted the accommodations RLUIPA demands.

JURISDICTIONAL STATEMENT

Fernando Nuñez, Jr. appeals a final judgment of the United States District Court for the Middle District of Pennsylvania. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction under 28 U.S.C. § 1291.

On September 30, 2022, the district court granted Defendants' motion for summary judgment on Mr. Nuñez's claims, JA001, and entered judgment in favor of Defendants, JA017. Mr. Nuñez then timely filed his notice of appeal by depositing the notice in the prison's internal mail system on October 28, 2022. JA018; *see* Fed. R. App. P. 4(c).

STATEMENT OF THE ISSUES

1. Whether (a) DOC's general claims of safety concerns satisfy its statutory burden under RLUIPA to prove that the substantial burden imposed on Mr. Nuñez's ability to engage in congregate prayer furthers a compelling interest, and (b) if a compelling governmental interest is present, DOC met its burden to show that no less restrictive means to further such compelling interest are available.

2. Whether (a) DOC's general claims of safety, security, and health concerns satisfy its statutory burden under RLUIPA to prove that

the substantial burden imposed on Mr. Nuñez's ability to consummate his marriage furthers a compelling interest, and (b) if a compelling governmental interest is present, DOC met its burden to show that no less restrictive means to further such compelling interest are available.

3. Whether (a) DOC's cost- and health-related interests satisfy its statutory burden under RLUIPA to prove that the substantial burden imposed on Mr. Nuñez's ability to obtain a religious-based circumcision furthers a compelling interest, and (b) if a compelling governmental interest is present, DOC met its burden to show that no less restrictive means to further such compelling interest are available.

STATEMENT OF RELATED CASES

Neither this case nor any related case has been before this Court or any tribunal.

STATEMENT OF THE CASE

I. Factual Background

Mr. Nuñez is a devout and practicing Muslim incarcerated in the State Correctional Institution at Mahanoy ("SCI-Mahanoy"). JA144 (Defs.' SOMF) ¶ 4. In the early 2000s, Mr. Nuñez converted to Islam. JA041 (Am. Compl. ¶ 7). Since his conversion, he has been an avid

student of Islamic texts, laws, and rituals, and has participated regularly in DOC-sanctioned prayer. *See* JA159 (Religious Accom. Req. Docs.).

A decade after his conversion, in August 2013, Mr. Nuñez participated in a wedding ceremony with Jenny E. Nuñez. JA041 (Am. Compl. ¶ 8). DOC policy permitted only a brief kiss and embrace "[u]pon completion of the marriage ceremony," JA233 (DC-ADM 821, § 2), so Mr. Nuñez was unable to consummate his marriage in a manner consistent with his religious beliefs, which required Mr. Nuñez to lead his partner in congregate prayer and then—following the marriage ceremony—engage privately in acts of intimacy. *See* JA041–42 (Am. Compl. ¶¶ 9–11).

In January 2015, while incarcerated in the State Correction Institution at Huntingdon, Mr. Nuñez, in accordance with his religious beliefs, requested (1) congregate prayer with his family during contact visits, (2), conjugal visits to allow him to consummate his marriage, and (3) a circumcision. JA144 (Defs.' SOMF ¶ 5–8); *see* JA284 (Grievance 562984 – congregate prayer); JA183 (Grievance 564319 – conjugal visits for consummation); JA254 (Grievance 564054 – circumcision). After DOC denied his initial requests, Mr. Nuñez appealed both to the Facility Manager and to DOC's Secretary's Office of Inmate Grievance and Appeals,

which upheld the denial of Mr. Nuñez's requests. JA183 (consummation); JA248 (congregate prayer); JA254 (circumcision).

First, DOC denied Mr. Nuñez's initial request for congregate prayer either in a designated prayer area in the public visiting room or in a private room. JA248 (final appeal decision). DOC claimed that "[p]erforming religious practices in the Visiting Room" would create an unspecified "safety concern" and "pose a major distraction to families of other inmates meeting their loved ones." JA253 (Kephart response). As for his request for a private room, DOC noted that it could not accommodate this request because it "cannot provide every inmate with private visiting room for congregational prayers with family members." *Id.* Finally, evincing what can be charitably described as a misunderstanding of Mr. Nuñez's request and religious beliefs, DOC closed by observing that Mr. Nuñez and his family "are free to pray by themselves both before their visit has commenced and after their visit has concluded." *Id.*

On appeal, Mr. Nuñez argued that DOC had failed to explain "why [its] policies cannot be modified to accom[m]odate [his] religious request." JA251 (facility grievance appeal). Nor did it explain "why the easily available alternative in which I proposed within my grievance"—to

"utilize the non-contact visiting room when they are not in use and/or available to congregate with my visitors"—"cannot be accommodated." *Id.* This failure was "troubling," Mr. Nuñez explained, given that this proposed alternative was the "least restrictive means to accommodate [his] religious request" and those suggested by DOC would cause Mr. Nuñez "to sin." *Id.* In rejecting the appeal, the Secretary reiterated that "the visiting room is not for the purpose of practicing religion," but "a seated, quiet prayer . . . would be permitted." *Id.* The Secretary concluded by noting, without explanation, that "[i]t is not feasible to provide other alternatives or to modify policy." JA248 (final appeal decision).

Second, DOC denied Mr. Nuñez's initial request for conjugal visits, citing unspecified "safety, security and health concerns." JA188 (Kephart response). Though DOC recognized that Mr. Nuñez "support[ed] his request by [submitting] evidence of other States having policies which permit conjugal visits," it nevertheless rejected the request because DOC visiting policy permits only "a 'brief kiss [and] embrace' when meeting [and] departing from a visit." JA186 (Houser grievance denial). Notably, DOC's "brief research" discovered "6 States" that "allow such [conjugal] visits" and "have specific criteria for approval." *Id.* But DOC still denied

Mr. Nuñez's request, finding its policies consistent "with the vast majority of States which do not permit conjugal visits." *Id.* The Secretary ultimately upheld this decision, once again citing only general "safety, security and health concerns." JA183 (final appeal decision).

Third, DOC denied Mr. Nuñez's initial request for circumcision on the ground that circumcision is an "elective surgery" and not "medically necessary." JA256 (Kephart response). In denying this request, DOC cited Policy 13.2.1, which it claims does not permit "elective surgery." JA262 (Houser denial); JA264 (DOC Policy 13.2.1). DOC also explained that it is "unreasonable for [DOC] to assume the costs of elective surgery for all inmates." JA256 (Kephart response). In upholding this decision, the Secretary explained that a circumcision procedure "is an elective surgery" that is "not permitted" under "policy 13.2.1." JA254.[2]

[2] This 413-page policy does not bar "elective" surgeries. In fact, the only mention of the word "elective" comes in Section 13(F), which states that "[e]lective termination of pregnancy procedures will be provided at the inmate's request." JA270–71. Policy 13.2.1 actually provides that several categories of "[m]edical services" will not be provided by DOC, including "cosmetic surger[ies]," "extraordinary medical expenses for infants beyond routine newborn care," and "sterilization." JA268–69; *see* JA015 (Op.) ("The DOC also cited Policy 13.2.1 as indicative that it does not pay for cosmetic surgeries.").

II. Procedural History

In August 2015, Mr. Nuñez brought a claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc, *et. seq,* against Governor Wolf[3] and various prison officials in their official capacities, seeking declaratory and injunctive relief. Doc. 1 (Compl.). After Defendants moved to dismiss the complaint for failure to state a claim, *see* Doc. 22, Mr. Nuñez filed an amended complaint in April 2019, alleging that defendants had violated RLUIPA by denying his requests for congregate prayer, conjugal visits to consummate his marriage, and a circumcision, *see* JA040. Not long after, DOC moved to dismiss the amended complaint, arguing that Mr. Nuñez had failed to state a cognizable claim under RLUIPA. *See* Docs. 35, 36. Well over a year later, the district court denied DOC's motion to dismiss Mr. Nuñez's RLUIPA claims for all three requests. JA077–78.[4]

[3] The district court granted DOC's motion to dismiss with respect to Governor Wolf based on his lack of personal involvement in the denial of Mr. Nuñez's requests. JA071–72.

[4] The district court granted DOC's motion to dismiss Mr. Nuñez's RLUIPA claim based on the denial of an electric razor. JA078. Thus, that claim was not addressed in the district court's summary judgment opinion and is not at issue here.

In June 2021, DOC moved for summary judgment on Mr. Nuñez's three RLUIPA claims. *See* JA115. As the district court explained, for all three RLUIPA claims, DOC did not challenge the sincerity of Mr. Nuñez's religious beliefs or that he had established a prima facie case under RLUIPA. JA009, 012, 015. Instead, DOC argued that it had not violated RLUIPA because it had compelling governmental interests and employed the least restrictive means of furthering that interest. *See* JA001.

The district court entered summary judgment in favor of DOC on all three claims. The court's reasoning relied heavily on the analysis in *Washington v. Klem*, 497 F.3d 272 (3d Cir. 2007), granting considerable deference to the opinions of prison administrators despite a sparse evidentiary record. Throughout its opinion, the court placed the burden of proof on Mr. Nuñez to "present evidence to counter" DOC's contention that it had employed the least restrictive means available to further its purported compelling interest. JA012.

On Mr. Nuñez's request for congregate prayer, the court analyzed both the request to engage in congregate prayer in a private room and in a designated area in the public visiting room. With regard to the private room, the court held that "DOC's compelling government[al] interest in

prison safety and avoiding the introduction of contraband into the prison is furthered by not allowing private rooms for group prayer during contact visits." JA013. The court also reasoned that Defendants "provided evidence that their policy against private rooms is the least restrictive means in furtherance of the governmental interest." *Id.* Notably, on this point, the court explained that Mr. Nuñez had "failed to provide evidence to counter [DOC's] evidence regarding visitors being the main avenue of contraband into prisons." *Id.*

As for Mr. Nuñez's request that DOC, in lieu of giving him a private room, provide "a designated prayer area in the public visiting rooms," the court reasoned that keeping visitors in their seats in the general visiting room furthers DOC's safety interest. JA013–14. The court also cited to the declaration from DOC's Chief of Security, which explained that "avoiding group prayer in the general visiting area is required to maintain neutrality" and "avoid feelings of resentment and hatred." JA014. Once again, the court noted that Mr. Nuñez had "failed to refute [DOC's] evidence" that its "policy of allowing quiet seated prayer is the least restrictive means to further" its safety interest. *Id.*

On Mr. Nuñez's conjugal visit request, the court did not analyze the compelling interest prong, reasoning that Mr. Nuñez "does not challenge that safety, security, and health are compelling government interests." JA010 (citing, without reference to any page number, Mr. Nuñez's brief in opposition to DOC's motion for summary judgment (JA294, Doc. 111)).[5] The court did note, however, that a declaration from DOC's Chief of Security stating that "[v]isiting room areas are the main avenue of the introduction of contraband," provided an "explanation for how DOC policy furthers the named interest." JA010. The court also dismissed evidence that several other state correctional systems permit conjugal visits, reasoning that *Washington* requires courts to be "deferential to the prison authorities' decisions about how to run their institution." JA011–12.

On Mr. Nuñez's circumcision request, the court held that "DOC's denial of [Nuñez's] request for an elective circumcision furthers compelling government interests" because "[i]t would be unreasonable to allocate taxpayer money to elective surgeries for prisoners." JA015 (citation

[5] As explained below, *infra* Part II.A, this is plainly incorrect—Mr. Nuñez did challenge whether DOC had proved a compelling interest. *See* JA302 (Opp'n to Mot. for Summ. J.) ("[D]efendants ha[ve] not carried [their] burden under RLUIPA 'demonstrating' that they have a compelling interest in refusing to grant all three of Nuñez's [requests].")

omitted). The court also held that DOC's wholesale denial of this request "meets the least restrictive means" test because Mr. Nuñez believes that those who convert to Islam are required to get a circumcision "as early as possible," and DOC's policy is "not precluding [Mr. Nuñez] from fulfilling this religious obligation when it is possible for him to do so"—*i.e.*, when he is no longer incarcerated. JA015–16.

This appeal followed.

SUMMARY OF ARGUMENT

I. DOC's denial of Mr. Nuñez's request to engage in congregate prayer violates RLUIPA. Through RLUIPA, Congress provided "expansive protection" for prisoners' religious liberty, *Holt*, 574 U.S. at 357–58, commanding that "[n]o government shall impose a substantial burden" on a prisoner's "religious exercise" unless the prison "demonstrates that imposition of the burden *on that person*" is (1) "in furtherance of a compelling governmental interest," and (2) "the least restrictive means of furthering" that compelling interest, 42 U.S.C. § 2000cc-1(a) (emphasis added). DOC's vague and general "safety" and "staffing" interests, and the district court's reasoning that Mr. Nuñez "failed to refute [its]

evidence" on least restrictive means, cannot be reconciled with RLUIPA's text or the Supreme Court's clear teaching in *Holt*.

A. To prove a compelling interest, RLUIPA mandates that a prison engage in a "focused" inquiry that "requires [it] 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.'" *Holt*, 574 U.S. at 363; *Ramirez*, 142 S. Ct. at 1278. That means courts must "scutinz[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 362–63 (alteration in original) (citation omitted).

Here, DOC flunked this test by offering nothing more than broadly formulated interests in safety and staffing, far short of the individualized and specific determination required by RLUIPA. *See Johnson v. Baker*, 23 F.4th 1209, 1217 (9th Cir. 2022) ("[T]he government may not satisfy the compelling interest test by pointing to a general interest."). In fact, due to its misunderstanding of the RLUIPA analysis and the Court's guidance in *Holt*, DOC submitted evidence stating that it had a

"legitimate penological interest" in denying Mr. Nuñez's request, not the "compelling interest" required by RLUIPA. *See Warsoldier*, 418 F.3d at 998 ("RLUIPA replaced *Turner*'s 'legitimate penological interest' test with a 'compelling government interest' test."); *Mast v. Fillmore Cnty.*, 141 S. Ct. 2430, 2432 (2021) (Gorsuch, J., concurring) ("[RLUIPA] requires the application of 'strict scrutiny.'").

DOC's broad and conclusory purported interests in safety and staffing—devoid of any explanation as to how these interests pertain specifically to Mr. Nuñez's request—are not enough to prove a compelling interest in denying Mr. Nuñez's request for private congregate prayer. Its sole purported interest in denying Mr. Nuñez's request for public congregate prayer in the visiting room—preventing the visiting room from being converted from a "neutral space" into one used for "religious purposes"—fares no better. DOC's claim that converting the space *could* lead to "resentment and hatred" that then *could* "manifest into assaults" is pure speculation and conjecture "insufficient to satisfy its burden under RLUIPA." JA239–40 (Woodring Decl. ¶¶ 34–36).

B. DOC also failed to prove that its wholesale ban on congregate prayer is the least restrictive means of furthering its purported interests.

The least-restrictive-means test is "exceptionally demanding"—it requires the government to demonstrate that it "lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Holt*, 574 U.S. at 364–65. Yet here, DOC failed to engage with any possible alternatives—such as asking Mr. Nuñez and his family members to stay a certain distance from each other when praying—and instead simply noted that Mr. Nuñez's ability to "pray in the privacy of his cell or seated in the visiting area" is an "adequate" alternative. This gets the analysis all wrong. So too does DOC's attempts to place the burden on Mr. Nuñez to refute DOC's bare assertions—the burden on this prong belongs to DOC. *Ramirez*, 142 S. Ct. at 1281 (explaining that this reasoning "gets things backward").

II. DOC also violated RLUIPA by denying Mr. Nuñez's request for conjugal visits to consummate his marriage. Here, the district court plainly erred by failing to analyze the compelling-interest prong at all. But even if it had, DOC failed to carry its burden and also failed even to consider a limited exception to its conjugal visit policy to permit Mr. Nuñez's request to consummate his marriage.

A. Despite Mr. Nuñez unequivocally arguing that DOC had failed to prove a compelling interest on this request, the district court claimed that Mr. Nuñez did "not challenge that safety, security, and health are compelling interests." This failure alone is reversible error. But in any event, DOC did not demonstrate a compelling interest. Here again, DOC brought forth declarations asserting a "legitimate penological interest," not a "compelling interest."

Even looking past this error, DOC's broad and conclusory safety, security, and health interests are not enough to prove a compelling interest. The first two interests—identical to those asserted for Mr. Nuñez's congregate prayer request—fail for much the same reasons. And the third interest, supported primarily by evidence of general facts about sexually-transmitted infections untethered from Mr. Nuñez's particular request is likewise not enough. On top of all this, DOC's absolute ban on consummating one's marriage cannot be squared with the government's recognition of the importance of consummation across different areas of law and its longstanding commitment to protecting marital autonomy.

B. So too, DOC failed to prove that its complete ban on conjugal visits, even for marriage consummation, is the least restrictive means of

furthering its purported interests. Here, DOC (and the district court) failed to consider a limited accommodation exclusively for the purposes of marriage consummation—indeed, DOC never even distinguished between Nuñez's request for a limited exception and an indefinite and ongoing conjugal-visit program. *See* JA124 (Mot. for Summ. J.) (stating Mr. Nuñez's request as one for "sexual contact with his spouse"). Nor did DOC refute potential alternatives to an outright ban or explain why, in light of the robust conjugal visit programs in similarly situated jurisdictions, it cannot provide Mr. Nuñez a narrow exemption for consummation—two missteps fatal to its arguments on the least-restrictive-means prong.

III. Finally, DOC's denial of Mr. Nuñez's request for a religious circumcision violates RLUIPA. Here again, DOC failed to provide evidence regarding how denying Mr. Nuñez's specific request furthered its purported interests, or that its ban on all circumcisions is the least restrictive means of furthering its purported interests.

A. To start, DOC once again dooms its arguments on the compelling-interest prong by offering evidence that asserts only a "legitimate penological interest[]." JA246–47 (¶¶ 22–23). Worse still, on this

request, DOC compounds this fatal error by supporting its argument with citations to cases applying this more lenient (and inapplicable) standard. *See* JA138. In any event, DOC's claimed interests in cost savings, avoiding potential health complications, and its "no cosmetic surgery" rule are all wholly unsupported by evidence. So too, its claim that it must deny Mr. Nuñez request lest it have to assume the costs of cosmetic surgeries for all inmates is nothing more than the "classic rejoinder of bureaucrats" courts have routinely rejected. *See Holt*, 574 U.S. at 368.

What is more, the compelling nature of all these supposed interests is severely undermined by DOC's recent decision to allow sex reassignment surgeries—a set of procedures far more expensive than a circumcision, as Philadelphia's Center for Transgender Surgery has recognized. Allowing medically-elective surgeries such as sex reassignment surgery but not religious-based circumcision demonstrates a value-judgment favoring secular matters over religious matters, and exposes the state's under-inclusivity in its pursuit of purported compelling interests.

B. DOC also failed to demonstrate that its outright ban on *all* circumcisions—for any reason—is the least restrictive means of furthering its cost- and health-based interests. Here again, DOC failed to

consider that other similarly-situated jurisdictions such as Florida permit religious-based circumcisions—let alone offer "persuasive reasons why" it cannot do the same. *Id.* at 354, 369. DOC's conclusory defenses of its chosen path simply asked the district court to defer to its determination. But under RLUIPA, that is "not enough." *Ramirez*, 142 S. Ct. at 1279.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. *Lighthouse Inst. for Evangelism, Inc. v. City of Long Beach*, 510 F.3d 253, 260 (3d Cir. 2007). Because summary judgment is "only appropriate if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law," *id.*, this Court's "review of a grant of summary judgment is plenary," *Rosen v. Bezner*, 996 F.2d 1527, 1530 (3d Cir. 1993). In conducting its review, the court must "view the facts in a light most favorable to the nonmoving party." *City of Long Beach*, 510 F.3d at 260. Courts thus "must keep in mind that 'inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" *Bezner*, 996 F.2d at

1530 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

ARGUMENT

I. DOC's Denial Of Mr. Nuñez's Request To Engage In Congregate Prayer Violates RLUIPA.

DOC failed to prove that its denial of Nuñez's request to engage in congregate prayer furthers a compelling interest or that it employs the least restrictive means available to further that purported interest.[6] The district court held that DOC's policy furthered its compelling interest in "safety," and that Nuñez had "failed to refute [DOC's] evidence" that its "policy of allowing quiet seated prayer is the least restrictive means to further" that interest. JA013–14. That reasoning, however, cannot be reconciled with RLUIPA's plain text or *Holt*'s clear teaching.

A. DOC Failed To Prove That Denying Mr. Nuñez's Request To Engage In Congregate Prayer Furthers A Compelling Interest.

Through RLUIPA, Congress provided "expansive protection" for prisoners' religious liberty. *Holt*, 574 U.S. at 358; *Adams v. Corr.*

[6] For all three requests, DOC does not challenge the sincerity of Mr. Nuñez's religious beliefs or that he has established a prima facie case under RLUIPA. JA009, 012, 015.

Emergency Response Team, 857 F. App'x 57, 60 (3d Cir. 2021) ("RLUIPA offers greater protections for prisoner's religious exercise than the First Amendment."). RLUIPA commands that "[n]o government shall impose a substantial burden" on a prisoner's "religious exercise" unless the prison "demonstrates that imposition of the burden *on that person*" is (1) "in furtherance of a compelling governmental interest," and (2) "the least restrictive means of furthering" that compelling interest. 42 U.S.C. § 2000cc-1(a) (emphasis added). So too, in interpreting RLUIPA, courts must construe its text "in favor of a broad protection of religious exercise, to the maximum extent permitted by the [text] and the Constitution." *Id.* § 2000cc-3(g).

To prove a compelling interest, a prison may not simply cite to general, "broadly formulated interest[s]" like "prison safety and security." *Holt*, 574 U.S. at 362 (cleaned up). Rather, RLUIPA mandates a "more focused' inquiry" that "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.*; *Ramirez v. Collier*, 142 S. Ct. 1264, 1278 (2022). That means courts must "scutinz[e] the asserted harm

of granting specific exemptions to particular religious claimants" and "to look to the marginal interest in enforcing the challenged government action in that particular context." *Holt*, 574 U.S. at 362–63 (cleaned up); *Washington*, 497 F.3d at 283.

Here, the district court's analysis looks nothing like the individualized, "case-by-case analysis that RLUIPA requires." *Ramirez*, 142 S. Ct. at 1280. The court relied exclusively on a declaration from DOC's Chief of Security, and the conclusory assertion that "[v]isiting room areas are the main avenue of the introduction of contraband into Pennsylvania state prisons." JA012–14; *see* JA236 (Woodring Decl. ¶ 10). What is more, instead of requiring DOC to meet its burden to demonstrate a compelling interest under RLUIPA, the court flipped the test, reasoning that Mr. Nuñez had failed to "provide evidence to counter" the prison's supposed "evidence regarding visitors being the main avenue of contraband into prisons." JA013; *see Mast,* 141 S. Ct. at 2433 (Gorsuch, J., concurring) ("The [government] must prove with evidence that its rules are narrowly tailored to advance a compelling state interest with respect to the specific persons it seeks to regulate.").

The court's gross misapplication of RLUIPA, standing alone, is grounds for reversal. As *Holt* makes clear, prisons must conduct a "focused," individualized inquiry required to prove a compelling interest. 574 U.S. at 363; *Ramirez*, 142 S. Ct. at 1280. Indeed, because RLUIPA requires courts to weigh the government's compelling interest against "the burden on *that* person" bringing a claim, "broad generalities about the government's interest unmoored from the particularities of *this* case will not suffice." *Haight v. Thompson*, 763 F.3d 554, 563–64 (6th Cir. 2014) (Sutton, J.); *see Johnson*, 23 F.4th at 1217 ("[T]he government may not satisfy the compelling interest test by pointing to a general interest."). Yet the court relied on nothing more than broad generalities here.

Applying the proper test under RLUIPA, DOC failed to prove that its wholesale denial of Mr. Nuñez's request to engage in congregate prayer furthers its safety interest. In denying Mr. Nuñez's request to engage in such prayer in a private room, DOC pointed to the declaration from its Chief of Security, who offered three "legitimate penological interest[s]," including (i) "preventing contraband from entering the prisons via private contact visits," (ii) "utilizing resources of staffing, space, and time to best serve all inmates," and (iii) "preventing the visiting room

from being converted from a neutral meeting space into one being used for religious purposes." JA240–41 (Woodring Decl. ¶¶ 42–44).[7]

To start, RLUIPA requires a "compelling interest," not a "legitimate penological interest." *Warsoldier*, 418 F.3d at 998 ("RLUIPA replaced *Turner*'s 'legitimate penological interest' test with a 'compelling government interest' test."); *Mast*, 141 S. Ct. at 2432 (Gorsuch, J., concurring) ("[RLUIPA] requires the application of 'strict scrutiny.'"). Indeed, as this Court has recognized, the "legitimate penological interest" standard "applies in the First Amendment context, but RLUIPA is broader than the First Amendment and requires the 'compelling government interest' and 'least restrictive means' test of strict scrutiny." *Robinson v. Superintendent Houtzdale SCI*, 693 F. App'x 111, 117 (3d Cir. 2017) (per curiam). Yet here, DOC did not even *try* to establish a compelling interest. *See* JA240–41 (Woodring Decl. ¶¶ 42–44). It thus failed to satisfy RLUIPA's compelling-interest test.

[7] As explained, *infra*, though DOC claims that "[d]enying [Nuñez's] request for congregate prayer in private . . . prevent[s] the visiting room from being converted from a neutral meeting space into one being sued for religious purposes," this is nonsensical. Nuñez's "congregate prayer in private" would necessarily not be in the "visiting room." DOC thus asserts only two interests that are purportedly furthered by denying Mr. Nuñez's request for public congregate prayer.

In any event, DOC's broad, conclusory interests—devoid of any explanation as to how these interests pertain specifically to Mr. Nuñez or his requested accommodation—are not enough to prove a compelling interest. *Holt*, 574 U.S. at 363; *see Washington*, 497 F.3d at 283 (holding that "the mere assertion of security or health reasons" or other "conclusory statement is not enough" to prove a compelling interest). Indeed, RLUIPA does not permit courts to grant "unquestioning deference" to prison officials' claims of compelling interest, thereby "abdicati[ng] . . . the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard." *Holt*, 574 U.S. at 364. Rather, courts have the "statutory duty to decide whether the prison's claimed safety and cost interests qualify as compelling in the context of particular cases, not in the abstract." *Yellowbear v. Lampert*, 741 F.3d 48, 58 (10th Cir. 2014) (Gorsuch, J.).

A recent case from this Court shows what it takes to clear RLUIPA's high bar. In *Watson v. Christo*, the Delaware DOC provided a specific and detailed analysis to justify its compelling interest in safety regarding a Jewish prisoner's request to use tefillin (a long leather strap used in prayer). 837 F. App'x 877, 880 (3d Cir. 2020). Delaware DOC considered that tefillin had "uniquely risky attributes" which it detailed extensively;

that the prisoner had a long history of attempting escape, suicide, and harm to others; and that the unit in which he was housed was particularly difficult to secure and required above-average staff flexibility. *Id.* at 881. And even with this evidence, this Court's decision was not unanimous—Judge Phipps dissented, reasoning that even "on this record, Waston's RLUIPA and constitutional claims should survive summary judgment." *Id.* at 883 (Phipps, J., dissenting). DOC's evidence and analysis here—for all its purported compelling interests—look nothing like *Watson* and thus fail to demonstrate a compelling interest.

Safety and Security. On the safety and security interest in preventing contraband from entering the prison, DOC fails to provide any evidence that denying *Mr. Nuñez*'s request to engage in congregate prayer furthers that interest. To be sure, DOC *claimed* that Nuñez "has shown himself to pose a direct threat regarding introduction of contraband into the Department." JA236 (Woodring Decl. ¶ 11). But it offered no evidence to support its bald assertion. Indeed, it failed to provide a single citation to any disciplinary action against Mr. Nuñez—involving contraband or anything else. In fact, the evidence showed that Nuñez had "never been issued a prison charge for smuggling drugs into any

prison" or "for violating any visiting policy or rule." JA305–06 (Opp'n to Mot. for Summ. J.); *see* JA291–92 (Nuñez Decl. ¶¶ 25, 30).

DOC also claimed that its denial of Nuñez's private congregate prayer request furthers this interest because it would be "very difficult for security personnel to observe whether contraband is being passed . . . if they are in a private room, prostrating themselves, and able to conceal items much easier than in a seated position next to one another in the already-designated visiting room." JA134 (Mot. for Summ. J.). But DOC's suggestion that "lying prostrate on the ground" during Islamic prayer would create a safety concern is equally conclusory and unsupported, both by the record evidence and by common sense. JA013.

For one, Nuñez religious beliefs do not require him—at any point—to assume a position "*lying* prostrate on the ground." Rather, as Nuñez explained, his religious briefs require him to pray in a manner consistent with fourteen "pillars of the prayer," which includes reciting prayers, "bowing," rising from bowing, "prostrating *on all seven limbs*"—*i.e.*, with his forehead (and nose), both hands, both knees, and the toes of both feet touching the ground. JA049 (Am. Compl. ¶ 67) (emphasis added). For another, DOC failed to offer any evidence regarding how this posture

assumed during Islamic prayer presents a safety risk. *See Ramirez*, 142 S. Ct. at 1280 ("Such speculation is insufficient to satisfy" a prison's burden under RLUIPA.). Indeed, it seems passing strange to suggest that two people in this prostrate position would be able to pass contraband without detection more easily than two people, sitting next to one another, each with free use of their hands and a table to obstruct guards' vision.

Staffing and Space. DOC also failed to establish that its "staffing" and "space" interest—*i.e.*, that if Mr. Nuñez "were to be given a private room to engage in . . . group prayers, other inmates would surely expect the same treatment," JA240 (Woodring Decl. ¶ 37)—satisfies the compelling interest test. *See* JA134–35 (claiming that accommodating Mr. Nuñez's request would "result in the need to supply a virtually limitless number of rooms at or near the same time"). Besides having no evidentiary basis, this argument is "but another formulation of the 'classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions,'" which courts have rejected time and again. *E.g.*, *Holt*, 574 U.S. at 368; *see Yellowbear*, 741 F.3d at 62 ("[T]he feasibility of requested exceptions usually

should be assessed on a 'case-by-case' basis, taking each request as it comes: accommodations to avoid substantial burdens must be made until and unless they impinge on a demonstrated compelling interest.").

More still, any purported compelling interest on this point is undermined by DOC's inconsistent and underinclusive pursuit of its interests as applied to secular activities. "[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (cleaned up); *see Roman Cath. Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63, 67 (2020) (per curiam). In other words, where the government exercises "flexibility" in pursuing an interest or makes "exceptions" to a policy, it "belies the 'compelling' nature of the policies with respect to safety and security." *Washington*, 497 F.3d at 284–85; *see Fulton v. City of Phila.*, 141 S. Ct. 1868, 1882 (2021) (explaining that the government must offer a "compelling reason why it has a particular interest in denying an exception to [a religious claimant] while making them available to others").

Here, DOC permits numerous activities which undermine its supposed compelling interest in safety. DOC provides playrooms for the

visiting children of inmates, for example, complete with the "accoutrement" of toys, raising at least equal (if not greater) safety concerns—in addition to creating inter-inmate jealousy and hostility concerns and administrative burdens—as Nuñez's request to engage in congregate prayer. So too, DOC permits private contact visits with outside personnel, *see* JA189 (DCM-ADM 812), including with a designated Religious Advisor—an individual from outside the prison who has received endorsement from a faith group to provide religious counseling and guidance and is given a designated space within the prison for their activities with inmates. Both of these exceptions "undermine the *compelling* nature of" DOC's congregate prayer policy. *Washington*, 497 F.3d at 284; *cf. Mast*, 141 S. Ct. at 2432 (Gorusch, J., concurring) ("[T]he [government] must offer a compelling explanation why the same flexibility extended to others cannot be extended to [this religious claimant].").

Converting Neutral Space Into One Used For Religious Purposes. Finally, DOC's claim that "[d]enying [Nuñez's] request for congregate prayer in private" furthers its "legitimate penological interest" in "preventing the visiting room from being converted from a neutral meeting space into one being sued for religious purposes" also fails. JA240–

41 (Woodring Decl. ¶ 44); JA134 (Mot. for Summ. J.) (calling this a "legitimate penological concern"). Indeed, it is nonsensical: Mr. Nuñez's *private* congregate prayer would take place in *private*, not in the "visiting room." This thus cannot form the basis for any compelling interest in denying Mr. Nuñez's request for private congregate prayer.

DOC, however, asserts this same interest—and only this interest—in denying Mr. Nuñez's request for public congregate prayer in the visiting area, claiming that permitting such prayer would "convert a neutral meeting space into one being used for religious purposes," which *could* lead to "resentment and hatred," which then *could* "manifest into assaults very quickly." JA239–40 (Woodring Decl. ¶¶ 34–36). This pure speculation and conjecture is "insufficient to satisfy" DOC's burden under RLUIPA. *See Ramirez*, 142 S. Ct. at 1280. DOC provides no evidence that *any* religious accommodation has *ever* led to its parade of horribles.[8]

[8] Even if DOC had provided such evidence, RLUIPA does not permit prisons to give some prisoners a modified heckler's veto on religious accommodations with which they might be displeased, thereby burdening a prisoner's religious exercise. *See Fulton*, 141 S. Ct. at 1868, 1881 ("[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so."); *cf. Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001).

In fact, DOC's assertions here are even more attenuated and conclusory than the statements that this Court—even without the benefit of *Holt* and *Ramirez*—found insufficient to prove a compelling interest in *Washington*. *Cf. Washington*, 497 F.3d at 284 (rejecting DOC's claim that its policy prohibiting inmates from having more than ten books in their cell at one time "furthers a compelling government interest in protecting the safety and health" of prisoners and DOC employees because "an excess number of books can create a fire hazard, provide a place to conceal weapons or other contraband, and also create a sanitation problem"). Now, the Court's clear teaching in *Holt* and *Ramirez* leave no doubt: DOC's speculative and conclusory statements do not satisfy RLUIPA's compelling-interest test.

B. DOC Failed To Prove That Its Prohibition On Congregate Prayer Is The Least Restrictive Means Of Furthering Its Purported Interests.

DOC also failed to demonstrate that its wholesale ban on congregate prayer is the least restrictive means of furthering its purported interests. The least-restrictive-means test is "exceptionally demanding"—it requires the government to demonstrate that it "lacks other means of achieving its desired goal without imposing a substantial burden on the

exercise of religion by the objecting part[y]." *Holt*, 574 U.S. at 364–66. The court cannot "assume a plausible, less restrictive alternative would be ineffective," but must hold the government to its burden to "prove that petitioner's proposed alternatives" would "not sufficiently serve" its purported interest. *Id.* at 367, 369; *see Washington*, 497 F.3d at 283–84 (same). Critically, the burden here rests on the government—demanding that a prisoner refute bare assertions or identify obvious alternatives "gets things backward." *Ramirez*, 142 S. Ct. at 1281. Simply put, "[i]f a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Holt*, 574 U.S. at 365 (citation omitted).

Here too, the district court fundamentally misunderstood the test under RLUIPA. Instead of requiring DOC to carry its burden of proving that its wholesale ban on congregate prayer is the least restrictive means of furthering its purported interest, the Court held that "[Nuñez] has failed to refute [DOC's] evidence that that [sic] the DOC's policy of allowing quiet seated prayer is the least restrictive means to further this government interest." JA014. This of course gets the standard "backward."

Ramirez, 142 S. Ct. at 1281. Once again, this critical flaw in the district court's analysis is grounds for reversal.

Applying the proper, "exceptionally demanding" test, DOC failed to prove that denying Nuñez's request wholesale was the least restrictive means and did not engage with obvious alternatives. Nuñez initially requested to pray with his family in the common visiting area, in "a manner consistent with Islamic teachings," *i.e.*, standing rather than sitting. *See* JA253 (Kephart response); JA049 (Am. Compl. ¶ 67) (listing the fourteen "pillars of the prayer"). When DOC denied his request, he proposed the following suggestions: he could "utilize the non-contact visiting room[s] when they are not in use and/or available" or "a building" where he could engage in congregate prayer could "be constructed." JA251 (Nuñez facility manager grievance appeal) These suggestions encompass a wide range of least restrictive alternatives, including designating private rooms for discrete faith groups.

DOC failed to engage with any of these possible alternatives. Instead, DOC claimed it was not making it so Nuñez "cannot pray," but simply making it so he "cannot do it in the exact way he wishes." JA133. Remarkably, DOC then went a step further, claiming that Nuñez "can

still pray as he wishes in the privacy of his cell, or with visitors quietly in seated positions in the designated visiting area," and that—here's the kicker—the latter "is an *adequate* alternative" "[i]n the prison context." JA133–35 (emphasis added).

This gets the analysis all wrong. *First*, as *Holt* made clear, the RLUIPA analysis applies to the specific religious exercise the prisoner seeks to engage in, "not whether the RLUIPA claimant is able to engage in other forms of religious exercise." 574 U.S. at 361–62. RLUIPA thus does not allow a prison to shortcut the inquiry if it permits the prisoner to engage in other forms of religious activity. *Second*, an "adequate alternative" is not enough to carry DOC's heavy burden under RLUIPA. As explained, RLUIPA requires DOC to use the *least restrictive* alternative, not an "adequate alternative." That means DOC had to prove that it could not sufficiently serve its compelling interest by employing Nuñez's proposed alternatives or other obvious means. *Holt*, 574 U.S. at 367. It did not do so. *Cf. Mast*, 141 S. Ct. at 2433 (Gorsuch, J., concurring) ("RLUIPA prohibits governments" infringing a prisoner's religious beliefs and practice "except as a *last resort*." (emphasis added)).

Perhaps thinking its proposed "adequate alternative" enough to carry its burden, DOC only gestured at vague and speculative reasons for why Nuñez's alternatives would not be feasible, such as increased ease of concealing objects and passing contraband and lack of space. But DOC failed to prove that other, less restrictive means would not sufficiently serve its safety interest. And DOC in fact *could* sufficiently serve its safety interest through less restrictive means that are well within its control.

Most simply, DOC could ask Nuñez and his family members to space out at appropriate distances such that any chance of contraband being surreptitiously passed during prayer is wholly eliminated. *See* JA292 (Nuñez Decl. ¶ 34) (explaining that "praying in congregation" requires Mr. Nuñez to lead a prayer with the visitor "standing next to me or behind me"). This simple measure would allow Nuñez to engage in congregate prayer that adheres to all fourteen prayer pillars and sufficiently serves DOC's safety concern. So too, DOC could exercise its considerable latitude to schedule Nuñez's visits in a way that is both conducive to good prison administration and reduces the likelihood that feelings of "resentment and hatred" could arise and "manifest into assaults."

JA239–40 (Woodring Decl. ¶¶ 34–36); *see Green Haven Prison Preparative Meeting of Religious Soc'y of Friends v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 16 F.4th 67, 85–86 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2676 (2022).

II. DOC's Denial Of Mr. Nuñez's Request For Conjugal Visits To Consummate His Marriage Violates RLUIPA.

DOC also failed to prove that it has a compelling interest in denying Mr. Nuñez's request for conjugal visits in order to consummate his marriage in accordance with his faith, or that its outright ban on conjugal visits is the least restrictive means of furthering that interest. Though Mr. Nuñez argued that DOC had failed to satisfy the compelling-interest prong of the RLUIPA test, the district court erroneously held that Mr. Nuñez "does not challenge" whether DOC had proven a compelling interest, and thus failed to conduct this part of the analysis. In any event, DOC failed to show a compelling interest, and it failed even to consider a limited exception to its conjugal visit policy to permit Mr. Nuñez's request to consummate his marriage.

A. DOC Failed To Prove That Denying Mr. Nuñez's Request To Consummate His Marriage Furthers A Compelling Interest.

DOC failed to present evidence establishing its compelling interest in denying Mr. Nuñez's request for conjugal visits to consummate his marriage. As explained, RLUIPA's compelling-interest analysis does not permit the government to claim "broadly formulated [governmental] interests," but instead requires the government to "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Fulton*, 141 S. Ct. at 1881 (citation omitted); *see Mast*, 141 S. Ct. at 2432 (Gorsuch, J., concurring). The question thus "is not whether [DOC] has a compelling interest in enforcing its . . . policies generally, but whether it has such an interest in denying an exception to" Mr. Nuñez. *Fulton*, 141 S. Ct. at 1881.

Here, the district court failed to examine whether DOC proved a compelling interest, claiming that Mr. Nuñez "does not challenge that safety, security, and health are compelling governmental interests." JA009 (citing Mr. Nuñez's opposition to DOC's motion for summary judgment (JA294, Doc. 111) without reference to any page number). That is incorrect. In that very filing, Mr. Nuñez unequivocally argued that DOC

had failed to prove a compelling interest for all three requests. JA295 ("[D]efendants ha[ve] not carried [their] burden under RLUIPA 'demonstrating' that they have a compelling interest in refusing to grant all three of Nuñez's [requests]."); JA298*d.* at 7 ("Of course prison officials have an interest in security, but that is not the question. Invocation of such 'broadly formulated interest,' standing alone is not enough."). Just as above, this failure to analyze the compelling-interest prong is reversible error.

In any event, DOC did not demonstrate a compelling interest. The Secretary's reasoning on this request reads, in full: "Conjugal visits are not permitted due to safety, security and health concerns." JA183. Those general and conclusory interests plainly do not satisfy the compelling interest test. *See Johnson*, 23 F.4th at 1217. DOC's attempts to establish a compelling interest at the summary judgment stage fared no better. There, DOC pointed again to the declaration from its Chief of Security, who offered three "legitimate penological interest[s]" furthered by its wholesale ban on "contact visits of a sexual nature," including (i) "preventing contraband from entering the prisons via private contact visits," (ii) "utilizing resources of staff, space, and time to best serve all inmates,"

and (iii) "preventing staffing from being in the position of supervising a sexual encounter between [Mr. Nuñez] and his wife." JA237–38 (Woodring Decl. ¶¶ 21–23).

Just as with Mr. Nuñez's congregate prayer request, DOC did not even *try* to offer a compelling interest for Nuñez's request to consummate his marriage. *See id.* (asserting a "legitimate penological interest"). Here too, then, DOC cannot satisfy RLUIPA's compelling-interest test. *See Mast*, 141 S. Ct. at 2432 (Gorsuch, J., concurring) ("[RLUIPA] requires the application of 'strict scrutiny.'"); *Robinson*, 693 F. App'x at 117. For much the same reasons, *supra* Part I.A, DOC's broad, conclusory interests are not enough to prove a compelling interest. *Holt*, 574 U.S. at 363; *see Smith v. Ozmint*, 578 F.3d 246, 252 (4th Cir. 2009) (holding that an affidavit's "conclusory, one-sentence explanation" citing "security reasons" "does not, by itself, explain why the security interest is compelling").

DOC's first two purported interests are *identical* to those claimed for Nuñez's congregate prayer request and fail for much the same reasons. On the safety and security interest in preventing contraband from entering the prison, DOC again fails to provide any evidence that denying

Mr. Nuñez's request for a visit to consummate his marriage furthers that interest. As DOC notes, Mr. Nuñez's "would need a private room for the visit," JA237 (Woodring Decl. ¶ 15), so its conclusory assertion that "[*v*]*isiting room areas* are a main avenue" for contraband provides no support, JA236 (¶ 10) (emphasis added). So too, its claim that Nuñez poses a "direct threat" of introducing contraband—unsupported by any citation to a disciplinary action or any other evidence—provides no support. *See* JA236 (¶ 11).

DOC's "staffing" and "space" interest—*i.e.*, that it could not "accommodate a private room for all inmates requesting conjugal visits during visiting hours on any given day," JA237 (¶¶ 20, 37)—again falls short. As explained, this "interest" is nothing more than the "classic rejoinder of bureaucrats throughout history" that the Supreme Court has rejected over and over again. *See Holt*, 574 U.S. at 368; *Gonzales v. O Centro Espirita Beneficente Unio do Vegetal*, 546 U.S. 418, 436 (2006). Lastly, DOC's supposed "penological interest" in "preventing staff from being in the position of supervising a sexual encounter between [Mr. Nuñez] and his wife" borders on the absurd. JA238 (¶ 23). Unsurprisingly, DOC

failed to cite below any case where a prison has even claimed such an interest as compelling.

Finally, DOC also submitted a declaration from its Chief of Clinic Services for the Bureau of Health Care Services to try satisfy its burden of proving a compelling interest in denying this request. *See* JA242 (Seid Decl.). But Dr. Seid's declaration suffers from many of the same flaws as the Chief of Security's declaration. Most notably, it fails even to assert a compelling interest, claiming instead that DOC has "[s]everal legitimate medical reasons" for prohibiting contact visits "of a sexual nature," JA243 (¶ 9), and other "legitimate penological interest[s]," JA246–47 (¶¶ 22–23, 41.) This is not enough. *See Robinson*, 693 F. App'x at 117.

Dr. Seid's declaration asserts nothing but general interests untethered from Mr. Nuñez's particular request and characteristics. Dr. Seid's claims that DOC's policy "prevent[s] the introduction of sexually-transmitted infections (STIs) into any institution," JA243 (¶ 10); *see* JA243–44 (¶¶ 11–16) (listing general facts about the harmfulness of STIs), but DOC (and Dr. Seid) fails even to consider Mr. Nuñez' repeated statements that he and his partner do not carry any STDs, and the record shows no attempt to verify this fact before denying the accommodation. *See* JA276

(Pl.'s Counter SOMF ¶ 30); JA045 (Am. Compl. ¶ 35). The declaration's claim of a general interest in "preventing sexual assaults on government property" likewise fails to conduct the "more focused," individualized inquiry required by RLUIPA, failing to provide any evidence or reason why denying *Mr. Nuñez's* request furthers this general interest. *See Holt*, 574 U.S. at 362 (cleaned up).

Even more, DOC's absolute ban on the consummation of Mr. Nuñez's marriage contravenes the government's longstanding commitment to protecting marital autonomy. The Supreme Court has definitively spoken against policing the right to marry, concluding that this right is absolute: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Yet here, DOC flagrantly disregards this sacred right by forbidding Mr. Nuñez from engaging in the religious rituals necessary to consummate his marriage.

The significance of consummation—even without a religious grounding—permeates our law. Indeed, the government has repeatedly recognized consummation as a necessary component of a valid marriage. A valid marriage for purposes of immigration law, as this Court has

recognized, is intertwined with consummation. *See, e.g.*, *Mukui v. Dir. U.S. Citizenship & Immigr. Servs. Phila. Dist.*, 852 F. App'x 704, 708 (3d Cir. 2021) (indicating that lack of consummation is direct evidence of fraud in visa and adjustment-of-status applications).[9] Family law, too, uses consummation as a principal factor in determining the legitimacy of a marriage, especially in the annulment proceedings or where non-officiated individuals conducted the wedding ceremony. *See, e.g.*, 4 Am. Jur. 2d *Annulment of Marriage* § 5 ("It has been noted that, as a general rule, annulment may be secured more readily of an unconsummated than of a consummated marriage."); *cf. Meister v. Moore*, 96 U.S. 76, 81-82 (1877).

According to Mr. Nuñez's sincerely held religious beliefs, consummation requires (1) a private setting, (2) congregate prayer with his partner, and (3) intimacy, including "light talk, love expressions, touching, caressing, kissing, fondling, and sexual intercourse." JA042 (Am. Compl. ¶ 10-11); JA159 (Religious Accom. Req. Docs.). But DOC's policy permits Mr. Nuñez only a brief kiss and gentle embrace with his partner at the end of the ceremony and after each subsequent visit. JA145–46 (Defs.'

[9] *Cf. Villa v. Att'y Gen.*, 742 F. App'x 682, 684 (3d Cir. 2018) ("[A] proxy marriage does not give rise to a spousal relationship for immigration purposes unless it is consummated.").

SOMF ¶ 14); *see* JA232–33 (DC-ADM 821, § 2(B)(5)). This policy thus prohibits Mr. Nuñez from obtaining a valid marriage in accordance with his religious beliefs, leaving him—in the eyes of his religious community and Allah—a single man who has disgraced his significant other by failing to concretize his commitment to her. No government interest can sustain this complete ban on securing a valid marriage. *Cf. Turner v. Safley*, 482 U.S. 78, 79 (1987) ("Although prison officials may regulate the time and circumstances under which a marriage takes place, and may require prior approval by the warden, the almost complete ban on marriages here is not . . . reasonably related to legitimate penological interests.").

B. DOC Failed To Prove That Its Ban On All Conjugal Visits, Even For Marriage Consummation, Is The Least Restrictive Means of Furthering Its Purported Interests.

DOC also failed to prove that its complete ban on conjugal visits, even for marriage consummation, is the least restrictive means of furthering its purported security, safety, and health concerns. As explained, the "Government must consider and reject other means before it can conclude that the policy chosen is the least restrictive means," *Washington*, 497 F.3d at 284, and "[i]f a less restrictive means is available for the

Government to achieve its goals, [it] must use it," *Holt*, 574 U.S. at 365 (citation omitted). But here, DOC (and the lower court) failed even to consider a limited accommodation exclusively for the purposes of marriage consummation—indeed, DOC never even distinguished between Mr. Nuñez's request for a limited exception and an indefinite and ongoing conjugal-visit program. *See* JA124 (Mot. for Summ. J.) (describing Mr. Nuñez's request as one for "sexual contact with his spouse"); JA125 (stating that Nuñez "seeks to consummate his 2013 marriage and have ongoing conjugal visits" but then failing to mention the word "consummate" (or any of its derivatives) again the rest of its brief).

Nor did DOC refute potential alternatives to an outright ban on consummation. Indeed, DOC simply gestured to a pre-*Holt* case from a Pennsylvania trial court it had block quoted pages earlier and stated: "As the Commonwealth Court reasoned, there really is no least restrictive alternative to [Mr. Nuñez's] request for conjugal visits." JA132 (Mot. for Summ. J.) (gesturing to *Thomas v. Corbett*, 90 A.3d 789 (Pa. Commw. Ct. 2014). There could be no more flagrant failure to conduct the individualized, "case-by-case analysis that RLUIPA requires," *Ramirez*, 142 S. Ct. at 1280, than to attempt to satisfy the "exceptionally demanding" least-

restrictive-means test simply by pointing to a *different* case, from a *different* court, involving a *different* plaintiff with a *different* request, *Holt*, 574 U.S. at 364. Yet that is precisely what DOC did here.[10]

There in fact are multiple obvious alternatives that further DOC's security, safety, and health interests while still permitting marriage consummation and related religious ceremonies. DOC could instruct the prison to (1) conduct more thorough security checks of Mr. Nuñez and his partner before and after the consummation visit, (2) regulate the types of clothing and accessories that his partner could wear, (3) post extra security outside the private visitation space, (4) give the visitor some type of emergency alert device, and (5) require both Mr. Nuñez and his partner to undergo STD screenings. DOC did not consider any of these obvious alternatives and thus failed to satisfy its burden. *See Ramirez*, 142 S. Ct. at 1281.

[10] Worse still, the request made by the prisoner in *Corbett* could hardly be more different than Mr. Nuñez's religious-based request to consummate his marriage. *See Corbett*, 90 A.3d at 792 (claiming that "his religion requires him to marry" and "have multiple wives," and that the conjugal visit policy "precludes him from enjoying conjugal visits," leaving him "unable to have intercourse" "with his wives"). What is more, the court in *Corbett* actually *rejected* DOC's request to dismiss the prisoner's RLUIPA challenge to the conjugal visit policy. *Id.* at 796–97.

The district court's one-sentence analysis on this prong, moreover, suffers from two fatal errors. The court reasoned that Mr. Nuñez "has failed to present evidence to counter [DOC's] evidence that the current visiting policy regarding conjugal visits is the least restrictive means *available*—considering the DOC's limited resources." JA012. This is all wrong. *First*, the court once again makes a hash of the least-restrictive means analysis by "suggesting that it is [Nuñez's] burden to 'identify any less restrictive means.'" *Ramirez*, 142 S. Ct. at 1281 (explaining that this "gets things backward"). As RLUIPA's plain text makes clear, once a plaintiff has made out his initial case under RLUIPA, "it is the government that must show its policy 'is the least restrictive means.'" *Id.* (quoting 42 U.S.C. ¶ 2000CC-1(a)(2)).

Second, the court is incorrect that the least restrictive means test turns on DOC's available resources. To be sure, least restrictive alternatives might involve some increased cost to DOC. But RLUIPA requires DOC to expend additional funds to prevent violations of Mr. Nuñez' religious liberty. 42 U.S.C. § 2000cc–3(c) ("[T]his chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."); *Burwell v. Hobby Lobby Stores,*

Inc., 573 U.S. 682, 730 (2014); *see Yellowbear*, 741 F.3d at 59 (Gorsuch, J.) (reasoning that the prison's stated rationale from refusing alternative—that it would involve "some marginal cost it consider[ed] too high"—was not sufficient for denying a religious accommodations when there exists no showing of an "inability to provide adequate security at any price"). In sum, DOC has failed to prove that a wholesale ban on conjugal visits is the least restrictive means of advancing any of its purported interests.

Finally, the ability of other jurisdictions to broadly accommodate conjugal visits undermines DOC's position that its prohibition of conjugal visit to consummate one's marriage constitutes the least restrictive means of advancing its stated interests. As of 2020, Pennsylvania's penal system housed 39,357 prisoners. Nat'l Inst. of Corr., *2020 National Averages*, DOJ, https://perma.cc/SKX8-SM9K (last visited Apr. 15, 2023). Both California, with 97,328 prisoners, more than double that of Pennsylvania, and New York, with 34,128 prisoners, *id.*, have successful conjugal visit programs that provide visits to the general prison population and are *not* restricted to marriage consummation, *see, e.g.*, Cal. Code Regs. tit. 15 § 3177 (describing an overnight family visitation program

which incorporates conjugal visits); N.Y. Comp. Codes R. & Regs. tit. 7, §§ 220.1-220.9 (same); *see also* Extended Family Visitation, DOC 590.100 (Wash. Dep't Corr. May 1, 2020) (same in Washington); Inmate Visits, DOC 10.6 (Conn. Dep't Corr. Nov. 6, 2020) (same in Connecticut).

That these similarly situated prison systems provide expansive conjugal visit programs without collapsing under the weight of security breaches and health crises undercuts DOC's position here. These penological interests DOC has asserted are not unique features to Pennsylvania—they are common to any carceral system. So too, Mr. Nuñez's request for an exception to DOC's ban on conjugal visits in order to consummate his marriage presents none of the logistical and other concerns that accompany these viable, large-scale conjugal-visit programs because marriage consummation is inherently limited in scope. To establish that it used the least restrict means, DOC "bore the burden of presenting a 'compelling reason why' it cannot offer [Nuñez]" a narrow exemption in line with the practices of these similarly situated jurisdictions. *Mast*, 141 S. Ct. at 2433 (Gorsuch, J., concurring) (quoting *Fulton*, 141 S. Ct. at 1882); *see id.* ("It is the government's burden to show [that] alternative[s]" from other jurisdictions "won't work."). It failed to do so.

III. DOC's Denial of Mr. Nuñez's Request For A Religious Circumcision Violates RLUIPA.

DOC's decision to deny Mr. Nuñez's request for a religious-based circumcision runs afoul of RLUIPA. Though DOC cited various government interests furthered by this denial, it failed to support those interests with evidence regarding how denying Mr. Nuñez's *specific* request furthers those interests. Its compelling interests thus rest on nothing more than conjecture and do not meet the "precise" and "specific" standard set forth by *Holt, Ramirez,* and *Mast.* So too, DOC failed to show that denying Mr. Nuñez's request for a religious circumcision is the least restrictive means of furthering its purported interests.

A. DOC Failed To Prove That Its Denial Of Mr. Nuñez's Religious-Based Request For A Circumcision Furthers A Compelling Interest.

DOC pointed to three interests purportedly furthered by its denial of Mr. Nuñez's religious-based request for circumcision: (1) the cost of this surgery and elective surgeries for all inmates; (2) health complications from circumcision; and (3) its "no cosmetic surgery" rule. Once again, DOC relied heavily on Dr. Seid's declaration, which called all these interests not "compelling interests," but "legitimate penological interest[s]." JA246–47 (¶ 41). Even more, DOC took this same tack in its

summary judgment brief, lifting this language word-for-word from the declaration. *Compare id.*, *with* JA140. Further compounding this fatal error of failing even to attempt to prove a compelling interest, DOC supported its argument with citations to cases citing the "legitimate penological interest" standard in denying religious circumcisions. *See* JA138 (citing case "applying the *Turner* analysis").

As explained above, a "legitimate penological interest" is not enough. RLUIPA requires far more—DOC must *prove* that it has a *compelling interest* in denying the exception requested by Mr. Nuñez *specifically*. *Fulton*, 141 S. Ct. at 1881; *Mast*, 141 S. Ct. at 2432 (Gorsuch, J., concurring); *see Washington*, 497 F.3d at 283 ("[T]he burden shifts to the Pennsylvania DOC to show that the policy is in furtherance of a compelling governmental interest."). And here, DOC offers nothing more than "'broadly formulated' government" interests that are insufficient to carry this burden. *Mast* 141 S. Ct. at 2432 (Gorsuch, J, concurring).

Cost. DOC claims that denying Mr. Nuñez's request for religious circumcision serves "the legitimate penological interest of conserving government resources." *See* JA140 (Mot. for Summ. J.). But as explained, *supra* Part II.B, financial costs or burdens to administrative efficiency do

not excuse violations of RLUIPA. *See* 42 U.S.C. § 2000cc-3(c) (providing that the government must "incur expenses in its own operations to avoid imposing a substantial burden on religious exercise"); *see, e.g.*, *Hobby Lobby*, 573 U.S. at 730 (rejecting HHS's argument that government is not required to expend any funds in the accommodation of religious beliefs).[11]

In any event, DOC's cost concerns are wholly unsupported by the evidence. Relative to other medical procedures, male circumcision is exceedingly affordable, with costs as low as $800. *See* Catherine Hankins, Steven Forsythe & Emmanuel Njeuhmeli, *Voluntary Medical Male Circumcision: An Introduction to the Cost, Impact, and Challenges of Accelerated Scaling Up*, PloS Med. (Nov. 29, 2011). Considering DOC's $2.852 billion budget for Fiscal Year 2022-23, DOC's purported cost-based interest in preventing Mr. Nuñez's religious circumcision seems

[11] *See, e.g.*, *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1093 (C.D. Cal. 2003) ("[I]f a city's interest in maintaining property tax levels constituted a compelling governmental interest, the most significant provision of RLUIPA would be largely moot, as a decision to deny a religious assembly use of land would almost always be justifiable on that basis.") *rev'd on other grounds,* 197 F. App'x 718 (9th Cir. 2006); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1228–29 (C.D. Cal. 2002) ("If revenue generation were a compelling state interest, municipalities could exclude all religious institutions from their cities.").

incredulous, to say the least. *See* PA DOC Statistics, https://perma.cc/6MNT-ZNBX (last visited Apr. 15, 2023).[12] Simply put, DOC's cost concerns come nowhere close to satisfying its burden on the compelling-interest prong.

Here too, DOC decamps to its "slippery slope" argument that, if Mr. Nuñez were to receive this procedure, it would have to "assume the costs of elective surgery for all inmates, including the medical expenses which it would incur if medical complications ensued following elective surgery." *See* JA137 (Mot. for Summ. J.). But *Ramirez* made clear that RLUIPA requires courts to engage in a "case-by-case" analysis, scrutinizing the asserted harm of granting specific exemptions to particular religious claimants—not speculate about fanciful hypothetical scenarios. *See* 142 S. Ct. at 1280. And once again, this argument is nothing more than

[12] This remains true even if one were to credit Dr. Seid's vague and general claims that "[c]ircumcision surgery is *often* done to increase sexual gratification" and "*generally* costs approximately $3,500.00." JA246 (¶¶ 34, 36) (emphasis added). The simple fact is that DOC has likely spent more in litigation denying Mr. Nuñez a religious circumcision than it would have spent providing the surgery in the first place.

the "classic rejoinder of bureaucrats" courts have routinely rejected. *See Holt*, 574 U.S. at 368.[13]

Health Complications From Circumcision. DOC's concerns about health complications from circumcision are also pure conjecture. DOC speculates that if Mr. Nuñez were to be circumcised, "he would then come back into the prison with the *potential* for further complications, which [DOC] would then have to pay for. *See* JA140 (Mot. for Summ. J.); JA246 (Seid Decl. ¶ 39) (same). But DOC overlooks that Mr. Nuñez has agreed to sign an "informed consent waiver" to assume any medical or liability risks that may occur after the surgery. *See* JA323 (Opp'n to Mot. to Summ. J.). This takes care of DOC's worries (curtly stated without any supporting evidence) about complications such as glans hyperesthesia, wound dehiscence, and meatal stenosis, which are unlikely in a routine procedure like this. *See* Behnam Nabavizadeh et al., *Incidence of Circumcision Among Insured Adults in the United States*, PloS One (Oct. 17,

[13] In holding that DOC's denial of Mr. Nuñez's request *did* further a compelling interest, the court cited to a single conclusory sentence in the Free Exercise analysis of one unpublished, out-of-circuit, pre-*Holt* case. JA015 ("It would be unreasonable to allocate taxpayer money to elective surgeries for prisoners . . . ." (quoting *Vega v. Lantz*, No. 3:04CV1215(DFM), 2013 WL 6191855, at *8 (D. Conn. Nov. 26, 2013)).

2022). At bottom, DOC offers no evidence that Mr. Nuñez is at a higher-than-normal risk for such complications or anything more than speculation about hypothetical scenarios—untethered from Mr. Nuñez's personal characteristics or risk level—that is plainly insufficient. *See Ramirez*, 142 S. Ct. at 1280.

"No cosmetic surgeries." DOC's claim that denying Mr. Nuñez's request furthers a compelling interest because, pursuant to Policy 13.2.1, it does not pay for cosmetic surgeries, also falls short. *See* JA137, 139; JA246 (Seid Decl. ¶ 33). Mr. Nuñez's request for a religious-based circumcision is not a request for cosmetic surgery. While cosmetic surgeries are meant to improve a person's appearance, self-esteem, and self-confidence,[14] "[r]eligious circumcision . . . differs from . . . self-elected medical intervention such as cosmetic or aesthetic" procedures "because it is a response to a divine ideology." *See* Ayesha Ahmad, *Do Motives Matter in Male Circumcision?* 28 Bioethics 67, 71 (December 9, 2013), https://doi.org/10.1111/bioe.12074.

[14] *See Cosmetic Surgery*, Mayo Clinic, https://perma.cc/5UPG-LQJV (last visited April 15, 2023) (listing examples of cosmetic surgeries, including face-lifts, Botox, and eyebrow rejuvenation, and liposuction)

Here, contrary to DOC's baseless suggestion that Mr. Nuñez seeks a circumcision to increase sexual gratification, *see* JA246 (Seid Decl. ¶ 34), there can be no question that Mr. Nuñez seeks a circumcision because he believes it is one of Allah's highest commands that all Muslims who convert to the religion of Islam must do so as early as possible, *see* JA322 (Opp'n to Mot. for Summ. J.). So too, contrary to DOC's claim that "[p]roper hygiene techniques" will "keep [Mr. Nuñez's] genital area clean for religious purposes," *see* JA246 (Seid Decl. ¶¶ 36–37), being able to clean his genital areas is no substitute for Mr. Nuñez's religious conviction to be circumcised because circumcision is still obligatory for all new Muslims, *see* JA322 (Opp'n to Mot. to Summ. J.). While uncircumcised, Mr. Nuñez is in constant fear that his acts of worship, such as prayers, will not be accepted. *See* JA322 (Opp'n). Because Mr. Nuñez's request for circumcision is not based on improving his personal appearance but is instead rooted in his religious faith, his request is not for cosmetic surgery, and Policy 13.2.1 does not apply.

Further undercutting its argument, DOC allows "sexual reassignment surgery and related treatment"—a set of procedures far more expensive and riskier than a circumcision. Sex reassignment surgery can

cost well over $100,000, and involves serious risks and irreversible complications, many of which are not fully understood. *See* Alyssa Jackson, *The High Cost of Being Transgender*, CNN Health (July 31, 2015), https://www.cnn.com/2015/07/31/health/transgender-costs-irpt/index.html ("In Pennsylvania, the Philadelphia Center for Transgender Surgery posts cost estimates" of "$140,450 to transition from male to female, and $124,400 to transition from female to male."); Kevin Hanley et al., *Caring for Transgender Patients: Complications of Gender-Affirming Genital Surgeries*, Ann. Emerg. Med. (Sept. 2021). Allowing surgeries such as sex reassignment surgery but not religious-based circumcision demonstrates a value-judgment favoring secular matters over religious matters,[15] and illustrates the state's under-inclusivity in its pursuit of purported compelling interests.

DOC's actions here mirror those in *Holt*. There, the government permitted an exception for prisoners with medical conditions to grow ¼-

[15] When this litigation started, sexual reassignment surgery was on DOC's list of non-provided medical services. *See* JA264 (Policy 13.2.1). But in July 2015, DOC removed "sexual reassignment surgery and related treatment" from this list and, in 2022, permitted its first sex reassignment surgery. *See id.*; *see also PILP Client Becomes First Person in DOC Custody to Receive Gender-Affirming Surgery*, Pa. Inst. L. Project (Oct. 26, 2022), https://pilp.org/news/doe-surgery.

inch beards but did not allow religious exceptions. The Court reasoned that the prison's "failure to pursue its proffered objectives with regard to such 'analogous nonreligious conduct' suggests that its interests 'could be achieved by narrower ordinances that burdened religion to a far lesser degree.'" *Holt*, 574 U.S. at 354 (citing *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546). So too here. There is simply no principled basis—let alone a compelling interest—for preventing a simple, safe, and inexpensive procedure like religious circumcision, while paying for and supporting more complex, more expensive, and riskier procedures like sex reassignment surgery.

B. DOC Failed To Prove That Its Ban On All Circumcisions, Even Those With A Religious Basis, Is The Least Restrictive Means Of Furthering Its Purported Interests.

DOC failed to demonstrate that its outright ban on all circumcisions—for any reason—is the least restrictive means of furthering its cost- and health-based interests. As explained, under the "exceptionally demanding" least restrictive means test, a prison bears the burden of considering the religious accommodations of other jurisdictions and—"at a minimum"—"offer[ing] persuasive reasons why it believes it must take a different course." *Holt*, 574 U.S. at 364, 369; *Mast*, 141 S. Ct. at 2433

(Gorsuch, J., concurring) (government must offer "compelling reason why" it cannot offer the same alternative"—*i.e.*, it must "show this alternative won't work"); *see Roman Cath. Diocese of Brooklyn,* 141 S. Ct. at 67 (holding that challenged COVID regulations were not "narrowly tailored" because they were "much tighter than those adopted by many other jurisdictions hard-hit by the pandemic"); *Dunn v. Smith*, 141 S. Ct. 725, 725–26 (2021) (Kagan, J., concurring) (explaining that the fact that "other jurisdictions have allowed" the requested alternative is "still more relevant").

Here, other jurisdictions such as Florida—the third largest state prison system in the country— have permitted circumcision without compromising their interests in areas such as cost and health. *See Fla. Dep't of Corr.*, *About Us*, http://www.dc.state.fl.us/ (last visited Apr. 15, 2023). In 2013, for example, Florida's DOC allowed a Jewish inmate to have a religious circumcision. *See* David A. Schwartz*, Inmate Gets First Circumcision in a Florida Prison*, Jewish Journal (Oct. 16, 2013), https://www.sun-sentinel.com/florida-jewish-journal/news/palm-beach-county-news/fl-jjps-circumcision-1016-20131016-story.html. Given this,

DOC needed to explain why it cannot do what Florida and others have done. But it did not.

Indeed, that other jurisdictions have permitted religious-based circumcisions strongly suggests DOC's blanket prohibition on all circumcisions is not the least restrictive means. Yet the record contains no evidence that DOC explored "any relevant differences between" its religious circumcision policies and those of Florida and other states. *Ramirez*, 142 S. Ct. at 1279. Instead, like the prison officials in *Ramirez*, DOC offers only conclusory defenses that ask this Court to "simply defer to [its] determination." *Id.* That is "not enough under RLUIPA." *Id.*

CONCLUSION

The Court should reverse the district court's grant of summary judgment.

April 17, 2023

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Fernando Nuñez, Jr. requests oral argument. Given the extensive record, the Supreme Court's recent RLUIPA cases, and the important issues involved, oral argument would be helpful to the Court.

CERTIFICATE OF BAR MEMBERSHIP, IDENTICAL COMPLIANCE OF BRIEFS, AND VIRUS CHECK

I hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

I further certify that the text of the electronically filed copy of the brief and the text of the hard copies filed or to be filed with the Court are identical.

I further certify that the electronically filed copy of the brief has been scanned for viruses using Netskope, Inc., version 93.0.1.944. No virus was detected.

/s/ *Ellen Crisham Pellegrini*
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and the rules of this court, because this brief contains 12,813 words (as determined by the Microsoft Word 2016 word-processing system used to prepare the brief), excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 14-point Century Schoolbook font.

/s/ *Ellen Crisham Pellegrini*
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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April, 2023, I caused a copy of this brief to be filed with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users, including:

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No. 22-3076

United States Court of Appeals for the Third Circuit

FERNANDO NUÑEZ, JR.,

Plaintiff–Appellant,

v.

TOM M. WOLF, GEORGE LITTLE, TABB BICKELL,

Defendants–Appellees.

Appeal from the United States District Court
for the Middle District of Pennsylvania,
No. 3:15-cv-01573
(Judge Jennifer P. Wilson)

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FERNANDO NUNEZ, JR.,	:	Civil No. 3:15-cv-01573
Plaintiff,	:	
v.	:	
TOM W. WOLF *et al.*,	:	
Defendants.	:	Judge Jennifer P. Wilson

MEMORANDUM

Before the court is Defendants' motion for summary judgment. (Doc. 77.) Plaintiff brings a civil rights complaint pursuant to 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc, *et. seq.* against two remaining Defendants, Tabb Bickell, Regional Secretary of the Department of Corrections ("DOC"), and John E. Wetzel,[1] Secretary of the DOC. (Doc. 34.) Plaintiff asserts that Defendants substantially burdened the exercise of his religion by refusing to allow him to consummate his marriage, refusing to allow him group prayer in a private room, and refusing his request for a circumcision during his time at the State Correctional Institution at Huntingdon ("SCI-Huntingdon"). For the reasons articulated below, the court will grant judgment for Defendants and close the case.

[1] On May 13, 2022, the court substituted the name of the current Secretary of the Department of Corrections, George Little, for the former Secretary, John Wetzel, with respect to those aspects of the complaint which only seek prospective and injunctive relief. (Doc. 102.)

PROCEDURAL BACKGROUND

Plaintiff, a self-represented inmate currently housed at SCI- Mahanoy, initiated this action in August of 2015 and is proceeding *in forma pauperis*. (Docs. 1, 16.) Plaintiff filed an amended complaint after Defendants sought to dismiss the original Complaint. (Doc. 34.) In his amended complaint, he raises a RLUIPA claim against Bickell and Wetzel, alleging that Defendants substantially burdened the exercise of his religion by refusing to allow him to consummate his marriage, refusing to allow him group prayer in a private room, and refusing his request for a circumcision. (*Id*.)

Defendants filed a motion for summary judgment. (Docs. 77.) Plaintiff responded, Doc. 111, and the time for Defendants' reply has expired. The motion is now ripe to be addressed by this court.

JURISDICTION AND VENUE

The court has federal question jurisdiction over the complaint as it asserts claims under 42 U.S.C. § 1983. *See* 28 U.S.C. § 1331. Venue is appropriate because all actions detailed in the amended complaint occurred within the Middle District of Pennsylvania. 28 U.S.C. § 1391(b)(2).

STANDARD

A court may grant a motion for summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a

matter of law." Fed. R. Civ. P. 56(a). A dispute of fact is material if resolution of the dispute "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is not precluded by "[f]actual disputes that are irrelevant or unnecessary." *Id.* "A dispute is genuine if a reasonable trier-of-fact could find in favor of the nonmovant' and 'material if it could affect the outcome of the case." *Thomas v. Tice*, 943 F.3d 145, 149 (3d Cir. 2019) (quoting *Lichtenstein v. Univ. of Pittsburgh Med. Ctr.*, 691 F.3d 294, 300 (3d Cir. 2012)).

In reviewing a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Jutrowski v. Twp. of Riverdale*, 904 F.3d 280, 288 (3d Cir. 2018) (citing *Scheidemantle v. Slippery Rock Univ. State Sys. of Higher Educ.*, 470 F.3d 535, 538 (3d Cir. 2006)). The court may not "weigh the evidence" or "determine the truth of the matter." *Anderson*, 477 U.S. at 249. Instead, the court's role in reviewing the facts of the case is "to determine whether there is a genuine issue for trial." *Id.*

The party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the

absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). The non-moving party must then oppose the motion, and in doing so "'may not rest upon the mere allegations or denials of [its] pleadings' but, instead, 'must set forth specific facts showing that there is a genuine issue for trial. Bare assertions, conclusory allegations, or suspicions will not suffice.'" *Jutrowski*, 904 F.3d at 288–89 (quoting *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 268–69 (3d Cir. 2014)).

Summary judgment is appropriate where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

DISCUSSION

A. Facts Material to Plaintiff's Claims[2]

Plaintiff was incarcerated at SCI-Huntingdon during all the events alleged in the amended complaint. (Doc. 34). He asserts that he is a devout and practicing Muslim. (Doc. 79 ¶ 4). Plaintiff was permitted to marry in 2013, but was not permitted to consummate his marriage in accordance with his religious beliefs. (*Id*. ¶ 5.) He is seeking ongoing conjugal visits and other forms of intimacy as understood in Islamic practice including light talk, love expressions, touching, caressing, kissing, and fondling. (*Id*. ¶ 6.) Plaintiff is also seeking to engage in congregate prayer in private with his family during contact visits. (*Id*. ¶ 10.) Plaintiff describes his request as the ability "to congregate in prayer with my family and friends 'standing' in a secured room away from other visitors." (Doc. 80-9, p. 2.)[3] DOC policy allows for inmates to pray silently while sitting. (Doc. 79 ¶ 15.) However, Plaintiff asserts this is inconsistent with the Islamic faith. (Doc. 80-9, p. 2.) Finally, Plaintiff is seeking a circumcision for religious reasons. (Doc. 79. ¶ 8.) Plaintiff's request assumes that Defendants would be responsible for incurring the expense for such procedure. (Doc. 110, ¶ 8.)

[2] In accordance with the court's Local Rules, the parties have filed their respective statements of material facts. (Doc. 79, 110.) From those statements, and the evidence submitted by the parties, the court has identified the material facts in this matter and has set forth those facts in this section.

[3] For ease of reference, the court utilizes the page numbers from the CM/ECF header.

Plaintiff initially requested the conjugal visits, private congregate prayer, and circumcision in January of 2015. (Doc. 79 ¶ 10.) The request for conjugal visits was denied due to safety, security, and health concerns. (*Id*. ¶11.) The private request for group prayer was denied because of safety concerns and because it would cause a distraction for families of other inmates meeting their loved ones, as well as the institution's inability to provide this option for all inmates. (*Id*. ¶ 12.) The request for circumcision was denied because it is an elective surgery and not medically necessary. (*Id*. ¶ 13.) The DOC cited the cost involved for elective procedures and cited Policy 13.2.1 as indicating that the DOC does not pay for any cosmetic surgeries. (*Id*.)

Plaintiff filed grievance number 564319 relating to his request for conjugal visits, which was denied due to safety, security, and health concerns, and it was noted that he is permitted to embrace and kiss his spouse at the beginning and end of each visit. (*Id*. ¶ 14.) This denial was upheld on the appeal at both the first and second levels based on the same rationale. (*Id*.)

Plaintiff filed grievance number 562984 regarding the request for congregate prayer, and it was denied because inmates share the visiting room, and that space is not for the purpose of practicing religion. (*Id*. ¶ 15.) Plaintiff is permitted to quietly pray in a seated position with his guests. (*Id*.) This denial was upheld on appeal at the first and second levels based on the same rationale. (*Id*.)

Plaintiff filed grievance number 564054 regarding his request for a circumcision, which was denied because the DOC does not permit elective surgeries. (*Id*. ¶ 16.) This denial was upheld on appeal at the first and second levels based on the same rationale. (*Id*.)

Plaintiff requests injunctive relief "enjoining the Defendants . . . from enforcing the Administrative Code regulation and Department policies at issue, so as to not continue to substantially burden the Plaintiff's religious beliefs" and "[o]rder the Defendants in his action to implement a family/conjugal visit program, and execute policies and practices which serve to accommodate Plaintiff's religious beliefs." (Doc. 34 ¶ 106.)

B. Defendants Will be Granted Judgment on Plaintiff's RLUIPA Claims.

RLUIPA "protects institutionalized persons who are unable to freely attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion". *Cutter v. Wilkinson*, 544 U.S. 709, 721 (2005). In relevant part, RLUIPA provides:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc–1(a).

To establish a *prima facie* case under RLUIPA, an inmate must demonstrate that: (1) he engaged in a religious exercise; and (2) the religious exercise was substantially burdened. If the plaintiff makes this *prima facie* showing, the burden then shifts to the government "to show that the policy is in furtherance of a compelling governmental interest and is the least restrictive means of furthering this interest." *Washington v. Klem*, 497 F.3d 272, 283 (3d Cir. 2007) (citing 42 U.S.C. § 2000cc-1(a)). Alternatively, if the inmate fails to present evidence to support a *prima facie* case, the government need not demonstrate that "it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014)). The application of the compelling interest standard is context-specific, and deferential to the prison authorities' decisions about how to manage the institution. *Washington*, 497 F.3d at 283 (citing *Cutter*, 544 U.S. at 722– 23).

RLUIPA defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief 42 U.S.C. § 2000cc–5(7)(A). The Third Circuit has defined "substantial burden" as follows:

> For the purposes of RLUIPA, a "substantial burden" exists where: (1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other

> inmates versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs.

Washington, 497 F.3d at 280 (emphasis in original). A "substantial burden" includes a rule or regulation which compels the prisoner to engage in "conduct that seriously violates [his] religious beliefs." *Holt*, 135 S.Ct. at 862 (quoting *Hobby Lobby*, 134 S.Ct. at 2775). "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." *Id.* at 862.

Here, Plaintiff, a Muslim, alleges that the DOC is placing a substantial burden on his religious practices by denying him conjugal visits with his wife, private congregate prayer with his visitors, and circumcision surgery.

1. Conjugal Visits

Plaintiff alleges that consummating his marriage is a requirement of his religious beliefs. (Doc. 34, ¶¶ 10–14.) He alleges, therefore, that the DOC's policy prohibiting conjugal visits violates his Islamic beliefs. (Doc. 77, p. 11.) Defendants do not challenge the sincerity of Plaintiff's belief; nor do they challenge Plaintiff's establishment of a *prima facie* case under the RLUIPA. (Doc. 78.) Instead, Defendants argue that their policy is in furtherance of a compelling

governmental interest and is the least restrictive means of furthering this interest. (*Id*.)

Plaintiff's request for conjugal visits was denied due to safety, security, and health concerns. (Doc. 79 ¶ 11.) Plaintiff does not challenge that safety, security, and health are compelling governmental interests, but asserts that the DOC's policy is not the least restrictive means of furthering these interests. (Doc. 111.) First, he argues that Defendants are speculating instead of addressing facts. (*Id.*, p. 12.) Plaintiff cites *Washington*, in support of his assertion that Defendants' statement of compelling government interests is mere speculation rather than fact. (*Id*.)

The court observes that Defendants have provided an affidavit from Major Scott Woodring, the Chief of Security for the DOC, providing an explanation for how DOC policy furthers the named interest. (Doc. 82-5). Contrary to Plaintiff's assertion, this is sufficient under *Washington*, which found that the DOC's failure to explain how their policy furthered their interests was an unacceptable conclusory statement. 497 F.3d at 283. Unlike the conclusory statement provided in *Washington*, here Major. Woodring explains that "[v]isiting room areas are the main avenue of the introduction of contraband into Pennsylvania state prisons." (Doc. 80-5. ¶10.) Additionally, Major Woodring states that in Pennsylvania all contact visits in a prison are to take place under official supervision. (*Id*. ¶ 16.)

Plaintiff counters this evidence with citations to articles that discuss DOC's employees bringing contraband into prisons and asserts that the introduction of contraband is an internal problem not mitigated by restricting contact visits. (Docs. 110-2, 111.)

Accepting the evidence that employees are a source of contraband in prisons, this does not render Major Woodring's evidence invalid. The court accepts that there are multiple sources attempting to introduce contraband into prisons. Major Woodring's evidence is that contact visits are the "main avenue" for bringing contraband into prisons. Plaintiff introduces a memo that lists the seven ways contraband is being introduced to the prisons. (Doc. 110-3.) "Visitors" is listed as number three with mail and legal mail listed as numbers one and two. (*Id*., p. 3.) However, nothing in this memo indicates that the list provided was made in order of frequency. (*Id*.) Indeed, Plaintiff's evidence is consistent with Major Woodring's evidence.

Plaintiff also argues that other states' correctional systems allow for such visits, including California, New York, and Washington. (*Id*.) He asks the court to take judicial notice of the visitation policies of these states' correctional institutions as evidence of a less restrictive means of furthering the interests of safety, security, and health concerns. (*Id*., p. 19–20.) However, the court notes that the application of the compelling interest standard is context-specific and deferential to the prison

authorities' decisions about how to run their institution. *Washington*, 497 F.3d at 283 (citing *Cutter*, 544 U.S. at 722– 23). There is no doubt that the states who have implemented conjugal visits had to allocate significant resources to accommodate these visits. Major Woodring addresses this in his affidavit: "Denying Plaintiff's request for conjugal visits serves the legitimate penological interest of utilizing resources of staffing, space, and time to best serve all inmates and not just this Plaintiff," and "[a] with conjugal visits, scarcity of resources is a concern . . ." (Doc. 80-5 ¶¶ 22, 37.) Plaintiff has failed to present evidence to counter Defendants' evidence that the current visiting policy regarding conjugal visits is the least restrictive means *available*–considering the DOC's limited resources. For this reason and the reasons stated above, judgment will be entered in Defendants' favor as to the issue of conjugal visits.

2. Congregate Prayer

Plaintiff is seeking to engage in congregate prayer in private with his family during contact visits. He alleges that the DOC's policy prohibiting group prayer in private rooms violates his Islamic beliefs. (Doc. 111, p. 25.) Defendants do not challenge Plaintiff's sincerity in his belief; nor have they made any challenge to Plaintiff's establishment of a *prima facie* case under the RLUIPA. (Doc. 78.) Instead, Defendants argue that their policy is in the furtherance of a compelling

governmental interest and is the least restrictive means of furthering these interests. (*Id.*)

Here the DOC's compelling government interest in prison safety and avoiding the introduction of contraband into the prison is furthered by not allowing private rooms for group prayer during contact visits in the same manner as not allowing private rooms for conjugal visits. Also, as discussed above, Defendants have provided evidence that their policy against private rooms is the least restrictive means in furtherance of this government interest. Plaintiff has failed to provide evidence to counter Defendants' evidence regarding visitors being the main avenue of contraband into prisons. Therefore, the court will grant judgment in Defendants' favor in regards to his request for a private room for group prayer for the same reason that judgment is granted with respect to his request for conjugal visits.

Plaintiff states that he proposed a designated prayer area in the public visiting rooms as an alternative to the use of a private room. (Doc. 34 ¶ 73.) These requests were denied on first and second levels of appeal because lying prostate on the ground would not only create a safety concern, but would also pose a major distraction to families of other inmates meeting their loved ones. (Doc. 80-1, pp. 1, 6.) Defendants have provided evidence that keeping inmates and visitors in their seats during contact visits in the general visiting rooms is a policy in furtherance of

safety. Major Woodring asserts that avoiding group prayer in the general visiting area is required to maintain neutrality in the general visiting rooms, and neutrality is required to avoid feelings of resentment and hatred that can manifest very quickly into assaults in a prison setting. (Doc. 80-5, ¶¶ 34–36.) Plaintiff has failed to refute Defendants' evidence that that the DOC's policy of allowing quiet seated prayer is the least restrictive means to further this government interest. (Doc. 111.) Therefore, the court will grant judgment in Defendants' favor in regards to his request for a designated space for group prayer in the general visiting area.

The court notes that Defendants discussed the compelling government interest of not distracting families of other inmates meeting their loved ones. (Doc. 78.) However, the court has resolved the matter by accepting the compelling government interest of safety. Therefore, the court is not making a finding regarding whether or not avoiding distractions of visitors in the visiting room is a compelling government interest.

3. Circumcision

Plaintiff alleges that he sincerely believes that circumcision is one of Allah's highest commandments and a sunnah of Prophet Muhammad, which all Muslims who convert to Islam must do as early as possible. (Doc. 111, p. 29.) He further alleges that since he is uncircumcised, he has difficulty in keeping his genitals clean, which leaves him in constant fear that his acts of worship, such as prayers,

will not be accepted. (*Id*.) He clarifies that he is requesting circumcision for both cleanliness and as an obligatory practice for new Muslims who convert to Islam. (*Id*.)

Defendants have not challenged Plaintiff's sincerity in this belief, nor that circumcision is integral to Muslim religious observance. (Doc. 78.) Nor have they challenged Plaintiff's establishment of a *prima facie* case under the RLUIPA. (*Id*.) Instead, the Defendants argue that their policy is in the furtherance of a compelling governmental interest and is the least restrictive means of furthering this interest.

Here, Defendants assert that "[i]t is unreasonable for the Department [of Corrections] to assume the costs of elective surgery for all inmates, including the medical expenses which it would incur if medical complications ensued following elective surgery." (Doc. 78 citing Doc. 80-1, p. 1.) The DOC also cited Policy 13.2.1 as indicative that it does not pay for cosmetic surgeries. (*Id*.) The court finds that the DOC's denial of Plaintiff's request for an elective circumcision furthers compelling government interests. "It would be unreasonable to allocate taxpayer money to elective surgeries for prisoners . . . ." *Vega v. Lantz*, No. 3:04CV1215(DFM) 2013 WL 6191855 at *8 (D. Conn. Nov. 26, 2013).

Furthermore, the court notes that Plaintiff asserts that he sincerely believes that circumcision is required by all Muslims who convert to Islam "as early as possible." (Doc. 111, p. 29.) Therefore, the DOC is not precluding Plaintiff from

fulfilling this religious obligation when it is possible for him to do so, but is merely asserting that it not possible for him to have the procedure while he is incarcerated and at the public's expense. Therefore, the DOC policy prohibiting Plaintiff from receiving an elective circumcision meets the least restrictive means test, and judgment will be entered in favor of Defendants.

CONCLUSION

For the reasons discussed above, the court will grant Defendants' motion for summary judgment, Doc. 77, and enter judgment in favor of Defendants and against Plaintiff. The Clerk of the Court will be directed to close this case.

An appropriate order will follow.

s/Jennifer P. Wilson
JENNIFER P. WILSON
United States District Court Judge
Middle District of Pennsylvania

Dated: September 30, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FERNANDO NUNEZ, JR.,	:	Civil No. 3:15-cv-01573
Plaintiff,	:	
v.	:	
TOM W. WOLF *et al.*,	:	
Defendants.	:	Judge Jennifer P. Wilson

ORDER

For the reasons stated in the accompanying memorandum, **IT IS ORDERED AS FOLLOWS**:

1. Defendants' motion for summary judgment, Doc. 77, is **GRANTED**. Judgment is entered in favor of the Defendants and against Plaintiff.

2. The clerk of the court is directed to **CLOSE** this case.

s/Jennifer P. Wilson
JENNIFER P. WILSON
United States District Court Judge
Middle District of Pennsylvania

Dated: September 30, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FERNANDO NUÑEZ, JR., Plaintiff,	:	Civil No. 3:15-cv-01573
v.	:	(Judge Jennifer P. Wilson)
TOM W. WOLF, et al., Defendants.	:	

NOTICE OF APPEAL

Notice is hereby given that, Fernando Nunez Jr.,("Plaintiff"), in the above captioned case hereby appeal to the United States Court of Appeals for the Third Circuit from the final judgment order entered on October 3, 2022, granting Defendants'motion for summary judgment. [Dkt # 114].

In addition to filing this appeal, Plaintiff has also filed a motion to proceed in forma pauperis on appeal.

Date: October 26, 2022

By: _____
Fernando Nuñez Jr.
(Pro Se Plaintiff/Appellant)

FILED
HARRISBURG, PA
NOV 02 2022
PER _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FERNANDO NUÑEZ, JR.	:	
	:	
Plaintiff	:	No. 3:15-cv-01573
	:	
v.	:	(Judge Jennifer P. Wilson)
	:	
TOM W. WOLF, et al.,	:	
	:	
Defendants	:	Jury Trial Demanded

CERTIFICATE OF SERVICE

I hereby certify that I am today depositing in the U.S. mail a true and correct copy of the foregoing motion upon the person and in the manner indicated below.

Service by first-class mail addressed as follows:

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Dated: October 26, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April, 2023, I caused a copy of this Joint Appendix – Volume I to be filed with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users, including:

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