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 PRISON FELLOWSHIP MINISTRIES, WORLD VISION, NATIONAL ASSOCIATION OF EVANGELICALS, AND CHRISTIAN LEGAL SOCIETY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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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 sec.*, to the extent that it prohibits petitioner from growing a one-half-inch beard in accordance with his religious beliefs.

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INTEREST OF *AMICI CURIAE*[1]

This brief is submitted on behalf of *amici curiae* Prison Fellowship Ministries, World Vision, National Association of Evangelicals, and Christian Legal Society.

Prison Fellowship Ministries is the largest prison ministry in the world, partnering with thousands of churches and tens of thousands of volunteers in caring for prisoners, ex-prisoners, and their families. Founded over 30 years ago by the late Chuck Colson, who served as special counsel to President Nixon and went to prison in 1975 for Watergate-related crimes, Prison Fellowship Ministries carries out its mission as a Christian ministry dedicated to redeeming the damaging effects of sin, crime, and incarceration on individuals, families, and communities.

Relevant to this litigation, Prison Fellowship Ministries (i) provides in-prison seminars, special events, and programs that expose interested prisoners to the Christian message of personal redemption, teach biblical values and their application, and develop leadership qualities and life skills; (ii) develops mentoring relationships that help

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

prisoners mature through coaching and accountability; and (iii) supports released prisoners to enable successful restoration to their families and communities. In this way, Prison Fellowship Ministries fulfills the Bible's call to "remember those in prison as if you were together with them". (Hebrews 13:3.) Meanwhile, through Justice Fellowship, Prison Fellowship Ministries advocates for reforms to the criminal justice system based on biblical principles of restorative justice so communities are safer, victims are respected, and prisoners' lives are restored instead of wasted.

Prison Fellowship Ministries has a strong interest in the correct interpretation and application of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA"), the law at issue in this litigation, because issues concerning the accommodation of sincerely held religious belief affect prisoners who are involved in Prison Fellowship Ministries programs and activities, as well as the ability of Prison Fellowship Ministries to conduct those programs and activities. Through Justice Fellowship, Prison Fellowship Ministries supported the passage of RLUIPA and the predecessor legislation to RLUIPA, the Religious Liberty Protection Act, in order to protect religious liberty at the State and local levels.[2]

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[2] *See, e.g.*, *Protecting Religious Freedom After* Boerne v. Flores*: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 3-9 (1997) (testimony of Charles Colson, President, Prison Fellowship Ministries).

Prison Fellowship Ministries believes that encouraging rather than obstructing sincere religious commitment is highly beneficial to prisoners, the environment within prisons, and society at large, because it motivates prisoners to make good choices that benefit themselves and our communities, bringing greater peace and security inside prison in the short term, and outside prison as prisoners are released. For example, a study conducted by the Minnesota Department of Corrections found that participation in InnerChange, a values-based prison program developed by Prison Fellowship Ministries, lowered the hazard of recidivism by 26 percent for rearrest, 35 percent for reconviction, and 40 percent for new offense reincarceration.[3]

World Vision, Inc. is a nonprofit Christian humanitarian organization that, for 64 years, has been dedicated to working with children, families, and their communities in nearly 100 countries to reach their full potential by tackling the causes of poverty and injustice. Motivated by their faith in Jesus Christ, World Vision's employees serve alongside the poor and oppressed as a demonstration of God's unconditional love for all people. World Vision serves all people, regardless of religion, race, ethnicity, or gender. World Vision has a significant stake in this case, as it may impact the ability of

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[3] G. Duwe & M. King, *Can Faith-Based Correctional Programs Work? An Outcome Evaluation of the InnerChange Freedom Initiative in Minnesota*, 57 Int'l J. Offender Therapy & Comparative Criminology 813, 829 (2012), *available at* http://ijo.sagepub.com/content/early/2012/03/14/0306624X12439397.

RLUIPA to fulfill its legislative purpose of subjecting to strict scrutiny governments' denials of exemptions to generally applicable laws in cases of sincere religious exercise by prisoners.

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries. NAE holds that duties to God are prior and superior in obligation to the commands of civil society, that religious freedom is God-given, and therefore that the civil government does not create such freedom but is charged to protect it. It is grateful for the American legal tradition of church-state relations and religious liberty, and believes that this constitutional and jurisprudential history should be honored, nurtured, taught, and maintained.

The Christian Legal Society is an association of Christian attorneys, law professors, and law students dedicated to the defense of religious freedoms. From its inception, members of the Christian Legal Society have fought to preserve the autonomy of religious organizations from government intrusion and entanglement, and to protect the free exercise rights of persons of all faiths. In addition to a long tradition of litigation representations, the Christian Legal Society played

an active role in the drafting and advocacy of RLUIPA.

In 2000, after conducting extensive hearings and finding that various State prison systems were imposing "frivolous or arbitrary" restrictions on prisoners' practice of their religions, 146 Cong. Rec. 7775 (2000) (joint statement of Sens. Orrin Hatch and Edward Kennedy), a *unanimous* Congress enacted RLUIPA, which provided financial incentives to States to provide rigorous protection for the free exercise rights of prisoners. Now, various State agencies and some courts are adopting "interpretations" of RLUIPA's requirements that ignore the statutorily mandated "strict scrutiny" review of any abridgments of prisoners' free exercise rights, and are effectively reading RLUIPA's free exercise safeguards out of existence.

These decisions, if allowed to stand, will have corrosive implications far beyond prison walls. Because RLUIPA expressly incorporates the traditional constitutional strict scrutiny analysis, any effort to "tone down" strict scrutiny in this context could weaken strict scrutiny across the board. As this Court has previously warned, the "watering . . . down" of strict scrutiny in one context will inevitably "subvert its rigor in the other fields where it is applied". *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 888 (1990).

SUMMARY OF ARGUMENT

This is a case about the scope of a State's obligation, under RLUIPA, to accommodate inmates' religious observances once the State has made the decision to accept federal funds subject to RLUIPA's statutory requirements.

It is undisputed that the State of Arkansas has accepted funds tied to RLUIPA's requirements, and so must comply with those requirements. It is undisputed that Petitioner Gregory Holt, an observant Muslim also known as Abdul Maalik Muhammad, believes in good faith that it is a requirement of his religion that men should wear beards. It is undisputed that the Arkansas Department of Correction ("DOC") has refused to allow Mr. Holt to wear even a one-half-inch beard, as he has requested.

Nevertheless, mistakenly relying on conclusory testimony from Arkansas DOC employees concerning strictly hypothetical security risks, and mistakenly guided by an erroneous Eighth Circuit decision, *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008), that utterly fails to apply the stringent analysis required by RLUIPA, the District Court dismissed Mr. Holt's RLUIPA claim, and the Circuit Court affirmed that dismissal.

This Court should correct the legal error below, and give full effect to RLUIPA's express mandate that the State shall not place any "substantial burden" on prisoners' free exercise rights unless the State can satisfy the rigorous and well-defined "strict scrutiny" standard. RLUIPA is structured as a

package deal between State prison systems and the Federal Government. States that voluntarily agree to comply with RLUIPA's requirements are granted additional federal funds. In exchange for those funds, those States have agreed that they will not "impose . . . a substantial burden" on an inmate's religious exercise absent a showing that the challenged government policy: (1) "is in furtherance of a compelling governmental interest" and (2) "is the least restrictive means of furthering that compelling governmental interest". 42 U.S.C. § 2000cc-1(a). Perhaps even more importantly—because it gives teeth to these requirements—RLUIPA places a burden on participating States to "*demonstrate*[]" with specific facts that each element is met. *Id.* (emphasis added). Mere speculation or conclusory assertions, without a factual basis and without any analysis of alternatives, simply will not do.

The State of Arkansas failed to make the required showing, and the Eighth Circuit failed to apply the "strict scrutiny" analysis required by RLUIPA.

ARGUMENT

I. RLUIPA REQUIRES THE THOROUGH-GOING APPLICATION OF THE TRADITIONAL "STRICT SCRUTINY" TEST.

A. The Elements of the "Strict Scrutiny" Test

The judicially created standard of "strict scrutiny" was adopted to protect this country's most important civil rights from government intrusion. Courts have applied strict scrutiny to government actions that discriminate based on race, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), regulate the content of free speech, *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813-14 (2000), or impinge on "fundamental rights", *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

The test is undeniably and intentionally exacting: *First*, the government must demonstrate that its action "is in furtherance of a compelling governmental interest". This in turn contains two components: the interest must be "compelling", and the action must be calculated to "further[]" that interest. *Second*, the government must demonstrate that denial of free exercise is the "least restrictive means" available to achieve that interest. *Playboy*, 529 U.S. at 813-14. Integral to both these prongs is a requirement that should be emphasized in its own right: the burden of proof facing the government. "To survive strict scrutiny . . . a State must do more than *assert* a compelling state interest—it must *demonstrate* that its law is necessary to serve the

asserted interest." *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (emphases added). In other words, under well-established law, the State must show that any restriction of religious exercise by prisoners is *actually* necessary to further a compelling State interest, and that there is *no* less restrictive means for the State to achieve that interest.

Given the above, it is not surprising that strict scrutiny has been characterized as this Court's "most rigorous and exacting standard" of review, *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (Kennedy, J.), and that "Only rarely are statutes sustained in the face of strict scrutiny", *Bernal v. Fainter*, 467 U.S. 216, 220 n.6 (1984) (Marshall, J.). *See also United States v. Chovan*, 735 F.3d 1127, 1149 (9th Cir. 2013) (Bea, J., concurring) ("Scholarly analysis shows that federal courts uphold around thirty percent of the laws they analyze under strict scrutiny.").

B. The RLUIPA Statutory Test and the "Strict Scrutiny" Test Are One and the Same.

There should be no dispute that the test required by RLUIPA is exactly the same "strict scrutiny" test developed by this Court for the purpose of protecting our most critical constitutional rights. After this Court held in *Smith* that religious conviction does not entitle one to an exemption from otherwise valid laws of general applicability, 494 U.S. at 877-80, a *unanimous* Congress determined that it nevertheless wished to encourage States to accord the highest level of protection to the free exercise rights of prisoners, whose lives are otherwise so entirely regimented by prison rules of

"general applicability" as to preclude observance of even the most basic commandments of their religions.[4] To accomplish this, Congress imported this Court's articulation of the strict scrutiny test verbatim into the text of RLUIPA.[5] And it is

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[4] In fact, some studies and expert opinion have suggested that encouraging religious conviction and observance among prisoners at least correlates with reduced violence and thus *improved* security within prisons. *See* T.P. O'Connor & M. Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation,* 35 J. Offender Rehab. 11, 28 (2002) (study concluding that "the more religious sessions an inmate attended, the less likely he was to have an [in-prison] infraction"); T.R. Clear & M.T. Sumter, *Prisoners, Prison, and Religion: Religion and Adjustment to Prison,* 35 J. Offender Rehab. 127 (2002) (study finding that religiosity is often a "principal determinant" in the number of disciplinary infractions that a prisoner receives, with fewer infractions among those prisoners who have greater religious activity and belief); *see also Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 175 (1999) (statement of Glenn S. Goord, Comm'r, N.Y. State Dep't of Corr. Servs.) ("every correction administrator in the country recognizes the vital role played by most religious practices and beliefs in furthering inmate rehabilitation, in maintaining a sense of hope and purpose among individual inmates and in enhancing overall institutional safety and well-being. Most inmates who sincerely practice their religious beliefs do not pose institutional problems. Rather, as a rule of thumb, they promote institutional stability.").

[5] *Compare* 42 U.S.C. § 2000cc-1(a) (stating that "No government shall impose a substantial burden on the religious exercise" of a prisoner unless the imposition of the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest"), *with Playboy*, 529 U.S. at 813-14 (holding that, in order to satisfy strict scrutiny, a statute

indisputable that a literal importation of this preexisting "strict scrutiny" test into the context of prisoners' free exercise rights was exactly what Congress intended. *See, e.g.*, 146 Cong. Rec. 19123 (2000) (statement of Rep. Charles T. Canady) (explaining that RLUIPA was "intended to codify the traditional compelling interest test"); 146 Cong. Rec. 7778 (2000) (statement of Sen. Reid) (describing the strict scrutiny test to be applied under RLUIPA, which is "the highest standard the courts apply to actions on the part of government"). There is no permission in the statutory text for courts to "dumb down" strict scrutiny in this one particular context by crafting a "strict scrutiny lite" for RLUIPA alone.

Faithful to this statutory background, numerous courts—including this Court—have recognized that RLUIPA applies the standard strict scrutiny test to the context of free exercise within prisons. While *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430 (2006), concerned the Religious Freedom Restoration Act ("RFRA") rather than RLUIPA, the relevant RFRA statutory language is identical to that of RLUIPA, and there this Court held that "Congress's express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test".

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that regulates speech based on its content "must be narrowly tailored to promote a compelling Government interest" and be the "least restrictive means" to further that interest).

Circuit courts across the country have applied undiluted strict scrutiny when evaluating restrictions on free exercise in the prison setting under RLUIPA. For example, in *Benning v. Georgia*, 391 F.3d 1299, 1304 (11th Cir. 2004), the Eleventh Circuit held that "RLUIPA applies strict scrutiny to government actions that substantially burden the religious exercise of institutionalized persons". The Fourth Circuit has emphasized that Congress deliberately mandated this "more searching standard" of review for claims brought under RLUIPA "than the standard used in parallel constitutional claims: strict scrutiny instead of reasonableness". *Lovelace v. Lee*, 472 F.3d 174, 186 (4th Cir. 2006); *see also Couch v. Jabe*, 679 F.3d 197, 203 (4th Cir. 2012) ("RLUIPA adopts a strict scrutiny standard." (internal quotation marks omitted)). Even the Eighth Circuit, which in this case did *not* apply strict scrutiny, has previously held that strict scrutiny is required in adjudicating claims brought under RLUIPA. *See Gladson v. Iowa Dep't of Corr.*, 551 F.3d 825, 833 (8th Cir. 2009).

It is important to note that RLUIPA also explicitly incorporates the heavy burden of proof that strict scrutiny places on the government not merely to assert, but to "*demonstrate*[]", that the burden on a prisoner's religious exercise (1) "is in furtherance of a compelling governmental interest" and (2) "is the least restrictive means of furthering that compelling governmental interest". 42 U.S.C. § 2000cc-1(a) (emphasis added); *see also Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005); *Burson*, 504 U.S. at 199.

Furthermore, the government's burden under RLUIPA is particularized: it must show that the

policy in question is the least restrictive means to achieve a compelling governmental interest *as applied to the individual prisoner*. RLUIPA states that prisons cannot "impose a substantial burden on the religious exercise of a person residing in . . . an institution . . . even if the burden results from a rule of general applicability". 42 U.S.C. § 2000cc-1(a). Courts have, therefore, interpreted RLUIPA's language as requiring particularized review. *See Gonzales*, 546 U.S. at 430-31 (determining RFRA requires individualized review); *Washington v. Klem*, 497 F.3d 272, 285 (3d Cir. 2007) (inquiring whether the restriction was the least restrictive means available "either facially or as applied to [the plaintiff]."). Thus, it is insufficient for the government to justify its policy as a whole; it must also justify its failure to grant a religious-based exception to the particular prisoner. *See Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33, 39 (1st Cir. 2007) ("The burden thus shifts to [the Rhode Island Department of Corrections] to demonstrate that its ban on inmate preaching, as applied to [the plaintiff], furthers a 'compelling governmental interest' and is the least restrictive means of achieving that interest.").

While the religious accommodation requirements of RLUIPA are strict, no State can complain that they are unfair. The requirements are not absolute mandates on States, but come only as conditions on certain federal grants to State prison systems. Essentially, Congress decided that it considered respect and accommodation of prisoners' free exercise of religion to be an important value, so much so that it was prepared to pay States to commit

to provide that respect and accommodation. A State may excuse itself from *all* of the accommodation requirements of RLUIPA at any time by the simple expedient of declining the grants that RLUIPA offers. This type of federal "package deal" is permissible. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987) ("Congress may attach conditions on the receipt of federal funds."); *Van Wyhe v. Reisch*, 581 F.3d 639, 652 (8th Cir. 2009) ("If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant."), *cert. denied*, 131 S. Ct. 2149 (2011). For Arkansas to cash the Federal Government's RLUIPA check while refusing to deliver the "purchased" free exercise rights for prisoners, however, is neither lawful nor fair.

As discussed below, the lower courts in this case erred in not holding Arkansas to its bargain by requiring accommodation of sincere religious observances, with exceptions permitted only under a strict scrutiny analysis. However, the lower courts here were not alone in this error. The Eleventh Circuit, addressing a RLUIPA challenge to Alabama's prison grooming policy, has also wrongly allowed prisons to limit religious exercise based on mere hypotheses and generalized assertions from prison officials about security, without applying statutorily required "strict scrutiny". *See Knight v. Thompson*, 723 F.3d 1275 (11th Cir. 2013), *petition for cert. filed* (U.S. Feb. 6, 2014) (No. 13-955). That case and the decisions below threaten to nullify Congress's protection of prisoners' free exercise rights and to erode the meaning of "strict scrutiny".

II. THE COURTS BELOW ERRED BECAUSE THEY FAILED TO APPLY ANY "LEAST RESTRICTIVE MEANS" ANALYSIS.

A. Preliminary Elements

We touch only briefly on elements that lead up to the "least restrictive means" analysis.

The Magistrate Judge held that "Mr. [Holt's] ability to practice his religion has not been substantially burdened". Joint Appendix ("J.A.") at 176-77, *Holt v. Hobbs*, No. 13-6827 (Apr. 23, 2014). The Eighth Circuit did *not,* however, endorse or base its holding on this conclusion, and this Court should not do so either, because the Magistrate Judge's analysis was improper. *First*, he explained that Mr. Holt had had enough *other* opportunities to practice his religion in prison, including by being "provided a prayer rug and a list of distributors of Islamic material", and by being "allowed to correspond with a religious advisor", "to maintain the required diet", and to "observe religious holidays". J.A. at 176-77. But this is like saying that seven out of the Ten Commandments are quite enough for anyone to observe—a fraught evaluation the State has no business entering into, and that RLUIPA certainly does not authorize.[6] The fact that

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[6] *See Mayfield v. Tex. Dep't of Crim. Justice*, 529 F.3d 599, 613-615, 617 (5th Cir. 2008) (reversing grant of summary judgment for the State in a RLUIPA case, and rejecting the State's argument that the inmate could simply worship alone in his cell, rather than in a group, as the inmate contended was necessary under his religion).

Mr. Holt is permitted to do *some* things required by his religion does not excuse the State from showing that its prohibition against his doing *other* things required by his religion furthers a compelling State interest and is the "least restrictive means" available of doing so. *Second,* the Magistrate Judge elsewhere stated, and may have been swayed by, the undoubted fact that "not all Muslims believe a man must maintain a beard". J.A. at 166. But again, this is like asserting that, because not *all* Jews keep kosher, keeping kosher must not be a "big deal" for *any* Jews. It is a non sequitur, and false on its face.

Certainly, there is no dispute that prison security may be a "compelling state interest". But the government's burden only begins—and does not end—there.

Whether Arkansas introduced any evidence that could remotely meet its burden of "demonstrating" that a ban on very short beards "furthers" its security interests in any identifiable way is doubtful. Two speculative justifications were offered: a concern that contraband might be concealed in beards, and a concern that beards could permit escaping prisoners to alter their appearance. But no supporting evidence beyond the merest speculation was offered to back up either concern.

As to concealing contraband, the Warden of the unit in which Mr. Holt is imprisoned testified that he could not recall a single recent incident in which his prison "actually had people hiding contraband in their hair", let alone in a very short beard, J.A. at 110, and the Magistrate Judge opined on the record that "it's almost preposterous to think that you could

hide contraband in your beard", J.A. at 155.[7] As to facilitating escape, when asked by Mr. Holt if there have "been a whole lot of escapes from the Department of Correction because people were wearing beards", the Warden testified, "Not as of recent years, thank goodness", and went on to "recall one back in the 70s or 80s", where the prisoner in fact escaped "*clean shaven* and grew the beard *after* he got out". J.A. at 105 (emphases added). Needless to say, the anti-beard policy does nothing to address that problem.

But what is beyond dispute is that Arkansas put in no evidence at all that could justify a finding that its policy against short beards is the "least restrictive means" of achieving its security goals. Equally beyond dispute is that the courts below failed to conduct any "least restrictive means" analysis at all. This was error.

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[7] One may contrast a recent RLUIPA case in which a prohibition on dreadlocks was supported by specific and credible evidence concerning the ability of inmates to conceal substantial and dangerous objects therein. *See Williams v. Snyder*, 367 F. App'x 679, 683 (7th Cir. 2010) (unpublished). Needless to say, dreadlocks and a half-inch beard present rather different opportunities for concealment.

B. Arkansas Neither Attempted To Meet Nor Met Its Burden of Establishing that Its Restriction on Short Beards Is the Least Restrictive Means of Addressing Its Security Concerns.

The State of Arkansas failed in this case to attempt any showing whatsoever that its refusal to accommodate Mr. Holt's religious grooming requirements was the "least restrictive means" by which it could protect its interest in prison security. Given that at least 44 prison systems around the nation—including maximum security prisons—do *not* impose a categorical ban on short beards, *see* Brief for Petitioner at 24-26, *Holt v. Hobbs*, No. 13-6827 (May 22, 2014), it is logically almost impossible to conceive how the Arkansas DOC could have made that showing here.

At the hearing before the Magistrate Judge, the Warden was asked if Arkansas's "grooming policy make[s] any allowances for any type of religious exemptions". J.A. at 87. He responded succinctly, "No, ma'am". J.A. at 87. Yet the vast majority of States, and the federal system, *do* provide such accommodations to observant Muslim prisoners who wish to grow short beards, apparently believing that they can do so without sacrificing necessary security. *See* D. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 964-72 (2005) (reviewing prison grooming policies and finding that 39 States, the United States, and the District of Columbia allow beards for religious or other reasons). Despite the readily available evidence of widespread American prison practice inconsistent with Arkansas's absolute beard

prohibition, the Arkansas DOC's Assistant Director, when asked at the hearing if he was aware of what other States are doing in the grooming context, testified, "No, ma'am, not specifically. I'm really not", J.A. at 119, while the Warden admitted that "I don't know what goes on nationally across the country", J.A. at 105, and testified that "I suppose maybe [permitting short beards under a religious observance exception is] an individual preference in those states. I can't tell you for what reason they've elected or chosen to go that route." J.A. at 101.

As this testimony suggests, the State of Arkansas totally failed to examine or consider any alternatives to its absolute rule against beards. But in the context of a "least restrictive means" analysis, ignorance is not bliss. Given the State's failure to consider *any* alternatives to a prison rule prohibiting what many Muslims believe to be a religious mandate, several questions remain unanswered—and even unasked.

How do all these other State and federal prison systems—which necessarily have similar security interests to Arkansas's—allow prisoners to grow short beards in accordance with their religious convictions without triggering the security problems that Arkansas predicts? *See Warsoldier v. Woodford*, 418 F.3d 989, 999-1000 (9th Cir. 2005) ("[F]ailure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means.").

Why is the State of Arkansas able to accommodate prisoners with medical conditions, consistent with security concerns, *see* Ark. Dep't of Corr., Ark. Admin. Directive 98-04 ("Medical staff may prescribe that inmates with a diagnosed dermatological problem may wear facial hair no longer than one quarter of an inch."), yet can think of no way to provide exceptions for religious reasons? *See Couch*, 679 F.3d at 204 ("The [government's] affidavits . . . fail to explain how the prison is able to deal with the beards of medically exempt inmates but could not similarly accommodate religious exemptions.").

How is it that Arkansas is able to administer medical exceptions to the enforced shaving rule that permit a quarter-inch beard, but asserts that the administration of a half-inch beard rule is not feasible? The mechanics of administering either rule are the same; as the Warden admitted, "I mean, you could start, I guess, with a particular clipper guard that's a particular length". J.A. at 84. *See Couch*, 679 F.3d at 203 ("The [government's] affidavit was also deficient because it failed to explain how the prison could accommodate other exceptions to the grooming policy but could not accommodate a religious exception.").

These are the types of questions the "least restrictive means" analysis would necessarily ask. And even to ask these questions is to realize that there can be no good answer. A jury would very likely find that Arkansas's purported security concerns are mere pretext for a system that simply cannot be bothered to make accommodations for religious observance.

Notably, the American Correctional Association ("ACA"), in a 2011 "Accreditation Report", found that the precise Arkansas grooming policy at issue in this case, as enforced against the general prison population, is *not* the least restrictive means necessary to meet the Arkansas DOC's interest in security. Instead, the ACA Visiting Committee, in its initial report, concluded that Arkansas did not "validate[] any security, identification or sanitation interest in establishing and enforcing an inmate appearance and grooming code that denies inmates freedom in personal grooming". Am. Corr. Ass'n, Accreditation Report, Comm'n on Accreditation for Corr. (2011) at 250-51, *available at* http://adc.arkansas.gov/Documents/ADC-ACA-Reports.pdf. When the Arkansas DOC appealed this finding, the ACA "Auditor" affirmed this conclusion in no uncertain terms, finding that:

> "While certain extreme grooming options on the part of inmates could potentially interfere with contraband control and identification, the policy referred to appears to be *more limiting than is necessary*. . . . The auditors felt the limits were *more restrictive than required by good correctional practice* . . . .
>
> The auditors support reasonable grooming standards that prohibit extreme styles but feel that the Arkansas policy *exceeds necessary limits*."

Id. at 251 (emphases added). The Auditor went on to highlight the less restrictive means of promoting prison security that had been adopted in other

jurisdictions, observing that "Many correctional systems address the identification issue by requiring offenders to take new photographs for IDs and file pictures, at offender expense". *Id.*[8] But Arkansas never changed its practice. Indeed, if the testimony of the State's witnesses in this case is to be believed, Arkansas never even considered these alternative, less restrictive practices.

C. The Courts Below Erred in Applying a Standard that Did Not Even Approximate "Strict Scrutiny".

If the ruling below is permitted to stand, then the "least restrictive means" requirement has been simply erased from RLUIPA.

Although the Magistrate Judge stated during Mr. Holt's hearing that the case "requires an individual and particular analysis", J.A. at 50, and that "this is a pretty . . . close call in this case", J.A. at 153, he did not apply strict scrutiny. In fact, in the Magistrate Judge's Proposed Findings and Recommendations following the hearing, he did not provide a *single* rationale for his conclusion that the prohibition against Mr. Holt's free exercise "was the least restrictive means available". J.A. at 176.

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[8] *Amici* recognize that, on further appeal of this issue to the Accreditation Commission Panel, the Panel "granted" that appeal without explanation in the record of the review. *Id.* at 228. However, that decision presumably related to the ACA's accreditation standards, not to strict scrutiny's "least restrictive means" requirement, and neither contradicts nor takes away from the observations of the ACA Visiting Committee and Auditor quoted above.

Instead, the Magistrate Judge collapsed the first and second prongs of RLUIPA's strict scrutiny analysis, finding that a "compelling penological interest" combined with an obligation of "deference" to prison officials essentially relieved the State of its burden to show "least restrictive means". J.A. at 176 ("'Although prison policies from other jurisdictions provide some evidence as to the feasibility of implementing a less restrictive means of achieving prison safety and security, it does not outweigh the deference owed to the expert judgment of prison officials who are infinitely more familiar with their own institutions than outside observers.'" (quoting *Fegans*, 537 F.3d at 905)).[9]

Unfortunately, neither the District Court nor the Eighth Circuit cured the deficiencies in the Magistrate Judge's recommendation. The District Court adopted the recommendation without explanation, holding only that "the proposed findings and recommended disposition should be, and hereby are, approved and adopted in their entirety in all respects". J.A. at 179. The Eighth Circuit got off on the wrong foot by describing, but leaving

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[9] The Magistrate Judge's concluding remarks at the hearing betray this same view, based on Eighth Circuit case law and contrary to the plain language of RLUIPA, that the State need not show "least restrictive means" if it can establish a "compelling governmental interest". J.A. at 154 ("you've done a good job, Mr. Muhammad, of distinguishing the fact that you want the half inch, that *Fegans* was arguing for a more—more freedom in growing his beard, but the principles are still the same. The principles are, as I said, *deference to the prison officials if they're able to state legitimate penological needs*. And I think they have done so." (emphasis added)).

unquestioned, the Magistrate Judge's "seven out of ten isn't bad" mode of analysis, emphasizing the other religious requirements that Mr. Holt *is* able to comply with, as though this lightened the State's obligation under RLUIPA with respect to the rule concerning beards that is at issue in this case, J.A. at 185-86, and then completely flipped the statutory burden of proof with respect to "least restrictive means" by asserting that "absent substantial evidence in [the] record indicating that [the] response of prison officials to security concerns is exaggerated, courts should ordinarily defer to their expert judgment in such matters", J.A. at 186 (citing *Fegans*, 537 F.3d at 903).

The court then provided the following "least restrictive means" analysis: "we conclude that defendants met their burden under RLUIPA of establishing that [the Arkansas DOC's] grooming policy was the least restrictive means of furthering a compelling penological interest, notwithstanding Mr. Holt's citation to cases indicating that prisons in other jurisdictions have been able to meet their security needs while allowing inmates to maintain facial hair". J.A. at 186 (citation omitted). That is the entirety of the Eighth Circuit's "least restrictive means" analysis. That is not strict scrutiny.

The Magistrate Judge and the Eighth Circuit misunderstood the nature of the "deference" that is appropriate in the RLUIPA context. As the Fourth Circuit (in an opinion joined by Retired Associate Justice Sandra Day O'Connor) has explained, the requirement that "the government, consistent with the RLUIPA statutory scheme, acknowledge and give some consideration to less restrictive alternatives" is

not inconsistent with the obligation to defer to the judgment of prison officials. *Couch*, 679 F.3d at 203-04 (vacating grant of summary judgment where affidavits offered by prison officials failed to show that the grooming policy was the least restrictive means to further health and security concerns).

It is of course true that courts are to give deference to the expertise and judgment of prison officials on matters of security and discipline. *See Cutter*, 544 U.S. at 723. It is *not* true that this deference amounts to a free pass on the "least restrictive means" test, and permits prison officials to prevail based on mere say-so; purely "speculative testimony cannot satisfy [the State's] burden". *Garner v. Kennedy*, 713 F.3d 237, 246 (5th Cir. 2013) (finding that the State had not carried its burden of proving that its grooming policy was the least restrictive means available, where the State offered "no studies" or "concrete evidence" in support of its witnesses' testimony); *see also Yellowbear v. Lampert*, 741 F.3d 48, 59 (10th Cir. 2014) ("the deference this court must extend the experience and expertise of prison administrators does not extend so far that prison officials may declare a compelling governmental interest by fiat.").

Furthermore, strong authority emphasizes that the "least restrictive means" prong is a vital and separate requirement that cannot be satisfied or elided by some vague combination of "compelling penological interest" with "deference". This Court defined the "least restrictive means" element in the strongest possible terms in *Cutter*, citing with approval the district court's requirement of "[a] finding 'that it is *factually impossible* to provide the

kind of accommodations that RLUIPA will require without significantly compromising prison security or the levels of service provided to other inmates'". 544 U.S. at 725. Several circuit courts analyzing grooming policies under RLUIPA have similarly held that "the Government must *consider and reject other means* before it can conclude that the policy chosen is the least restrictive means". *Couch*, 679 F.3d at 203 (internal quotation marks omitted) (emphasis added); *see also Warsoldier*, 418 F.3d at 999 ("[The government] cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice."); *Spratt*, 482 F.3d at 41 (same); *Washington*, 497 F.3d at 284 ("In other strict scrutiny contexts, the Supreme Court has suggested that the Government must consider and reject other means before it can conclude that the policy chosen is the least restrictive means. In light of the statute's text and legislative history, we agree with the Ninth Circuit in *Warsoldier* that this requirement applies with equal force to RLUIPA." (citations omitted)).

Although the Eighth Circuit did not perform the careful and exacting analysis required by RLUIPA and the case law applying it, even that court has previously recognized that the State in a RLUIPA case must consider alternative means in order to meet the "least restrictive means" test, and that the "compelling governmental interest" and "least restrictive means" analyses are distinct. *See Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 989 (8th Cir. 2004) ("We cannot conclude . . . that [the Missouri Department of Corrections ('MDOC')] has met its

burden of establishing that its limitation on [the prisoner's] religious practices constituted the least restrictive means necessary", where, among other things, "It is not clear that MDOC seriously considered any other alternatives, nor were any explored before the district court."), *cert. denied*, 543 U.S. 991 (2004); *Native Am. Council of Tribes v. Weber*, __ F.3d __, 2014 WL 1644130, at *7 (8th Cir. Apr. 25, 2014) (affirming the district court's finding of a RLUIPA violation even where a State employee "testif[ied] that some of the alternatives were 'talked about,'" because "the defendants offered no evidence that they *meaningfully* considered any of the alternatives or *tested* the effectiveness of such alternatives before effectuating the tobacco ban." (emphases added)).

The facts here, where the evidence indicates that the Arkansas DOC did not give any consideration and analysis at all to alternatives to its "no beards" policy, fall far from anything to which a court could and should defer as it conducts its "least restrictive means" analysis.

CONCLUSION

For the foregoing reasons, *amici curiae* Prison Fellowship Ministries, World Vision, National Association of Evangelicals, and Christian Legal Society respectfully request that this Court give effect to the statutory choice to require accommodation of prisoners' religious observances subject only to exceptions that can survive the rigorous requirements of strict scrutiny, and that it reject the invitation of the State of Arkansas and the Eighth Circuit to sanction a new "not-so-strict scrutiny" standard to be applied in RLUIPA cases. The Court should reverse and remand with instructions to proceed consistently under the well-established definition of strict scrutiny.

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Respectfully submitted,

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