No. 13-6827

In The Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A ABDUL MAALIK MUHAMMAD,
Petitioner,

v.

RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, *ET AL.*,
Respondents.

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

BRIEF OF THE RUTHERFORD INSTITUTE, *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Anand Agneshwar
Counsel of Record
ARNOLD & PORTER LLP
399 Park Avenue
New York, NY 10022
(212) 715-1000
anand.agneshwar@aporter.com

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
923 Gardens Boulevard
Charlottesville, VA 22901
(434) 978-3888

Anna K. Thompson
Carl S. Nadler
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000

Counsel for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED

Whether the Arkansas Department of Correction's grooming policy violates the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc *et seq*., to the extent that it prohibits Petitioner from growing a half-inch beard in accordance with his religious beliefs.

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INTEREST OF *AMICUS*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing pro bono legal representation to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues.

The Rutherford Institute is interested in this case because the Institute was one of the moving forces behind the drafting and enactment of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq*., and it has and continues to represent the individuals, religious assemblies, and institutions that are the intended beneficiaries of RLUIPA. A decision affirming the Eighth Circuit would undermine RLUIPA and eviscerate the religious liberty protections Congress intended to provide through the statute.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

Petitioner Gregory Holt (a/k/a Abdul Maalik Muhammad), a Salafi Muslim, is a prisoner in the Arkansas Department of Correction ("ADC"). *See* JA 162. One essential tenet of his faith is to follow the sayings of the Prophet Muhammad as collected in the *hadith*. This includes the requirement to "keep the mustaches short [but] leave the beard as it is." JA 54; *see also* JA 142.

The ADC grooming policy, however, prohibits prisoners from growing beards:

> No inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip. Medical staff may prescribe that inmates with a diagnosed dermatological problem may wear facial hair no longer than one quarter of an inch.

JA 164 (citing Ark. Admin. Directive 98-04). The alleged purpose of the ADC grooming policy is to "provide for the health and hygiene of incarcerated offenders, and to maintain a standard appearance throughout the period of incarceration, minimizing opportunities for disguise and for transport of contraband and weapons." *Id.*

Petitioner requested an exemption to grow a half-inch beard to accommodate his religious beliefs. *See, e.g.*, JA 56. The State denied the request on account of alleged security concerns. *Id.* Petitioner then challenged the ADC grooming policy under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). JA 16-26.

Magistrate Judge Joe Volpe held an evidentiary hearing, at which the State presented various prison officials as witnesses. JA 48-159. The prison officials testified that the ADC grooming policy served security concerns, particularly to prevent prisoners from transporting contraband (*e.g.*, razors, needles, SIM cards), and to prevent prisoners from changing their appearance. *See, e.g.*, JA 166. The magistrate recommended that the district court deny Petitioner's motion for preliminary injunction and that the court dismiss the complaint. JA 177.

The district court adopted the report and recommendation in its entirety and dismissed Petitioner's complaint with prejudice. JA 179. First, the district court concluded that Petitioner would not be irreparably harmed because "not all Muslims believe a man must maintain a beard. . . . [and Petitioner] testified that followers of his faith get credit for attempting to follow the religious tenets." JA 166. Petitioner, moreover, was able to practice his religion and allowed to have a prayer rug and other Islamic material, to maintain an Islamic diet,

to observe religious holidays, and to correspond with a religious advisor. JA 177.[2] Second, the court found the prisoner officials' security concerns persuasive. *See, e.g.*, JA 166-68. Warden Lay testified that with a beard, an "inmate could change his appearance during an escape . . . [and that a beard could be] used as a means to facilitate the introduction of contraband into the inmate population." JA 166. Assistant Director Harris testified that a "needle from a syringe" or "a SIM card could be easily concealed in an inmate's beard." JA 167.

Petitioner appealed, and the Eighth Circuit affirmed based on its prior decision in *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008). JA 184-87. This Court granted *certiorari*.

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[2] During the evidentiary hearing, however, the court repeatedly implied that Petitioner met his initial burden and that the issue was whether the State's security concerns could survive strict scrutiny. *See, e.g.*, JA 77 ("[U]ltimately it boils down to whether or not the -- whether or not we can have the ADC meeting their security objectives without substantially burdening your religious freedom. I mean, that's it in a nutshell. And so it really is incumbent on them -- the way it works, Mr. Muhammad is that they have to ante up now, they have to say we can't do it, we can't allow you to grow this beard because of whatever the reasons are."); JA 135 (permitting the state to present closing arguments first because "you know, it's kind of your burden, Ms. Cryer, I think, so if you want to go first").

SUMMARY OF THE ARGUMENT

RLUIPA provides that "[n]o 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." 42 U.S.C. § 2000cc-1. Courts apply strict scrutiny in resolving RLUIPA claims, requiring that the government demonstrate that it considered and rejected less restrictive means before adopting the challenged policy. The ADC grooming policy violates this standard.

The first issue is whether the State's prohibition of beards substantially burdens Petitioner's genuine religious belief. Petitioner is a Salafi Muslim, whose religious beliefs require him to maintain a beard. The ADC policy requires Petitioner to be clean-shaven and denies him the right to grow a beard. As such, it significantly burdens Petitioner's exercise of his religious beliefs.

The second issue is whether the State's no-beard policy is the least restrictive means to further the government's interest in prison security. Here, the State concededly failed to consider alternatives, including the experience of most other states that have permitted inmates to wear beards without

experiencing security concerns. The State's failure to consider these alternatives was particularly egregious in light of its inability to cite a single security incident that resulted from an inmate wearing a beard.

ARGUMENT

I. The ADC Grooming Policy Is Not the Least Restrictive Means to Further a Compelling Governmental Interest

Section 3 of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq.*, prohibits the government from "impos[ing] a substantial burden on the religious exercise of a person residing or confined to an institution . . . unless the government demonstrates that imposition of the burden . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest." 42 U.S.C. § 2000cc-1(a).

A. Prohibiting a Half-Inch Beard Substantially Burdens Petitioner's Religious Exercise

The plaintiff bears the initial burden to demonstrate that the challenged governmental action substantially burdens his religious exercise. 42 U.S.C. § 2000cc-2(b); *Garner v. Kennedy*, 713 F.3d 237, 241 (5th Cir. 2013) (citation omitted). "Religious exercise" is broadly defined 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). Although this Court has not had the opportunity to interpret what constitutes a "substantial burden" under RLUIPA, lower courts consistently accept a plaintiff's claim that the challenged activity "truly pressures [the plaintiff] to significantly modify his religious behavior and significantly violates his religious belief." *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006); *Ind v. Colo. Dep't of Corr.*, No. 09-cv-537, 2014 WL 1312457, at *11 (D. Colo. Mar. 31, 2014) (similar); *Hundal v. Lackner*, No. 08-cv-00543, 2011 WL 1935734, at *5 (C.D. Cal. Apr. 12, 2011) (similar).

Although Respondent has not seriously disputed that Petitioner's exercise of religion has been substantially burdened by the no-beard policy, the rulings below are ambiguous on this threshold issue. The magistrate's report and recommendation, JA 160-78, which was adopted *in toto* by the district court, concluded that Petitioner's "ability to practice his religion has not been substantially burdened." JA 176-77. Petitioner was "provided a prayer rug and list of distributors of Islamic material, [ ] was allowed to correspond with a religious advisor, and was allowed to maintain the required diet and observe religious holidays." JA 176, 177. The court also pointed out that not all Muslims believe a man must maintain a beard. JA 166. *But see supra* note 2 (trial court commented during the evidentiary

hearing that Petitioner met the threshold burden and the burden was on the state to show a compelling interest).

But it is not for a court to say what aspect of a prisoner's religious beliefs is important to him, nor does RLUIPA require a prisoner to choose only the most important tenets he would like to follow. *Ind*, 2014 WL 1312457, at *11 (courts may not "attempt to gauge how central a sincerely held belief is to the believer's religion") (citation omitted). The district court's approach is akin to prohibiting a Christian prisoner from praying because he is allowed to celebrate Christmas and Easter. Instead, lower courts have held that a "consistent restriction or flat denial of access to something" is a substantial burden. *Id.* at *12 (citations omitted). Petitioner easily satisfies this standard: the State's flat denial of his request to maintain a half-inch beard significantly modifies and, in fact, violates his Islamic beliefs.

To the extent the district court ruled that there was no substantial burden because maintaining a beard is not a uniform tenet among Muslim men, that holding directly conflicts with this Court's precedent. In *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), a Jehovah's Witness quit his job because his religious beliefs prohibited him from participating in the manufacture of armaments. *Id.* at 709. He challenged the state's rejection of unemployment

compensation benefits as violative of his First Amendment right to free exercise of religion. *Id.* This Court did not give any weight "to the fact that another Jehovah's Witness had no scruples about [manufacturing armaments]." *Id.* at 715. "[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith." *Id.* at 715-16.

Similarly, in *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989), this Court held that a claim to the protection of the First Amendment's Free Exercise Clause requires only that the religious belief be sincere. The Court rejected the notion that "one must be responding to the commands of a particular religious organization." *Id.* at 834. The fact that other Christians failed to share the plaintiff's belief that Sunday work is forbidden did not diminish the constitutional protection of the plaintiff's belief.

Thus, even if Petitioner's belief that he must maintain a beard were wholly personal and idiosyncratic (which it demonstrably is not), his belief is protected by the constitutional guarantee to free exercise of religion and by federal statutory law. RLUIPA makes plain, by defining of "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), that the scope of beliefs protected is as broad as the protection afforded by the First Amendment's Free Exercise Clause under *Thomas* and *Frazee*. The clear substantial burden on Petitioner's exercise of religion cannot be avoided because the belief at issue is not universal; it is enough that it is sincerely held.

B. The District Court Failed to Apply the Required Strict Scrutiny Test, Because It Refused to Consider Less Restrictive Alternatives

Once a plaintiff meets his initial burden, the burden shifts to the government to demonstrate the challenged action is the least restrictive in furthering a compelling interest. 42 U.S.C. § 2000cc-5(2); *Garner*, 713 F.3d at 241.[3]

A prison policy cannot comply with RLUIPA unless it furthers a compelling governmental interest and is the "least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a)(2). Consistent with the plain text of the statute, courts apply strict scrutiny in analyzing RLUIPA. *See, e.g.*, *Couch v. Jabe*, 679

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[3] Although the parties did not address whether Petitioner's requested exception to the ADC grooming policy would result in burdensome costs to the State, RLUIPA recognizes that the government may need to incur some expenses to avoid substantially burdening the exercise of religion. *Garner*, 713 F.3d. at 245.

F.3d 197, 203 (4th Cir. 2012) ("'RLUIPA adopts a . . . strict scrutiny' standard.") (citations omitted); *Warsoldier v. Woodford*, 418 F.3d 989, 1001 n.13 (9th Cir. 2005) ("[U]nder RLUIPA, [the state's] regulations must survive strict scrutiny.") (citing 42 U.S.C. § 2000cc-1(a)).[4]

Courts do not require the government to consider every possible alternative to survive RLUIPA's strict scrutiny standard. *Hamilton v. Schriro*, 74 F.3d 1545, 1556 (8th Cir. 1996). At the same time, courts may not "rubber stamp or mechanically accept the judgments of prison administrators." *Couch*, 679 F.3d at 201 (citing *Lovelace*, 472 F.3d at 190) (alterations and internal quotation marks omitted); *see also id.* at 203; *Washington v. Klem*, 497 F.3d 272, 283 (3d Cir. 2007) (courts may defer to prison officials regarding security concerns of a challenged activity, but the

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[4] *See also Lovelace*, 472 F.3d at 186 ("[B]y passing RLUIPA, [Congress] mandat[ed] a 'more searching standard' of review of free exercise burdens than the standard used in parallel constitutional claims: strict scrutiny instead of reasonableness.") (citations omitted); *Ind*, 2014 WL 1312457, at *15 ("In enacting RLUIPA, Congress chose to subject prison regulations which substantially burden an inmate's religious beliefs to the 'most demanding test known to constitutional law.' . . . 'Whereas rational basis review permits a court to hypothesize interests that might support a decision, RLUIPA's strict scrutiny standard requires courts to consider only the actual reasons for a decision.'") (citations omitted).

"mere assertion of security or health reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement") (citations omitted).

The unambiguous terms of RLUIPA require the government to satisfy a "strict scrutiny" test by showing that the prohibited religious practice is the "least restrictive means of furthering th[e] compelling governmental interest." 42 U.S.C. § 2000cc-1(a)(2). This Court has routinely interpreted strict scrutiny to require consideration and rejection of less restrictive alternatives. *See, e.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 824 (2000) (in First Amendment challenge to speech restrictions, "[a] court should not assume a plausible, less restrictive alternative would be ineffective"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (because city failed to consider race-neutral measures, minority set-aside program was not narrowly tailored to further a compelling governmental interest).[5]

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[5] The circumstances behind the statute's passage confirm this reading. In passing RLUIPA, Congress warned that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements." 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch & Sen. Kennedy) (citation omitted). Indeed, one of the stated purposes of RLUIPA was to "secure redress for inmates who encountered undue barriers to their

The Department of Justice concurs that RLUIPA's strict scrutiny test requires a state to substantively consider and reject less restrictive alternatives:

> RLUIPA require[s] that administrators *support their assertions of appropriateness with specific evidence.* Bare assertions that a religious accommodation will compromise the security or integrity of an institution will not suffice. . . . [C]ourts have required institutions to show that alternatives means of satisfying the compelling government interest *were considered and found insufficient.*

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religious observances. . . . RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter v. Wilkinson*, 544 U.S. 709, 716-17, 721 (2005) (citations omitted); 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch & Sen. Kennedy) (noting that "Congress has long acted to protect the civil rights of institutionalized persons . . . [whose] right to practice their faith is at the mercy of those running the institution"). RLUIPA's legislative history thus makes clear that Congress intended the statute to be interpreted broadly and to allow for the greatest exercise of religious freedom.

Dep't of Justice, *Statement of the Department of Justice on the Institutionalized Persons Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA)* 3-4 (Sept. 22, 2010), *available at* http://www.justice.gov/crt/ rluipa_q_a_9-22-10.pdf (emphases added). *See also* Brief for the United States at 10-14, *Thunderhorse v. Pierce*, No. 09-1353 (U.S. Dec. 2010) (noting that under RLUIPA, courts uniformly require the government to show it considered but rejected alternative means) [hereinafter "U.S. Amicus Br. in *Thunderhorse*"].

Nine federal circuit courts also have agreed that the statute requires a state to consider less restrictive alternatives before prohibiting a challenged religious activity. *See, e.g.*, *Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33, 41 n.11 (1st Cir. 2007) ("[T]o meet the least restrictive means test, prison administrators generally ought to explore at least some alternatives, and their rejection should generally be accompanied by some measure of explanation."); *see also, e.g.*, *Couch*, 679 F.3d at 202; *Ali v. Quarterman*, 434 F. App'x 322, 325 (5th Cir. 2011); *Jova v. Smith*, 582 F.3d 410, 416 (2d Cir. 2009); *Koger v. Bryan*, 523 F.3d 789, 800 (7th Cir. 2008) *Washington*, 497 F.3d at 284; *Hoevenaar v. Lazaroff*, 422 F.3d 366, 370 (6th Cir. 2005); *Murphy*

v. Mo. Dep't of Corr., 372 F.3d 979, 989 (8th Cir. 2004); *Warsoldier*, 418 F.3d at 999.[6]

Only the Eleventh Circuit has adopted a lower standard. In *Knight v. Thompson*, 723 F.3d 1275, 1286 (11th Cir. 2013), the Eleventh Circuit concluded: "RLUIPA asks only whether efficacious less restrictive measures actually exist, not whether the defendant considered alternatives to its policy." But this interpretation runs counter to the statutory

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[6] *See also Kuperman v. Wrenn*, 645 F.3d 69, 80 (1st Cir. 2011) (prison grooming policy did not violate RLUIPA because "the unrebutted Prison Officials' affidavits show that they considered and rejected alternatives to the shaving regulation"); *Casey v. City of Newport*, 308 F.3d 106, 114 (1st Cir. 2002); *Ind*, 2014 WL 1312457, at *16 n.1 (noting that "[t]hough the Tenth Circuit has never explicitly addressed this point, because of the wide consensus among the other circuits, the Court finds that this requirement [that a state must show it actually considered and rejected other less restrictive alternatives before adopting the challenged policy] is applicable").

The trial court below, however, felt constrained by the Eighth Circuit's prior decision in *Fegans v. Norris*, which had upheld the same ADC's grooming policy. But *Fegans* is distinguishable on its facts. The state in *Fegans* presented evidence that an uncut beard posed a security risk because the plaintiff-prisoner himself had two previous escape attempts and the smuggling of contraband within the prison. 537 F.3d at 907; U.S. Amicus Br. in *Thunderhorse* at 13-14 (describing *Fegans* as upholding a prison policy because "defendants [ ] explained why specific less restrictive alternatives [were] not feasible").

language, which requires the "*least* restrictive means of furthering that compelling governmental interest," 42 U.S.C. § 2000cc-1(a)(2) (emphasis added), and to the great weight of authority.[7]

Consistent with the plain text of the statute, the Department of Justice's interpretation, and the vast majority of the federal circuit courts, this Court should confirm that RLUIPA and its strict scrutiny test require a state to show that it has actually considered and rejected less restrictive alternatives before prohibiting an inmate from exercising an

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[7] Moreover, just six years earlier, in a *per curiam* opinion, the Eleventh Circuit remanded a RLUIPA claim in order for prison officials to present evidence that was not "over ten years old" to support the challenged activity. *See Lanthan v. Thompson*, 251 F. App'x 665, 667 (11th Cir. 2007) (per curiam). And district courts in that circuit have also applied a more robust standard. *See, e.g.*, *United States v. Sec'y, Fla. Dep't of Corr.*, No. 12-cv-22958, 2013 WL 6697786, at *14 (S.D. Fla. Dec. 6, 2013) ("Defendants' rationale for this provision is 'mere speculation,' which RLUIPA proscribes. . . . There is no evidence that Defendants have considered [ ] less restrictive alternative[s].") (citations omitted); *Benning v. Georgia*, 864 F. Supp. 2d 1358, 1366 (M.D. Ga. 2012) ("A number of circuit courts have determined that . . . the government must demonstrate that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice. . . . [T]he mere assertion of security or health reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement.") (quotation marks and citations omitted).

aspect of his religious beliefs. The state must substantively review the alternatives; "consideration and rejection" of alternative means cannot be merely *pro forma*. *See Warsoldier*, 418 F.3d at 996 (state cannot meet its burden unless "it demonstrates that it has *actually* considered and rejected *the efficacy* of less restrictive measures before adopting the challenged practice") (emphases added) (citations omitted); *see also Spratt*, 482 F.3d at 41 (same); *Shilling v. Crawford*, 536 F. Supp. 2d 1227, 1233 (D. Nev. 2008) ("conclusory affidavits that do not affirmatively show personal knowledge of specific facts" and generalized assertions "that a practice is the least restrictive" are insufficient) (internal quotation marks and citations omitted).

The State did not satisfy the essential "least restrictive alternatives" test here. During the evidentiary hearing, the court asked: "[I]t appears that [California] ha[s] a grooming policy and then the Ninth Circuit allowed this beard, half inch beard, have you had any sort of correspondence, any training, or anything based on that, that the California officials have mentioned anything or come and spoken at any conference or anything, have they talked about what the impact has been in their prison system?" JA 110-11. In response, Warden Lay responded: "*I haven't had an opportunity to visit with anyone about that. As a matter of fact, I wasn't aware of that case until this came up*." JA 111 (emphasis added).

Indeed, the State did not consider the experience of more than *forty* prison systems have grooming policies without express restrictions on beards, or have provisions for religions exceptions.[8] Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 964-70 App. B (2012); Brief for the United States in Supp. of Appellee at 19-20, *Garner v. Kennedy*, 713 F.3d 237 (5th Cir. 2013) ("The Federal Bureau of Prisons, and more than 40 out of the 50 States, allow their inmates to wear trim beards . . . .") (citations omitted). For example, the Federal Bureau of Prisons, which is the nation's largest prison system with over 200,000 inmates, provides: "An inmate may wear a mustache or beard or both. The Warden shall require an inmate with a beard to wear a beard covering when working in food service or where a beard could result in increased likelihood of work injury." 28 C.F.R. § 551.2.

There is no evidence that these prison systems have more security incidents than Arkansas because

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[8] Only 10 jurisdictions (Alabama, Arkansas, Florida, Georgia, Idaho, Louisiana, Mississippi, South Carolina, Texas, and Virginia) have prison policies with explicit grooming policies and without religious exceptions. Sidhu, *supra*, at 970-72 App. B; Ind. Dep't of Correction, Policy & Admin. Proc. 02-01-104(X). Within these 10 jurisdictions, courts have found several of these grooming policies did not meet strict scrutiny under RLUIPA. *See, e.g.*, *Garner*, 713 F.3d 237 (Texas); *Couch*, 679 F.3d 197 (Virginia).

of the differences in grooming policies. *See, e.g.*, *Garner*, 713 F.3d at 247 ("We [ ] find it persuasive that prison systems that are comparable in size to Texas's -- California and the Federal Bureau of Prisons -- allow their inmates to grow beards, and there is no evidence of any specific incidents affecting prison safety in those systems due to beards.").

Indeed, the purported security concerns relied upon by the State were purely illusory. Warden Lay testified:

> Q [Petitioner]. Have you -- has there been a whole lot of escapes from the Department of Correction because people were wearing beards?
>
> A [Warden Lay]. Not as of recent years, thank goodness. I do recall one back in the 70s or 80s where the individual grew a beard and blended in with homeless people in Houston, Texas, and I think two or three years before they captured him, and that was to alter his appearance. *Of course, that went the other way around, I think he left the ADC clean shaven and grew the beard after he got out, and he was eventually apprehended*, but.

> Q. So if -- somebody could escape from Cummins then and get out and alter their appearance by growing a beard, right?
>
> A. Oh, certainly, if we don't apprehend them before they have time to do that.

JA104-05 (emphasis added). The one example Warden Lay was able to provide -- that a *clean-shaven* inmate escaped and later grew a beard -- does nothing to support the ADC no-beard policy.

ADC's own grooming policy permits a quarter-inch beard for medical conditions. The prison officials did not provide any concrete examples how permitting a half-inch beard on account of religious beliefs (versus a quarter-inch beard for medical reasons) would lead to greater security concerns. Rather, Director Harris testified:

> Q [Petitioner]. [H]ow then is a quarter inch beard for dermatological reasons not a security threat given -- again, given that it's been stated that people can grow different -- a half inch beard can be one way on one person, different on another, where a quarter inch beard would be the same way, explain to me how that is not a

security threat, but a half inch beard is?

A [Director Harris]. A half inch is longer than a quarter inch.

Q. . . . [I]f your policy is to stop the moving of contraband and weapons in the facility, and your main objection is that the facial hair is the conduit to do so, to move it around the facility or whatever, then explain to me how a quarter inch beard is going to be any different than a half inch beard.

A. The last time I probably walked one of my institutions was before the holidays. The quarter inch beards, you know, primarily, you can still see the skin.

Q. And you're saying a half inch beard, you wouldn't be able to do that?

A. I don't think so, no. . . .

Q. [A] quarter inch beard, someone growing -- one person growing a quarter inch beard might grow it thicker than somebody else, where you can see the skin on him, but you can't see it on the other person. Would that --

> A. I suppose that's possible, sure.
>
> Q. So they could hide contraband in that, too, right?
>
> A. That's a possibility.

JA 124-25. *Compare Couch*, 679 F.3d at 204 (prison grooming policy did not meet strict scrutiny because state did not explain why it permitted medical exemptions but not religious exemptions for beards).

The State failed to consider whether its security concerns could be addressed by less restrictive alternatives than a flat-out prohibition of beards. It failed to evaluate the experience of more than 40 other jurisdictions that have permitted beards without incident. It further failed to consider the absence of any real-world security concerns it had experienced with beards. The State's superficial justification fails altogether to demonstrate that it's beard prohibition is the "least restrictive means of furthering th[e] compelling governmental interest" in prison security. 42 U.S.C. § 2000cc-1(a)(2).

CONCLUSION

For the reasons set forth above, the decision below should be reversed.

Respectfully submitted,

Anand Agneshwar
Counsel of Record
ARNOLD & PORTER LLP
399 Park Avenue
New York, New York 10022
(212) 715-1000
anand.agneshwar@aporter.com

Anna K. Thompson
Carl S. Nadler
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
923 Gardens Blvd.
Charlottesville, Virginia 22901
(434) 978-3888

Counsel for Amicus Curiae

Dated: May 29, 2014