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 FORMER PRISON WARDENS AMICI CURIAE IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* are former prison wardens who are sensitive to the pressing needs and distinct challenges of the penal setting. As individuals who have worked on the front lines of prison administration, *amici* recognize that there are cases where the important religious rights of inmates must give way to the security concerns of the prison system. But this not such a case. Rather, in the view of *amici*, this is a case where the attenuated security concerns articulated by Respondents reflect post-hoc rationalizations, outdated philosophies, and policies that fall short of industry standards.

*Amici* believe that the goals of prison administration are best served when prison officials are motivated to engage in meaningful analysis of requests for religious accommodations. Requiring officials to demonstrate thoughtful consideration of their practices and to make accommodations where possible not only weeds out practices that unnecessarily burden religious freedom, it leads to better public policy and more effective security safeguards for prisons.

*Amicus* Jeanne Woodford is currently a Senior Distinguished Fellow at the Chief Justice Earl War-

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[1] Pursuant to Rule 37, blanket letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation of this brief.

ren Institute on Law and Social Policy at University of California, Berkeley School of Law. From 1999 to 2004, she served as warden of California's San Quentin State Prison. Ms. Woodford was the Defendant in *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005), in which the Ninth Circuit ruled in favor of a prison inmate requesting a religious accommodation in connection with California's previous grooming policy. In 2004, Ms. Woodford was appointed Director of the California Department of Corrections and Rehabilitation (CDCR), the largest correctional system in the United States, and in July 2005, she was appointed Undersecretary of CDCR. Ms. Woodford then became the Chief of the San Francisco Adult Probation Department. She retired in 2008 after 30 years of work at the state and county level of government in the field of criminal justice.

*Amicus* Dr. Reginald A. Wilkinson is currently the President and CEO of the Ohio College Access Network. From 1986 to 1988, he served as warden of Ohio's Dayton Correctional Institution. In 1991, Dr. Wilkinson was appointed Director of Ohio's Department of Rehabilitation and Correction (ODRC). In this position, Dr. Wilkinson was the Defendant in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), in which this Court upheld the constitutionality of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc. He retired in April 2006 after 33 years of experience with the ODRC. Dr. Wilkinson is also the former Chairperson and current member of the National Institute of Corrections Advisory Board as well as Chair of the national Prison Rape Review Panel. He is a past president of the American Correctional Association, the Associa-

tion of State Correctional Administrators, and the International Association of Reentry. He is also the former Vice Chair of the International Corrections and Prison Association, North America.

*Amicus* Richard Subia is currently a Public Safety Consultant and sits on the Heald College Criminal Justice Advisory Board. From 2006 to 2007, he served as warden for California's Mule Creek State Prison. Mr. Subia has over 26 years of experience with CDCR, during which time he also held the positions of Correctional Officer, Correctional Sergeant, Correctional Lieutenant, Correctional Administrator, and statewide Director of the Division of Adult Institutions.

*Amicus* Dr. Allen Ault is currently the Dean of the College of Justice & Safety at Eastern Kentucky University. From 1971 to 1973, Dr. Ault served as warden for Georgia's Diagnostic and Classifications Prison, a maximum security prison. He also served as Chief for the National Institute of Corrections, as the Commissioner of state departments of corrections for five governors in three states (Colorado, Georgia, and Mississippi), and as Chairman of the Florida Board of Corrections for eight years. During his career, he has been Chairman and Full Professor in the Criminal Justice Department at Georgia State University, a Rehabilitation Counselor, Director of State Programs for the Mentally Retarded, and President of a national criminal justice consulting firm.

## INTRODUCTION AND SUMMARY OF ARGUMENT

There is no question that correctional facilities are a unique setting fraught with significant security concerns. But prison officials must address these concerns while taking into account other important interests, including the religious rights of inmates. When drafting the Religious Land Use and Institutionalized Persons Act (RLUIPA), Congress was well aware of the pressing security issues in the penal context. Yet Congress also recognized that prison officials sometimes impose arbitrary rules that unnecessarily restrict religious liberty. In the view of *amici*, this case is precisely the type Congress was concerned about—where vaguely articulated security concerns are being used to justify an outdated and unwarranted policy depriving an inmate of his religious rights.

This brief seeks to bring the expertise of former prison wardens to bear on four important points.

I. First, careful consideration of an inmate's request for religious accommodation, taking account of any unique security threats and characteristics of the inmate, is consistent with good prison administration practice. Experts in prison administration advocate use of objective criteria to evaluate the risks and needs of a specific inmate, in contrast to broad policies based on a one-size-fits-all approach. Requiring prisons periodically to engage in this type of thoughtful consideration not only gives meaning to RLUIPA's strict scrutiny review, it leads to sound policy that promotes more effective security while

simultaneously better meeting inmates' needs. Courts should require prison officials to present evidence showing that they carefully analyzed an inmate's accommodation request in light of the specific circumstances of that inmate and that prison before denying the request.

II. Second, in addition to their legal significance, comparisons to policies of other prisons serve the interests of effective prison administration. National prison administration bodies encourage prison officials, as a matter of best practice, to contact other jurisdictions with comparable facilities and thoroughly review relevant literature to avoid reinventing systems that have been successfully implemented or refined by other jurisdictions. A range of resources exists to facilitate this type of helpful comparison of policies, from formal guidance provided by national bodies, to the common practice of picking up the phone to call other prisons.

The successful implementation of less restrictive approaches in comparable jurisdictions is legally significant because it provides strong evidence that the policy at issue is not the least restrictive alternative. Arguably such evidence should create a presumption that less restrictive alternatives exist, particularly when the vast majority of jurisdictions successfully implement such approaches. If prison officials do not rebut this evidence by demonstrating why the policies of other jurisdictions are unworkable in their facility, then wide-spread use of less restrictive approaches may be determinative under RLUIPA's searching review. Further, courts should require prison officials to provide evidence demonstrating

their expertise in industry standards and practices so that courts can determine whether the officials' judgments are worthy of deference.

III. Third, the security concerns articulated by the prison officials here lack credibility and appear to rest on post-hoc rationalizations as well as outdated or legally invalid justifications. Prohibiting a half-inch beard maintained for religious purposes is far from the least restrictive method of preventing contraband secretion; in fact, it is probably one of the least effective solutions to that problem. Similarly, prohibiting such beards is a much less effective answer to negligible escape identification concerns than the very manageable—and widely employed—solution of keeping multiple digital photographs in an inmate's file. In any event, Respondents here have not even attempted to explain why any of their concerns apply only to beards grown for religious but not medical reasons.

Respondents' have also explained that their denial of accommodation here stems in part from the desire to avoid having to make exceptions to prison rules. But by its very terms, RLUIPA requires that exceptions be made in some cases. Respondents may also be influenced by political considerations, which can lead prison administrators to establish policies that restrict the provision of any additional benefits to inmates, even when the requested accommodations are meritorious.

IV. Fourth, a body of evidence demonstrates that allowing inmates to practice their religion may lead

to security benefits for prisons, as well as broader rehabilitative benefits for inmates and society.

## ARGUMENT

### I. Careful Consideration of An Inmate's Request for Religious Accommodation Is Consistent with Good Prison Administration Practices.

RLUIPA requires prison officials to "demonstrate[]" that a restriction on religious freedom is "in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000cc-1(a). The statute also requires officials to "meet[] the burdens of going forward with the evidence and of persuasion" on these issues. 42 U.S.C. §§ 2000cc-1, 2000cc-5(2).

When Congress drafted this statute, two of RLUIPA's Senate sponsors expressed concern that "prison officials sometimes impose frivolous or arbitrary rules. Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Senators Hatch and Kennedy). Thus, at a minimum RLUIPA was intended to weed out arbitrary and frivolous policies that burden religious freedoms while rendering negligible benefits to prison systems.

Here, the Eighth Circuit upheld just such an arbitrary rule, without requiring any "demonstrat[ion]" that the prison officials considered the rule's necessi-

ty, or any other alternatives, before denying the requested accommodation. *See* J.A. 184-87. To the contrary, the court appears to have applied a presumption that RLUIPA's burden has been met, "absent substantial evidence in record indicating that response of prison officials to security concerns is exaggerated." J.A. 186 (characterizing an earlier Eighth Circuit decision). Under this rule, which inappropriately shifts the burden to inmates, so long as prison officials make a talismanic reference to "security concerns," the court presumes that any prison practice survives strict scrutiny. This holds true even if prison officials merely proffer conclusory justifications, nonresponsive rejections of an inmate's proposed alternatives, and obsolete policies out of line with industry standards. Transforming RLUIPA into a mere rubber stamp of prison action will allow officials to reflexively reject any religious accommodation request without actual consideration of whether the prison's rules remain necessary, or even beneficial, for the prison.

This Court should reject that approach and instead prescribe a rule requiring prison officials to provide specific, credible evidence demonstrating they "actually considered"—rather than automatically denied—an inmate's request for religious accommodation. *Greene v. Solano Cnty Jail*, 513 F.3d 982, 989-90 (9th Cir. 2008); *see also* S. Rep. No. 103–111, at 10 (1993) ("[I]nadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements."). This consideration should focus on specific circumstances of the particular inmate and prison setting.

Such inmate-specific consideration is consistent with the type of analysis at the forefront of best practices for prison management. Specifically, the National Institute of Corrections (NIC) has observed that prisons and jails ought to implement objective classification systems that evaluate risks and needs based on criteria unique to each inmate. "[O]bjective systems depend on a narrow set of well-defined legal factors (e.g., severity of current offense, prior convictions, etc.) and personal characteristics (e.g., age, marital status, etc.)." These items are then "used to assess an inmate's level of risk or program needs." James Austin, *Objective Jail Classification Systems: A Guide for Jail Administrators* 3, U.S. Dep't of Justice, Nat'l Inst. of Corr. (Feb. 1998), *available at* http://nicic.gov/library/014373.

Classification systems "fulfill a wide range of correctional purposes, including preserving order in an institution; sustaining prisoner discipline; assessing prisoners' needs; assigning prisoners to appropriate programs; providing equitable treatment; protecting staff, prisoners, and the public; allocating prison resources; and planning for prison management." James Austin & Patricia Hardyman, *Objective Prison Classification: A Guide for Correctional Agencies* 6, U.S. Dep't of Justice, Nat'l Inst. of Corr. (July 2004), *available at* http://nicic.gov/library/019319. Classification systems are also "the principal management tool for allocating scarce prison resources efficiently," and they "help to minimize the potential for prison violence, escape, and institutional misconduct." *Id.* at 1.

In the experience of *amici*, an effective classification system would allow prison officials to evaluate a religious accommodation request based on the particular security concerns (or lack thereof) posed in a specific context.[2] For inmates who receive accommodations, additional security measures can be implemented to address specific concerns that may arise. Engaging in this type of thoughtful consideration is not only necessary to give meaning to RLUIPA's protections, it leads to sound policy that promotes more effective security while simultaneously better meeting inmates' needs.

## II. Comparisons to Other Prison Policies Are Not Only Legally Significant, They Help to Identify Best Practices of Prison Administration.

The Eighth Circuit gave little or no weight to the fact that many other jurisdictions do not restrict beards maintained for religious reasons. J.A. 186-87. However, in addition to their relevance to the RLUIPA analysis, *amici* believe comparisons with policies

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[2] This particularized analysis focused on application of objective criteria to the specific circumstances of individual inmates stands in contrast to subjective classification models (now largely defunct). Under these older models, prison officials reached decisions "based on the agency's correctional philosophy," or other subjective criteria. James Austin, *Objective Jail Classification Systems: A Guide for Jail Administrators* 17, U.S. Dep't of Justice, Nat'l Inst. of Corr. (Feb. 1998), *available at* http://nicic.gov/library/014373. Painting in broad and arbitrary brushstrokes led to problematic classifications that were inconsistent or inaccurate, outcomes that undermined penological interests.

of other prisons are valuable aids to good prison administration.

### A. Prison Officials Should Periodically Review Policies and Practices of Other Institutions to Keep Current and Avoid Re-inventing the Wheel.

To identify best practices in prison administration, prison officials can and should regularly compare their own policies to those of other institutions on related issues. Doing so helps prison officials 1) keep up with swiftly changing technology in the prison management industry, and 2) avoid re-inventing the wheel when other prisons have found workable solutions or refined practices for prison administration. A rule that incentivizes prison officials to review the practices of other jurisdictions where relevant would encourage sound policy and better use of limited prison resources.

Indeed, in a speech before the International Corrections and Prisons Association, *amicus* Dr. Wilkinson explained that building and sustaining best practices depend on the willingness of prison officials to "benchmark outside the organization for correctional best practices" and "avoid reinventing the wheel" by working "hard and with creativity in an effort to identify where there are established programs whose effectiveness has been documented and may be used to guide the creation of a best practice." Dr. Reginald A. Wilkinson, *Correctional Best Practices: What Does It Mean In Times of Perpetual Transition?* 4, Keynote Speech Before the Fifth Annual Conference, International Corrections and Prisons

Association, Miami, Florida (Oct. 27, 2003). Dr. Wilkinson also noted that "it is only prudent to build correctional best practices that may be replicated by others." *Id.*; *see also* Lonnie Lemons, *Developing Effective Policies and Procedures* 10, The Criterion (2010), *available at* http://www.mycama.org/uploads/7/7/6/3/7763402/the_criterion__-__august_20101.pdf.

Similarly, the NIC recommends that prison officials considering new classification criteria should engage in a "thorough review of the literature" and "avoid . . . reinvent[ing] a system that already has been developed or refined by another jurisdiction." *See* James Austin & Patricia Hardyman, *Objective Prison Classification: A Guide for Correctional Agencies* 32, U.S. Dep't of Justice, Nat'l Inst. of Corr. (July 2004), *available at* http://nicic.gov/library/019319. The NIC further noted that "[a]n important strategy for learning about models and promising approaches is to contact . . . comparable state agencies that have implemented the model . . . ." *Id.*

Officials who wish to identify and compare the policies of other prisons have access to a wide array of resources. In the experience of *amici*, prison officials frequently pick up the phone and call officials in other jurisdictions to learn more about their policies, and many prison policies are a matter of public record. Prison officials attend workshops and conferences, and they also employ consultants who have visibility into policies of other prisons. Finally, a number of professional associations and agencies focus on the development of best practices and/or the dissemination of such practices to prison officials, including the American Correctional Association

(which publishes standards), the Criminal Justice Institute, the American Bar Association, the International Community Corrections Association, and the NIC.

Had Respondents explored available resources, presumably they would have recognized that their policy stands as an aberration when viewed against wide-spread industry practices based on less restrictive grooming policies. Thirty-nine states, the United States, and the District of Columbia permit beards either for all prisoners or for prisoners with religious motivation. *See* Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 964-72 (2012). Similarly, the ABA recommends allowing prisoners "a reasonable choice in the selection of their own hair styles and personal grooming, subject to the need to identify prisoners and to maintain security." The ABA went on to note that "experience with religiously motivated grooming choices demonstrates the *low level of security risk* such choices entail, when reasonably regulated." American Bar Association, *Standards for Criminal Justice: Treatment of Prisoners* 216 (3d ed. 2011) (emphasis added); *see also id.* at 209; American Correctional Association, *Standards for Adult Correctional Institutions* 77 (4th ed. 2003).

But when asked below about the experience of other states, Respondents' witnesses testified that they were not "aware" of experiences elsewhere. *See* J.A. 101-02, 105-06, 110-11, 119, 127. Respondents' failure to educate themselves about other less restrictive alternatives should not shield their decision from RLUIPA's searching review.

### B. The Ability of Other Prisons To Implement Less Restrictive Solutions Strongly Suggests that the Policy At Issue is Not the Least Restrictive Alternative.

There is little doubt that comparisons to policies of other prisons are relevant under RLUIPA's legal analysis. Many courts have found it legally significant that another prison, with similar compelling government interests, is able to accommodate the same activity that is being denied by defendant prison officials. Essentially, successful accommodations by other prisons create a strong suggestion—arguably even a presumption—that other workable, less restrictive alternatives are available; prison officials before the court must rebut that presumption by explaining how their prison is differently situated from other institutions. *See Warsoldier v. Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005) ("Nevertheless, CDC offers no explanation why these prison systems are able to meet their indistinguishable interests without infringing on their inmates' right to freely exercise their religious beliefs."); *Spratt v. Rhode Island Dep't of Corr.*, 482 F.3d 33, 42 (2007) (government failed strict scrutiny "in the absence of any explanation . . . of significant differences" between defendant's prison and federal prisons with less restrictive policies); *Washington v. Klem*, 497 F.3d 272, 285 (3d Cir. 2007) (government failed strict scrutiny where its "other institutions" made the requested accommodation); *Garner v. Kennedy*, 713 F.3d 237, 247 (5th Cir. 2013) (finding 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").

Even under the less searching review standard applied in the context of a First Amendment challenge to prison policies, this Court has found the activities of other prisons relevant to determining the propriety of the restriction at issue. *See Procunier v. Martinez*, 416 U.S. 396, 414 n.14 (1974) ("While 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."); *Turner v. Safley*, 482 U.S. 78, 97-98 (1987) (reasoning that the fact that Federal Bureau of Prisons generally allowed marriages suggested that there were alternatives to state prison's refusal to allow inmates to marry).

As discussed above, Respondents' policy denying accommodation for beards maintained for religious purposes is out of step with the less restrictive practices employed by the great majority of jurisdictions and recommended by national prison organizations. Yet Respondents have failed to provide any meaningful explanation—either below before the Magistrate or in their opposition to certiorari before this Court—why they are unable to allow an activity that so many other jurisdictions have been able to accommodate.

Certainly deference to the expertise of prison officials is warranted in many contexts. But no deference is appropriate where, as here, Respondents made no showing of any careful analysis or familiari-

ty with industry practices applicable to Petitioner's requested accommodation. *See Koger v. Bryan*, 523 F.3d 789, 800 (7th Cir. 2008) ("We can only give deference to the positions of prison officials as required by *Cutter* . . . when the officials have set forth those positions and entered them into the record.").

## III. The Security Concerns Respondents Articulated Lack Credibility And Appear to Rest on Outdated or Legally Invalid Justifications.

### A. Prohibiting a Half-Inch Beard is One of the Least Effective Methods of Preventing Contraband Secretion.

The Eighth Circuit concluded that one security concern justifying Respondents' broad prohibition on inmate beards is the desire to prevent "concealing contraband." J.A. 186. In the experience of *amici*, however, the last place an inmate would choose to hide contraband is in a half-inch beard. If placed in a short beard, contraband could easily fall out or be seen by prison staff. Inmates are much more likely to hide forbidden objects in socks, shoes, boots, coats, other clothes, the hair on top of their heads, or other areas of the body not in plain view and more difficult to search. Thus, prohibitions on short beards do not provide any meaningful deterrent to the secretion of contraband.

If there is any doubt about whether items are stashed in an inmate's beard of half-an-inch (or more), prison staff can—and in fact often do—require inmates to vigorously run their fingers through their

beards. In the experience of *amici*, prisons frequently employ this policy, particularly prisons with very lenient grooming standards or no grooming restrictions at all. For example, in Missouri, where inmates "may have whatever hair and beard length they prefer," this privilege may be lost if the inmate refuses "to promptly follow staff directions with regard to a search of their hair or beard." Sidhu, 66 U. Miami L. Rev. at 950 n. 161 (citing *State Grooming Standards* 10 (Rev. Ulli Klemm, Adm'r, Religion & Volunteer Services, Bureau of Inmate Services, Pa. Dep't of Corr., ed.) (Dec. 17, 2009)). Similarly, Wyoming allows inmates to keep head and facial hair "at any natural length" provided that the hair "is able to be searched." *Id.* at 970 (citing Wyo. Dep't of Corr., Policy and Procedure: Inmate Grooming, Hygiene, and Sanitation, No. 4.201 § IV(D)(5) (2006), *available at* http:// corrections.wy.gov/Media.aspx?mediaId=37).

When an inmate runs his hands through his own hair, staff can avoid coming in contact with the inmate, which addresses both safety and sanitation concerns. It is doubtful whether this exercise would even be needed for a mere half-inch beard. But given that some prisons use this technique for inmates who have beards of unlimited lengths, certainly it would also be effective for a much shorter beard. It is unclear why this less restrictive alternative, which other prisons have employed successfully, would not be effective for Petitioner.

Moreover, the fact that Respondents allow inmates to have a quarter-inch beard for medical reasons severely undercuts their claim that an exception

cannot be made for religious reasons. J.A. 57. The security concerns should be no different based on the type of exception granted.[3]

As discussed in Part I, the most effective means of promoting security is through use of a modern objective inmate classification system, which assesses security risks based on the particular inmate at issue. Thus, if an inmate had previously tried to secrete contraband, heightened restrictions on that inmate might be warranted. For example, both Hawaii and Missouri have enhanced grooming restrictions for inmates who have been caught hiding contraband. *See* Sidhu, 66 U. Miami L. Rev. at 964.

Here, Respondents presented no evidence that Petitioner posed a unique contraband secretion risk. Had they presented such evidence, this would likely be a different case. But Respondents' broad assertion that beards present a contraband secretion risk is simply not credible nor deserving of any deference.

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[3] *See* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA'S Prisoner Provisions*, 28 Harv. J.L. & Pub. Pol'y 501, 549 (2005) ("Allowing prisoners to grow beards for medical reasons, which also poses the potential of doing appreciable damage to the interest of preventing contraband from being hidden in facial hair, fatally undermines [the state's] assertion that denying [inmates] the ability to grow a [shorter] beard serves a compelling interest.").

### B. Prohibiting a Half-Inch Beard is Not the Least Restrictive Method of Ensuring Inmate Identification or Preventing Prison Escape.

The Eighth Circuit also accepted Respondents' argument that their no-beard rule is justified on the ground that an inmate could change his appearance by shaving a beard upon escape from the prison. J.A. 186. This argument is problematic for at least three reasons.

First, in the experience of *amici*, it is a common practice for prisons to take a new picture of an inmate as the inmate's appearance changes. This would include maintaining before-and-after pictures of an inmate who grows a beard, as well as one who changes hair style or as the inmate ages. *See Garner*, 713 F.3d 237 (noting that prison officials could take a new photograph if an inmate changed his appearance); *Luckette v. Lewis*, 883 F. Supp. 471, 481 (D. Ariz. 1995) (noting the concern that an inmate may change appearance and evade identification with less stringent grooming policies can be "easily rectified."). Maintaining before and after pictures is also an option the ABA has set forth. *See* American Bar Association, *Standards for Criminal Justice: Treatment of Prisoners* 209 (3d ed. 2011) ("One solution that has been suggested is that the identification card prisoners are required to carry on their person and produce to staff on request matches the prisoner's daily and current appearance—including any coverings—but that a photo without religious head covering is maintained by prison administrators." (citing *Forde v. Zickefoose*, 612 F. Supp. 2d 171,

178-79 (D. Conn. 2009))). Thus, if the inmate escaped and shaved his beard, authorities could simply compare his appearance against the photos of the inmate with no beard.

This is not an onerous practice. Digital cameras make it easy and inexpensive for prisons to keep multiple pictures in an inmate's file, and some prisons even charge inmates a nominal fee for taking a new picture. For example, Alaska regularly re-photographs inmates as a matter of policy. *See* Sidhu, 66 U. Miami L. Rev. at 950 n. 161 (citing State Grooming Standards 1 (Rev. Ulli Klemm, Administrator, Religion & Volunteer Services, Bureau of Inmate Services, Pa. Dep't of Corr., ed.) (Dec. 17, 2009) ("If a prisoner drastically changes his or her appearance, e.g., changing hair length or color, shaving, or growing a beard or mustache, the individual shall be re-photographed for purposes of identification.")); *see also* Raj Kumar Singh, *Male Prisoner Hair Law: Analysis and Discussion*, The Raj Singh Collection (1997), http://www.choisser.com/longhair/rajsing3.html (report that in a survey of state prisons, the majority of states that responded said they did not have restrictive hair regulations and yet this "caused them no negativity in the areas of prisoner identification and sanitation/hygiene").

In the experience of *amici*, maintaining before and after pictures of inmates with facial hair is a simple step, and it certainly provides a much more effective security and identification measure than a blanket ban on facial hair. Before the magistrate below, Respondents offered no reason why this com-

mon practice would not provide a workable less restrictive alternative to address identification concerns. *See* J.A. 104, 123. This alternative seems particularly feasible here, where Respondents already require a photograph when an inmate enters the prison, and additional photographs thereafter whenever "the growth or elimination of hair, mustaches, sideburns and/or beard significantly changes [an prisoner's] appearance." Ark. Admin. Code. 004.00.1-I(C)(6).

Second, an inmate who grew a beard for medical reasons could change his appearance just as easily as an inmate who had a beard for religious reasons. Yet Respondents failed to explain why their security concerns do not extend to medical exceptions and why religious exceptions should be treated differently.

Third, with modern prison technology, prisoner escape is a statistically negligible concern. A 2005 study that analyzed prison escapes in the United States from 1988 to 1998 found that approximately 1.4% of the inmate population escaped annually. Of the escapees, the vast majority—88.5%—were "walkaways" from community facilities with minimal supervision. The study showed the escapee percentage declining steadily in the United States, which means the percentage is likely much lower now. *See* Richard F. Culp, *Frequency and Characteristics of Prison Escapes in the United States: An Analysis of National Data*, 85 Prison J. 270, 287 (Aug. 2005); *see also* James Austin & Patricia Hardyman, *Objective Prison Classification: A Guide for Correctional Agencies* 12, U.S. Dep't of Justice, Nat'l Inst. of Corr. (July 2004), *available at* http://nicic.gov/library/019319 ("In gen-

eral, the vast majority of prisoners never become disruptive or difficult to manage. The most serious forms of disruptive behaviors within a prison, such as homicide, escape, aggravated assault on other prisoners or staff, and rioting, are rare events."); Raj Kumar Singh, *Male Prisoner Hair Law: Analysis and Discussion*, The Raj Singh Collection (1997), http://www.choisser.com/longhair/rajsing3.html (estimating that "true escapes" were closer to about "one and one-half tenths of one percent (0.001592)").

In other words, when prison officials prohibit beards as an answer to prison escape, they are relying on an indirect solution to a largely non-existent problem. A far better approach would be to focus on implementing or improving an objective inmate classification system focused on providing solutions more relevant to the particular inmate and prison context. "Security risk assessments measure the likelihood of a prisoner engaging in high-risk behavior or attempting to escape while incarcerated." James Austin & Patricia Hardyman, *Objective Prison Classification: A Guide for Correctional Agencies* 4-5, U.S. Dep't of Justice, Nat'l Inst. of Corr. (July 2004), *available at* http://nicic.gov/library/019319. Thus, had Respondents presented evidence that Petitioner posed a unique escape risk, then heightened grooming restrictions might be warranted. No such evidence, however, was presented below.

### C. The Desire to Treat Inmates Alike Is Not a Compelling Government Interest.

The most plausible explanation Respondents articulated for their denial of Petitioner's accommodation request was a desire "to treat all inmates fairly and alike." Resp. Op. Cert. at 3. "[A]llowing Petitioner to maintain a beard, while not affording the same opportunity to other inmates, would elevate Petitioner's status above that of other inmates . . . ." *Id.*; *see also* J.A. 186 ("[A]ffording special privileges to an individual inmate could result in his being targeted by other inmates.").

What this argument really boils down to is the natural desire of prison officials to avoid having to make exceptions to their rules. Indeed, when asked about allowing an inmate "to do something that other inmates are not allowed to do," one official responded, "That's the last thing you would want to happen in an institution." J.A. 118. Far from being a new concern unique to Respondents, "[t]he Government's argument echoes 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." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006); *see also Religious Liberty Protection Act of 1998: Hearings Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 105th Cong. 2 (1998) (statement of Sen. Orrin Hatch, Chairman, S. Comm. on Judiciary) (Government too often "clings to its creed that, 'rules are rules,' no matter the damage done to the individual soul").

As former prison officials, *amici* are sympathetic to the general desire to avoid granting exceptions where possible. Blanket standards and generally applicable rules are easier to administer, even when rules are arbitrary or they lead to unfavorable outcomes.

But *amici* also recognize that, at its very essence, RLUIPA's purpose is to require prisons to make exceptions in some cases. RLUIPA explicitly prohibits burdens on religious exercise "even if the burden results from a rule of general applicability." 42 U.S.C. § 2000cc-1(a); *see also Gonzales*, 546 U.S. at 436 ("But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rule[s] of general applicability.'"). The Ninth Circuit similarly recognized the problematic nature of favoritism arguments under RLUIPA. "[W]e discounted the favoritism argument, since this effect 'is present in every case that requires special accommodations for adherents to particular religious practices.'" *Shakur v. Schriro*, 514 F.3d 878, 886 (9th Cir. 2008) (quoting *Ward v. Walsh*, 1 F.3d 873, 878 (9th Cir. 1993)); *see also Benning v. Georgia*, 864 F. Supp. 2d 1358, 1367 (M.D. Ga. 2012) ("Put simply, any religious accommodation not expressly contemplated by [the Defendants'] standard operating procedure impinges the Defendants' interest in uniformity, yet the Defendants regularly accommodate inmates' religious requests, and they note no adverse effects that have resulted."). Thus, allowing Respondents to allege as a compelling interest a bare desire to avoid exceptions would render RLUIPA meaningless.

### D. Political Considerations May Underlie Prison Officials' Resistance to Accommodations of Religious Practices.

Aside from the justifications they explicitly articulated, Respondents actions here may also result from unspoken, but no less significant, influences: the realities of serving as an official in a politically accountable administration. These political realities account, in part, for some positions *amici* took when they were defendants in previous lawsuits—positions different from the personal views *amici* articulate in this brief.[4] Political considerations may well provide a more realistic explanation for the otherwise "almost preposterous" position taken by Respondents in this case. J.A. 155.

Policies adopted by a penal administration are not influenced solely by the science of criminal justice, budgetary constraints, or personal views of prison officials regarding the feasibility or desirability of certain accommodations. Rather, policies are informed, as they must be, by the political environment and voter preferences at the time. For example, in the experience of *amici*, when a Governor adopts new penal policies, he or she is likely to seek and respond to input from many organizations, including district attorneys associations, sheriffs associations, police

[4] Moreover, the positions of *amici* have continued to evolve in recent years as industry standards have moved towards more individualized analysis of inmate risks and needs, as opposed to one-size-fits-all approaches. These industry standards are discussed in Part I, *supra*.

chiefs, crime victims organizations, and labor unions. Higher-level prison officials are charged with upholding policies developed at the State level without regard to their personal views. Moreover, prison wardens or directors of corrections may themselves be political appointees.[5]

In the experience of *amici*, political pressure from some groups can cause a penal administration to resist inmates' requests for accommodations, regardless of the merit of such accommodations. In California, for example, certain influential organizations, such as the Crime Victims United of California (CVUC), "promote[] an especially retributive brand of crime victims' rights" that views victims and inmates as "locked in a zero-sum grudge match" where "any policy that helps prisoners automatically harms victims and their families."[6] This philosophy, which is

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[5] For example, some high-level prison officials are politically appointed in Arkansas, California, Georgia, and Ohio. *See* Ark. Code Ann. § 12-27-107 ("The Director of the Department of Correction, who shall be the executive, administrative, budgetary, and fiscal officer of the department, shall be appointed by the Board of Corrections . . . . The director shall serve at the pleasure of the Board of Corrections."); Cal. Penal Code § 6050(a) ("The Governor, upon recommendation of the secretary, shall appoint the wardens of the various state prisons. Each warden shall be subject to removal by the secretary."); Ga. Code Ann. § 42-2-6(b) ("The commissioner shall be appointed by and shall serve at the pleasure of the board. Beginning July 1, 1999, the salary of the commissioner shall be set by the Governor and the expenses and allowances of the commissioner shall be as set by statute."); Ohio Const. art. VII, § 2 ("The directors of the penitentiary shall be appointed or elected in such manner as the general assembly may direct.").

[6] Joshua Page, *Prison Officers, Crime Victims, and the Prospects of Sentencing Reform*, California Progress Report (Mar. 22, (continued…)

supported by other political actors as well, motivates policies aimed at "mak[ing] penal facilities more austere" and denying benefits to inmates wherever possible.[7]

While *amici* understand such political pressures, they believe political considerations should not be regarded as a compelling government interest for purposes of RLUIPA. *Cf. Lawrence v. Texas*, 539 U.S. 558, 582 (2003) ("[A] bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review.") Moreover, many other crime victim organizations have recognized that "vengeful, ultra-tough penal policies do not help victims of crime but simply create more suffering and resentment."[8] These other groups instead advocate policies "that challeng[e] offenders to take responsibility for the harm their crimes cause through restorative justice practices and help[] prisoners develop the tools necessary to live crime-free lives . . . ."[9] As discussed in the next section, implementation of these more modern and widely accepted rehabilitative philosophies may well provide significant security benefits.

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2011), available at http://www.californiaprogressreport.com/site/prison-officers-crime-victims-and-prospects-sentencing-reform.

[7] *Id.*

[8] *See, e.g.*, Joshua Page, *Crime Victims United of California: A Powerful Voice in State Politics*, LA Times (June 3, 2011), http://articles.latimes.com/print/2011/jun/03/opinion/la-oe-page-prison-guards-20110603.

[9] *Id.*

## IV. Allowing Inmates to Practice Their Religion May Lead to Security Benefits for Prisons, as Well as Broader Benefits For Inmates and Society as a Whole.

Instead of increasing security concerns, *amici* believe that allowing inmates to practice their religion is likely to result in inmate behavior that alleviates security concerns and contributes to other goals of prison administration. A number of studies indicate that "[r]eligion targets antisocial values, emphasizes accountability and responsibility, changes cognitive approaches to conflict, and provides social support and social skills through interaction with religious people and communities. Such emphases seem to be consistent with what many rehabilitation workers would call principles of effective treatment." Byron R. Johnson, et al., *Religious Programs, Institutional Adjustment, and Recidivism among Former Inmates in Prison Fellowship Programs*, 14 Justice Quarterly 145, 148 (1997) (internal citations omitted).[10] One

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[10] *See also* Thomas P. O'Connor, *A Sociological and Hermeneutical Study of the Influence of Religion on the Rehabilitation of Inmates* (2001) (unpublished Ph.D. dissertation, Catholic University of America), *available at* http://transformingcorrections.com/wp-content/uploads/2011/11/Unpublished-Ph.D.-Dissertation.pdf; Todd R. Clear, et al., *Does Involvement in Religion Help Prisoners Adjust to Prison?*, NCCD Focus (Nov. 1992); Todd R. Clear & Marina Myhre, *A Study of Religion in Prison*, 6 Int'l Ass'n Res. & Cmty. Alts. J. on Cmty. Corrs. 20 (1995); Byron R. Johnson, *Religiosity and Institutional Deviance: The Impact of Religious Variables upon Inmate Adjustment*, 12 Crim. Just. Rev. 21 (1987); Byron R. Johnson, et al., *A Systematic Review of the Religiosity and Delinquency Literature: A Research Note*, 16 J. Contemp. Crim. Just. 32 (2000).

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2002 study, for example, found that increased religious involvement—measured by attendance rates at religious services or programs—reduced infraction rates. Thomas P. O'Connor & Michael Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation*, 35 J. Offender Rehab. 11 (2002) (assessing religious attendance and infraction rates at a medium/maximum security prison in South Carolina). Along the same lines, in a 1992 study, Todd Clear conducted interviews with over 700 inmates in 20 prisons and found that self-reported religiosity is associated with better adjustment to prison, fewer infractions, and less time spent in disciplinary confinement. Todd R. Clear & Melvina T. Sumter, *Prisoners, Prison, and Religion: Religion and Adjustment to Prison*, 35 J. Offender Rehab. 127, 154 (2002).

Anecdotal accounts from prison officials provide further support for the theory that inmates, and prisons, are benefited when inmates are permitted to engage in religious activities. For example, Sheryl Ramstad Hvass, Commissioner of the Minnesota Department of Corrections, noted of inmates participating in religious activity that "changes observed in participating inmates are remarkable" and that these inmates seemed more prepared to "return to

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Even Alexander Volokh, who has criticized the methodology of some studies analyzing "immersion-style faith-based" prisons, has excluded from this criticism "studies that explore more general issues like the effect of 'religiosity,'" by measuring factors such as the religious observance of inmates. Alexander Volokh, *Do Faith-Based Prisons Work?*, 63 Ala. L. Rev. 43, 49-50 (2011).

society" and had "lower recidivism rates." Sheryl Ramstad Hvass, *Faith-Based Programs Offer Hope for the Future*, *in* Correctional Best Practices: Directors' Perspectives 73-74 (Assoc. of State Corr. Adm'rs, 2000). Hvass found that religion helped these inmates "incorporate[ ] into their daily lives altruistic ethics, virtues and self-control that were all missing in their histories." *Id.* at 75.

Modern theories of prison administration also recognize that benefits can result when inmates are allowed to take responsibility for aspects of their identity, including religiosity. For example, innovative prison administrators such as Dora Schriro, Commissioner of the New York City Department of Corrections, have put forward a "Parallel Universe" concept. Under this theory, prison officials strive to ensure that the values and habits of prison life—including religious practice—match those required to succeed outside of prison. Instead of being treated as docile subjects, inmates are encouraged and enabled to take control of their identities, make many decisions about their daily lives, and be held accountable for their decisions. The Oregon and Arizona Departments of Corrections have followed a similar approach. *See* Todd R. Clear, et al., *American Corrections* 349 (10th ed. 2012); *see also* Dora Schriro, *Getting Ready: How Arizona Has Created a "Parallel Universe" for Inmates*, Nat'l Inst. of Just. J. No. 263 (2009).[11]

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[11] In contrast to these more modern approaches promoting inmate identity and religiosity, some commentators argue that strict grooming policies for inmates have historically been root-
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Had Respondents carefully considered the benefits that prisons can realize when inmates are allowed to engage in religious practice and take responsibility for their identities, they might have concluded that security concerns would be reduced and beneficial inmate behavior enhanced by making accommodations for religious liberties where possible.

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ed in draconian methods "of dominating prisoners by humiliating them and stripping them of any vestige of political or cultural identification or religious identity." Deborah Pergament, *It's Not Just Hair: Historical and Cultural Considerations for an Emerging Technology*, 75 Chi.-Kent L. Rev. 41, 57 (1999) (citing Lori B. Andrews, *White Blood, Black Power: The Life and Times of Johnny Spain* (1996)); *see also* Mara R. Schneider, *Splitting Hairs: Why Courts Uphold Prison Grooming Policies and Why They Should Not*, 9 Mich. J. Race & L. 503, 508 (2004) ("[T]he states' purpose for developing these policies actually may be to enforce a degree of conformity among prisoners. In other words, the rationales offered by the states may be pretexts designed to avert the courts' attention away from the true purpose of the policies: to repress individuality and to use the state's coercive power to prevent the practice of unpopular religions within their prisons."); Raj Kumar Singh, *Male Prisoner Hair Law: Analysis and Discussion*, The Raj Singh Collection (1997), http://www.choisser.com/longhair/rajsing3.html ("[T]he forced or coercive elimination of a man's hair ultimately has as its primary purpose the domination, oppression, and physical objectification of the prisoner.").

The desire to repress individuality amongst inmates presumably is not a compelling government interest, and *amici* believe these approaches have yielded no demonstrable benefits for prisons. Moreover, social science research disputes the effectiveness of these techniques. Susan Clark Craig, *Rehabilitation versus Control: An Organizational Theory of Prison Management*, 84 Prison J. 92S, 101S (2004) (discussing a study that found an absence of benefits associated with a control model and noting that many experts have argued that control model prisons are "counterproductive to inmate rehabilitation but also counterproductive to the very control it seeks").

## CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit should be reversed.

Respectfully submitted,

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