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Recent Development

Holt v. Hobbs: RLUIPA Requires Religious Exception to Prison's Beard Ban

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For the past ten years, courts have grappled with deciding what deference to give prison officials when prison regulations, though intended to "maintain good order, security, and discipline,"[1] also substantially burden a prisoner's religious exercise.[2] In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act ("RLUIPA")[3] "to provide very broad protection for religious liberty" of prisoners and others.[4] Pursuant to RLUIPA, if a prison's policy substantially burdens a prisoner's religious exercise, the prison must demonstrate that the policy is necessary to achieve a compelling government interest.[5] But in the 2005 case of *Cutter v. Wilkinson*, the Supreme Court held that RLUIPA analysis is context-sensitive,[6] and the Court recognized that prison officials are due deference under RLUIPA.[7] Since 2005, lower courts have struggled to inject deference into their "compelling interest" RLUIPA analyses.[8] The Supreme Court addressed this confusion in 2015 with *Holt v. Hobbs*,[9] clarifying where

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1. Cutter v. Wilkinson, 544 U.S. 709, 723 (2005).
2. *See infra* text accompanying notes 6–9 (discussing the requirements of the burden).
3. 42 U.S.C. § 2000cc (2012).
4. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. —, 134 S. Ct. 2751, 2760 (2014).
5. 42 U.S.C. § 2000cc.
6. *Cutter*, 544 U.S. at 723 (citing Grutter v. Bollinger, 539 U.S. 306, 327 (2003)).
7. *Id.* at 725 n.13.
8. Under RLUIPA, if the prison's policy substantially burdens a prisoner's religious exercise, the prison must demonstrate that the policy is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc-1(a).
9. 574 U.S. —, 135 S. Ct. 853 (2015).

deference to prison officials does *not* fit into RLUIPA analysis.

In *Holt v. Hobbs*, the Supreme Court, per Justice Alito,[10] held that an Arkansas prison violated RLUIPA by not granting a religious exemption to the prison's grooming policy prohibiting facial hair.[11] The Arkansas prison's grooming policy banned beards, excepting prisoners with skin conditions, who were permitted a quarter-inch beard.[12] Prisoner Gregory Holt requested permission to grow a half-inch beard in accordance with his religious beliefs, but the prison denied him a religious exemption.[13] The federal district court and the Eighth Circuit affirmed the prison's decision.[14]

The Supreme Court reversed, determining that RLUIPA does not permit "unquestioning deference" to prison officials' assertions that policies are necessary to achieve the prison's compelling interest.[15] Though the Court provided a clearer understanding of when deference is *not* due to prison officials, one significant question remains: To what extent should *Cutter* deference be given to prison officials when deciding RLUIPA claims?

Congress intended RLUIPA to grant "expansive protection for religious liberty."[16] In particular, section 3 of RLUIPA, the provision at issue in *Holt*, provides:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . 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.[17]

Furthermore, RLUIPA allows prisoners "to seek religious accommodations pursuant to the same standard as set forth in [the Religious Freedom Restoration Act ("RFRA")]."[18] RFRA requires courts to apply the same compelling-interest analysis as RLUIPA when the federal government substantially burdens religious exercise.[19] The

10. It bears note that Justice Alito also authored another recent case discussing regulatory interaction with religious exercise, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. —, 134 S. Ct. 2751 (2014).

11. *Holt*, 135 S. Ct. at 859, 867.

12. *Id.* at 860–61.

13. *Id.*

14. *Id.* at 861–62; *see* Holt v. Hobbs, 509 F. App'x 561 (8th Cir. 2013), *overruled by Holt*, 135 S. Ct. 853 (2015).

15. *See Holt*, 135 S. Ct. at 864.

16. *Id.* at 860.

17. 42 U.S.C. § 2000cc–1(a) (2012).

18. Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 436 (2006).

19. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. —, 134 S. Ct. 2751, 2761–62 (2014).

Court most recently interpreted the RFRA standards in *Burwell v. Hobby Lobby*, recognizing that RFRA—and thus RLUIPA—was enacted to provide greater protection for religious exercise than the First Amendment.[20] Notably, throughout its *Holt* opinion, the Court cited *Hobby Lobby* to support its reasoning under RLUIPA.[21]

The *Holt* Court also observed that several sections of RLUIPA underscore its expansive protection for religious liberty.[22] First, RLUIPA defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[23] Second, RLUIPA requires that this definition "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[24] Third, and finally, RLUIPA "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."[25]

With that background in mind, the Court applied RLUIPA to Holt's case. Holt is a devout Muslim incarcerated in an Arkansas state prison. The Arkansas Department of Correction's ("Prison") grooming policy prohibited prisoners from wearing facial hair other than a neatly trimmed mustache, or, if an inmate had a diagnosed medical problem, a quarter-inch beard. The policy granted no exemptions to prisoners who were required to grow a beard on religious grounds. Nevertheless, Holt requested permission to grow a half-inch beard as a compromise between the Prison's policy and his faith, which required him not to trim his beard at all. Prison officials denied his request.[26]

Holt sought judicial redress, filing a *pro se* complaint in federal district court challenging under RLUIPA the Prison's decision to deny his request for an exemption. The U.S. District Court for the Eastern District of Arkansas adopted the recommendation of the magistrate judge assigned to Holt's case, who had concluded that Holt's complaint should be dismissed.[27] The magistrate emphasized that prison officials are entitled to deference and the Prison's grooming policy allowed Holt to exercise his religion in ways other than growing a beard, such as by

20. *Id.*
21. *See*, *e.g.*, Holt v. Hobbs, 574 U.S. —, 135 S. Ct. 853, 859–60, 862–64, 867 (2015).
22. *Id.* at 860.
23. *Id.* (citing 42 U.S.C. § 2000cc–5(7)(A) (2012)).
24. *Id.* (citing 42 U.S.C. § 2000cc–3(g)).
25. *Id.* (citing 42 U.S.C. § 2000cc–3(c)).
26. *Id.* at 861.
27. *See* Holt v. Hobbs, No. 5:11:CV00164 BMS, 2012 WL 993403 (E.D. Ark. Mar. 23, 2012) (adopting magistrate's recommendation); Holt v. Hobbs, No. 5:11-cv-00164-BSM-JJV, 2012 WL 994481 (E.D. Ark. Jan. 27, 2012) (magistrate's recommendation).

praying on a prayer rug, maintaining the diet required by his faith, and observing religious holidays.[28] The Eighth Circuit affirmed, holding that the Prison had satisfied its burden of showing that the grooming policy was the least restrictive means of furthering the Prison's compelling interests in security.[29] The court of appeals reasoned that prison officials are entitled to deference when they assert security as a compelling interest unless substantial evidence shows the prison's response is exaggerated.[30] The court of appeals also held that although other prisons allow inmates to maintain facial hair, such evidence does not outweigh deference owed to prison officials because those officials are more familiar with their own institutions.[31]

The Supreme Court reversed, holding that the Prison's policy, as applied to Holt without a religious exemption, violated RLUIPA. At the outset, the Court noted that the sincerity of Holt's beliefs was not in dispute, and therefore he satisfied the threshold question for requesting accommodations for religious beliefs.[32] The Court went on to find the policy substantially burdened Holt's religious exercise; and the Prison asserted two compelling interests, but the Prison failed to show that applying its policy to Holt is the least restrictive means of achieving either of the Prison's asserted compelling interests.

First, the Court rejected and corrected the district court's substantial burden analysis by clarifying three points: (1) unlike normal Free Exercise Clause analysis, available alternative means of practicing religion are *not* relevant considerations under RLUIPA's substantial burden inquiry; (2) RLUIPA protects a religious practice even if that practice is not compelled by religious belief; and (3) RLUIPA's protection is not limited to religious practices shared by all members of a religious sect, and RLUIPA may even protect some idiosyncratic beliefs.[33] With these points clarified, the Court concluded that the Prison policy substantially burdened Holt's religious belief because the policy required Holt to choose between shaving his beard, which would

28. *Holt*, 135 S. Ct. at 861; *see* Holt v. Hobbs, 2012 WL 994481, at *7 (magistrate's recommendation).

29. Holt v. Hobbs, 509 F. App'x 561, 562 (8th Cir. 2013), *overruled by Holt*, 135 S. Ct. 853 (2015).

30. *Id.*

31. *Id.*

32. *Holt*, 135 S. Ct. at 862 (citing Burwell v. Hobby Lobby Stores, Inc., 573 U. S., —, 134 S. Ct. 2751, 2774 n.28 (2014)). The Court noted that RLUIPA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* Though RLUIPA does not bar inquiry into the sincerity of a belief, *see* Cutter v. Wilkinson, 544 U.S. 725 n.13 (2005), the Prison did not dispute the sincerity of Holt's beliefs here. *Holt*, 135 S. Ct. at 862.

33. *Holt*, 135 S. Ct. at 862–63.

violate his religious beliefs, or not shave his beard, which would violate the Prison's grooming policy.

Second, because the Prison's policy substantially burdened Holt's religious exercise, the Court applied RLUIPA's "compelling interest test," under which the Prison had the burden of showing that its decision to deny an exemption to its grooming policy was narrowly tailored to achieve a compelling government interest.[34] This inquiry, the Court clarified, is more focused on the individual, "requir[ing] the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to . . . the particular claimant whose sincere exercise of religion is being substantially burdened."[35]

The Prison asserted that applying the policy to Holt without exemption served two compelling interests: stopping the flow of contraband concealed in beards and facilitating prisoner identification.[36] While the Court agreed these were compelling interests,[37] it concluded that the Prison failed to show its policy was the least restrictive means of furthering either of the asserted compelling interests.[38]

The Court rejected the Prison's contraband justification, finding it "hard to take seriously."[39] The prison argued that an inmate with a half-inch beard could conceal contraband like razor blades in his beard.[40] The Magistrate Judge had disbelieved this explanation, but he and all the lower courts had concluded that they were "bound to defer" to the Prison's assertion that its interests would be undermined by granting the exemption.[41] The Supreme Court rejected this "unquestioning deference,"[42] instead analyzing why the Prison's justification was insufficient to meet the rigid scrutiny RLUIPA required.[43]

Under an eminently practical analysis, the Court found that a half-inch beard would not conceal contraband very well because contraband would be hard to hide and prone to fall out.[44] Moreover, instead of

34. *See id.* at 863 (noting that under the compelling interest test required by RLUIPA, the prison had to show that the compelling interests were served by applying the policy to the particular prisoner whose religious practice is substantially burdened, not merely that the policies were necessary to achieve some broadly formulated interest).

35. *See id.* (citing *Hobby Lobby*, 134 S. Ct. at 2779 (internal quotations omitted)).

36. *Id.* at 863–64.

37. *Id.* at 863.

38. *Id.* at 864–65.

39. *Id.* at 863.

40. *Id.*

41. *Id.*

42. *Id.* at 864.

43. *See id.* at 863–64 (holding that the Prison's alleged reasons for its policy are insufficient and too restrictive).

44. *Id.* at 863.

hiding items in a beard, a prisoner could simply hide contraband in the hair on the top of his head, which the Prison's grooming standards permitted to be longer than a half-inch in length.[45] The Court ultimately rejected the contraband justification, reasoning that, "without a degree of deference that is tantamount to unquestioning acceptance, it is hard to swallow the argument that denying petitioner a [half-inch] beard actually furthers the prison's interest in rooting out contraband."[46] The Court further explained why denying the exemption, even if it actually furthered the Prison's contraband justification, nonetheless failed to be the least restrictive means of furthering the interest in curbing contraband. The Court found that searching beards or having a prisoner run a comb through his beard would be a less restrictive alternative.[47] As such, the Court ruled that the interest in eliminating contraband could not sustain the Prison's refusal to allow Holt to grow a half-inch beard.[48]

The Court also rejected the Prison's argument that applying its grooming policy to Holt was necessary to facilitate prisoner identification. The Prison argued that its policy, as applied to Holt, was necessary to prevent bearded prisoners from shaving their beards, thereby disguising their identities, in order to enter restricted areas and escape. However, the Court found that the Prison failed to establish two points essential to its identification justification. First, the Court looked to the practices of many other prisons, which all use a dual-photograph system to prevent escape through beard shaving. The Court concluded that the Arkansas Prison failed to show why it could not use a similar dual-photograph system to achieve the Prison's interest without burdening the prisoner's beard-related religious practice.[49] Second, the Court looked to the Prison's other policies, which permitted mustaches, head hair, and quarter-inch beards for medical reasons, and determined that these too could be shaved off to conceal a prisoner's identity. The Court concluded that the Prison failed to show why it permitted other instances of hair growth but not Holt's half-inch beard, and therefore rejected the Prison's identification justification.

Before concluding its opinion, the Court in dicta provided several

45. *Id.*

46. *Id.* at 864.

47. *Id.*

48. *Id.*

49. *Id.* at 866. In this same vein, the Court later states, "'[w]hile not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction.'" *Id.* (quoting Procunier v. Martinez, 416 U.S. 396, 414 n.14 (1974)).

caveats. First, the Court cut back on the relevance of other prisons' practices by positing that RLUIPA does not require a prison to grant a religious exemption simply because other jurisdictions do so.[50] Rather, when many other prisons offer an accommodation, a prison not offering such an accommodation must provide the court with "persuasive reasons" to distinguish itself from those other prisons.[51] Under RLUIPA, courts cannot grant deference to prison officials when they merely assert that their policies justifiably differ; instead, courts must require prisons to prove that a plausible, less restrictive alternative used by many other prisons, would be ineffective at the subject prison.[52]

Second, the Court emphasized how, despite the *Holt* holding, RLUIPA still "affords prisons ample ability to maintain security."[53] Specifically, the Court instructed lower courts to be cognizant that RLUIPA analysis is conducted in a prison setting, but the Court did not elaborate further on what this means.[54] Additionally, if a prison suspects a prisoner is using a religious activity to "cloak illicit conduct," prisons may question the authenticity of a prisoner's "religiosity" that forms the basis for a requested accommodation.[55] And finally, even if a prisoner's religious belief is sincere, prisons may withdraw an accommodation if the prisoner "abuses the exemption in a manner that undermines the prison's compelling interests."[56]

Justice Ginsburg concurred only to clarify that she would require one additional element for successful RLUIPA claims: individuals who challenge government policies under RLUIPA or RFRA should show that accommodating their religious belief would not detrimentally affect others who do not share the belief.[57] This element, according to Justice Ginsburg, was met in *Holt*[58] but not *Hobby Lobby*.[59]

Justice Sotomayor concurred in part in order to reconcile striking down a prison policy in *Holt* with the emphasis on deference in *Cutter*.[60] To begin, Justice Sotomayor explained that, under *Cutter*,

50. *Holt*, 135 S. Ct. at 866.

51. *Id.*

52. *See id.* (explaining that courts "'must not assume a plausible less restrictive alternative would be ineffective'" (quoting United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 824 (2000))).

53. *Id.*

54. *Id.* at 866–67.

55. *Id.* 867 (citing Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005)).

56. *Id.*

57. *Id.* (Ginsburg, J., concurring).

58. *See id.*

59. Burwell v. Hobby Lobby Stores, Inc., 573 U. S. —, 134 S. Ct. 2751, 2787–2806 (2014) (Ginsburg, J., dissenting).

60. *See Holt*, 135 S. Ct. at 867 (Sotomayor, J., concurring) (reassuring that nothing in the

courts entertaining RLUIPA section 3 complaints should grant deference "to the experience and expertise of prison and jail administrators,"[61] and that such deference was due when prison officials "establish[] necessary regulations and procedures to maintain good order, security and discipline . . . ."[62] The Court's *Holt* opinion, according to Justice Sotomayor, does not preclude courts from granting deference to prison officials' reasoning when deference is properly due.[63] Justice Sotomayor posits that after *Holt* deference is proper when prison officials offer a "plausible explanation for their chosen policy that is supported by whatever evidence is reasonably available to them,"[64] but deference is not due when prison officials "declare a compelling government interest by fiat."[65]

In Justice Sotomayor's view, Holt's challenge fell into the category of deference to a fiat, rather than deference to a plausible explanation. The Prison's position was fatally wounded by its own failure to demonstrate with anything more than "unsupported assertions" why less restrictive policies offered by Holt were insufficient to achieve the Prison's compelling interests.[66] The Court's independent judgments concerning the merits of the alternative approaches, while appropriately skeptical, were not the reason the Court rejected the prison's justifications.[67] Under Justice Sotomayor's approach, courts should defer to prison officials' reasoning when those officials justify their policies with plausible explanations supported by evidence, and not when their policies are justified by mere fiat or speculation.[68]

What instruction does *Holt* offer lower courts analyzing future RLUIPA claims? The *Holt* majority and concurrences offer two points of clarification.

First, courts dealing with matters of first impression under RLUIPA may turn to RFRA case law by analogy. Throughout the *Holt* opinion, Justice Alito—who also authored the *Hobby Lobby* decision interpreting RFRA[69]—cited to the Court's *Hobby Lobby* decision in support of

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Court's *Holt* opinion calls into question *Cutter*).

61. *See* Cutter v. Wilkinson, 544 U.S. 709, 717 (2005).

62. *Holt*, 135 S. Ct. at 867 (Sotomayor, J., concurring).

63. *Id.*

64. *Id.*

65. *Id.*

66. *See id.* at 868 (explaining that the Prison's failure, not Court's independent judgment, is ultimately fatal to the Prison's position).

67. *Id.*

68. *Id.*

69. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. —, 134 S. Ct. 2751 (2014).

asserted RLUIPA standards.[70] Such is not surprising given that both RFRA and RLUIPA were enacted to "provide very broad protection for religious liberty."[71] Indeed, RLUIPA was enacted after the Court in *Boerne v. Flores* struck down the part of RFRA that applied to the States.[72] Hence, based on the *Holt* Court's use of RFRA in applying RLUIPA, one can conclude that going forward the Court, when applying RLUIPA, may look to its RFRA jurisprudence to fill in gaps where RLUIPA case law is lacking.

Second, the *Holt* Court clarified that the role deference plays in applying RLUIPA is limited, and that courts should first apply the strict scrutiny that RLUIPA requires. After *Holt*, courts should first require prison officials to adduce some evidence that their policies are actually necessary to achieve the prison's asserted compelling interest, and only upon such a showing should the court grant deference to the officials' justification.[73] Additionally, the Court rejected the Eighth Circuit's standard for deference, pursuant to which courts would defer to prison officials' judgment about security matters unless there is "substantial evidence that a prison's response is exaggerated."[74] The Court clarified that the burden rests on the prison, not the challenger. Proper deference analysis under RLUIPA requires the prison to prove that a challenger's proposed alternatives would not sufficiently serve the prison's security interests; a challenger need not show by "substantial evidence" that the policy is not narrowly tailored.[75] The Court also opted not to follow the Eighth Circuit's approach, where it deferred to prison officials' judgments about "their own institutions" without looking to policies of other prisons.[76] Instead, the Court clarified that other prisons' policies allowing the requested religious accommodation may inform a narrow tailoring analysis, under which the subject prison must offer persuasive reasons explaining why such an accommodation would not work at the subject prison.

To conclude, under RLUIPA analysis, courts must not grant

70. *See supra* note 21 and accompanying text (collecting citations to *Hobby Lobby* in *Holt*).

71. *Holt*, 135 S. Ct. at 859 (citing *Hobby Lobby*, 134 S. Ct. at 2760 (2014)).

72. *Id.* at 860; *see* City of Boerne v. Flores, 521 U.S. 507, 532–36 (1997) (reasoning that Congress exceeded its power under section 5 of the Fourteenth Amendment when it made RFRA applicable to the States and their subdivisions).

73. *See Holt*, 135 S. Ct. at 864 (explaining the prison's responsibility to prove that its policy is the least restrictive means of furthering the asserted justification in not providing an accommodation to the prisoner); *id.* at 866 (clarifying that lower courts erred when deferring to prison officials' mere "say-so" that they could not accommodate the prisoner's request for an exemption under RLUIPA).

74. *Id.* at 861.

75. *See id.* at 867.

76. *Id.* at 861.

"unquestioning deference" when a prison asserts that its policy is necessary, without exemption, to achieve the prison's interest in security.[77] Rather, prisons have to do more than point to their interest allegedly served by not granting an exemption; they must "*prove* that denying the exemption is the least restrictive means of furthering a compelling governmental interest."[78] But it would be incorrect to conclude that *Cutter* is implicitly overruled, for the Court did acknowledge that "[p]rison officials are experts in running prisons and evaluating the likely effects of altering prison rules, and courts should respect that expertise."[79] Hence, *Cutter*'s general command for deference remains. "But," as the Court concluded, "that respect [due to prison officials] does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard."[80]

77. *Id.* at 864.
78. *Id.* (emphasis added).
79. *Id.*
80. *Id.*