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 *AMICI CURIAE* THE SIKH COALITION AND MUSLIM PUBLIC AFFAIRS COUNCIL IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Sikh Coalition and Muslim Public Affairs Council share a profound interest in how prison officials accommodate inmates' exercise of religious practices under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. No. 106-274, 114 Stat. 803 (2012) (codified at 42 U.S.C. § 2000cc to 2000cc-5). Sikhs are religiously mandated to maintain uncut hair and unshorn beards. Some Muslims also grow beards as part of their religious practice. Members of both groups have endured substantial discrimination and persecution because of their beliefs and, more to the point, because of the garb and grooming habits associated with their beliefs. *Amici* are thus deeply troubled when an inmate's ability to grow a beard in accord with his faith's teachings is threatened.

The Sikh Coalition was founded in the wake of the September 11th attacks to counter misconceptions, promote cultural understanding, and advocate for the civil liberties of all people, especially Sikhs. All initiated Sikhs are religiously mandated to wear turbans and maintain uncut hair, including unshorn beards, or *kesh*, lest they be deemed apostates. See 2 *The Encyclopaedia of Sikhism* 466 (Harbans Singh ed., 2d ed. 2001) ("My Sikh shall not use the razor. For him the use of razor or shaving the chin shall be as sinful as incest."). *Kesh* must be honored at all

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution intended to fund the preparation and submission of this brief. Pursuant to Rule 37.3(a), the parties in this case have granted blanket consent to the filing of *amicus curiae* briefs.

times and places, even in prison. The right of Sikhs to wear turbans and maintain *kesh*—whether in the military, the workplace, or the prison—is central to the Sikh Coalition's cause.

The Muslim Public Affairs Council ("MPAC") has worked diligently since 1986 to foster a vibrant Muslim American identity and to represent the interests of Muslim Americans to decision makers in government agencies, media outlets, interfaith circles, and policy institutions. Some Muslims interpret the Qu'ran and the Sunnah to command them to wear a beard. See *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (Alito, J). For such practitioners of Islam, "[t]he refusal by a Sunni Muslim male who can grow a beard, to wear one is a major sin. . . . This is not a discretionary instruction; it is a commandment." *Ibid.* Protecting the rights of Muslim Americans to adhere to this religious commandment is at the core of MPAC's mission.

To accomplish their respective aims, the Sikh Coalition and MPAC regularly file *amicus curiae* briefs in cases that raise issues of vital concern to their respective communities. *Amici*'s missions include protecting the religious exercise of many of the more than 2 million persons incarcerated in the United States at the moment. The majority of these prisoners reside in state prisons and jails, and thus, will be directly affected by this Court's holding here.

Amici maintain that the Eighth Circuit incorrectly rubber-stamped a prison's justifications for cutting an inmate's religiously mandated beard against his will. Such unchecked deference cannot be reconciled with this Court's strict-scrutiny jurisprudence. Nor does it adequately respect or protect the many stripes of sincere religious practice exercised by incarcerated

persons. To the contrary, it cultivates ignorance and inadequately prevents discrimination against unfamiliar religious practices. *Amici* thus urge the Court to side with the majority of courts in holding that, to effectively guard against arbitrary and fear-based decisions, RLUIPA's "least restrictive means" test requires evaluating how other prisons have accommodated the religious practice at issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

For those inmates who belong to a religious minority, the Eighth Circuit's unprecedented "least restrictive means" test for RLUIPA claims is not only wrong but also perpetuates long-standing harms.

RLUIPA prohibits the imposition of "a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest" by "the least restrictive means." 42 U.S.C. § 2000cc-1(a). This "protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter* v. *Wilkinson*, 544 U.S. 709, 721 (2005); see also *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972) ("[When faced with] legitimate claims to the free exercise of religion. . . . . however strong the State's interest . . . , it is by no means absolute to the exclusion or subordination of all other interests."); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1488-1500 (1990).

Once a prisoner shows that a particular policy substantially burdens the exercise of his religion, see 42 U.S.C. § 2000cc-2(b), the prison must "demonstrate[]"

that its policy furthers a compelling governmental interest by the least restrictive means. See *id.* §§ 2000cc-2(b), 2000cc-5(2).[2] Under the least restrictive means standard, the prison must "demonstrate that no alternative forms of regulation would [accomplish the governmental interest] without infringing First Amendment rights." *Sherbert* v. *Verner*, 374 U.S. 398, 407 (1963); see *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004) (least restrictive means test in free speech context requires court to compare challenged regulation to available, effective alternatives).

The Arkansas prison officials' policy—and the Eighth Circuit's endorsement of their approach—does not meet this standard.

I. Wearing beards (and unshorn beards for Sikhs) is a central religious exercise for Sikhs and many Muslims, along with certain other grooming practices. All observant Sikhs must have uncut hair and unshorn beards, or *kesh*. See 2 *The Encyclopaedia of Sikhism*, *supra*, at 466 ("[T]he use of razor or shaving [or trimming] the chin shall be as sinful as incest."). In fact, many Sikhs have chosen to die rather than cut their hair. The forcible cutting of hair—whether on the head or the face—strips a Sikh of his faith identity and is among the gravest injuries he could suffer. Therefore, forcing a Sikh to cut his hair substantially burdens his free exercise of religion.

Many Muslims believe that the Qu'ran commands them to wear a beard. See *Fraternal Order of Police*, 170 F.3d at 360 (Alito, J.) (noting that "[t]he refusal by a Sunni Muslim male who can grow a beard, to wear one is a major sin."). Policies restricting a right

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[2] While RLUIPA does not define the phrase "least restrictive means," other First Amendment case law provides a definition.

to grow a beard thus substantially burden the religious exercise of many followers of the Islamic faith.

II.A. *Amici* concede that Respondents have compelling interests both in ensuring prison security and in advancing concerns for the hygiene of those who are incarcerated. The Eighth Circuit's holding, however, does not require prisons to advance those interests using the least restrictive means available. To the contrary, by deferring entirely to the testimony of prison officials and discounting whether other penal institutions have accommodated the practice at issue—*i.e.* whether inmates safely maintain half-inch beards elsewhere—the Eighth Circuit's approach eviscerates the least restrictive means standard that Congress expressly set forth RLUIPA. This alone merits reversal.

But *amici* emphasize that the Eighth Circuit's approach also works an especial harm against members of religious minorities in America who have suffered particular indignities and misunderstanding in daily life. Sikhs and Muslims have religious faiths whose tenets are less familiar to most American prison officials than are the tenets of Christianity, Judaism, and other religions more widely practiced in America. In addition, after the terrorism attacks of 9/11, Sikhs and Muslims have been disproportionately subjected to discrimination, persecution, and hate crimes borne out of documented misunderstanding of and hostility toward their faiths.

In most prisons, unfamiliarity and bias are counterbalanced by the efforts of prison officials to "actually consider[] and reject[] the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier* v. *Woodford*, 418 F.3d 989, 999 (9th Cir. 2005). Yet, despite the risk that individual

prison officials may have limited-to-no exposure to minority faiths, those faiths' grooming rules, or ways of accommodating them, prison officials in the Eighth Circuit hold final authority over an inmate's exercise of his religion, unencumbered by any consideration of whether less restrictive measures have been used elsewhere. In fact, as the court explained below, the "deference owed to [prison officials'] expert judgment" is virtually irrebuttable. J.A. 186-87. Such unchecked deference creates space for prejudice and discrimination; allows for bias, ignorance, and fear to dictate prison policies; and leaves inmates who practice nonmainstream religions bereft of the legal protection Congress guaranteed to them when it passed RLUIPA. This approach is contrary to RLUIPA's purpose in all instances, but it is especially troubling for Sikh and Muslim inmates, who not only must familiarize officials with the tenets of their faiths, but also must combat existing misunderstanding of and hostility toward their systems of religious belief. The ruling below should therefore be reversed.

II.B. As incarcerated Sikhs and Muslims have demonstrated, Arkansas's justifications for its no-beard policy fall short. Had the prison officials evaluated the feasibility of using less restrictive means to advance their legitimate safety concerns—as is required in the majority of circuits—they would have found that many prisoners maintain or grow beards for religious reasons without creating unmanageable safety concerns.

The policies and approach endorsed by the Eighth Circuit inadequately protect religious minorities against the unintentional biases that grow out of unfamiliarity and are an improper interpretation of

RLUIPA. The Eighth Circuit's approach should be reversed.

ARGUMENT

I. THE HAIR GROWTH AND GROOMING BELIEFS OF SIKHS AND MUSLIMS ARE SINCERELY HELD AND, INDEED, CENTRAL TO THEIR RELIGIOUS EXERCISE.

A prisoner seeking RLUIPA's protection must first demonstrate that the challenged prison policy substantially burdens a sincerely held religious belief. See 42 U.S.C. § 2000cc-1(a).[3] It cannot be disputed that a prison grooming policy that would restrict or forbid an inmate from growing his or her hair, where an inmate's religion mandates that such hair be maintained, directly interferes with a cognizable religious exercise and that this conflict represents a "substantial burden" within the meaning of RLUIPA. Cf. *Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988).

Many systems of religious belief include among their tenets certain precepts that relate to hair or beard growth. *E.g.*, *Warsoldier*, 418 F.3d at 991-92 ("[The] religious faith [of certain Native Americans] teaches that . . . hair may be cut only upon the death

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[3] "[R]eligious exercise" under RLUIPA is defined broadly to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). The statute leaves open the meaning of a "substantial burden." *See id.* § 2000cc-5 (definitions); 146 Cong. Rec. 16,698, 16,700 (2000) ("[I]t is not the intent of [RLUIPA] to create a new standard for the definition of 'substantial burden' on religious exercise."); 146 Cong. Rec. at 16,700 (joint statement of Sens. Hatch & Kennedy) (noting that "substantial burden" should be interpreted with reference to the Supreme Court's jurisprudence as to "the concept of substantial burden of religious exercise").

of a close relative."); *Benjamin* v. *Coughlin*, 905 F.3d 571, 573 (2d Cir. 1990) ("A fundamental tenet of the religion is that a Rastafarian's hair is not to be combed or cut . . . ."); *Leviticus* 19:27 (New Revised Standard Version) ("You shall not round off the hair on your temples or mar the edges of your beard."); Mark Oppenheimer, *Behold the Mighty Beard, a Badge of Piety and Religious Belonging*, N.Y. Times, Aug. 6, 2011, at A12 ("[T]he beard is integral to many men's religious identities, not just religious Jews'. The beard, especially the really big beard, constitutes a look, one that dictates how they are perceived by the world."). For the Sikh and Muslims communities, religious hair grooming mandates occupy an especially central place in their faiths.[4]

A. Sikhism And *Kesh*.

Founded in India's Punjab region in the fifteenth century by Guru Nanak, Sikhism is a monotheistic religion that preaches devotion to God, honest living, and sharing with others. W. Owen Cole et al., *A Popular Dictionary of Sikhism: Sikh Religion and Philosophy* 10 (1997). Guru Nanak rejected the caste system and declared all human beings, men and women, to be equal in rights, responsibilities, and

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[4] *Amici* note that protection under RLUIPA does not require a claimant to prove that the exercise at issue is somehow "central" or "fundamental" to or "compelled" by his faith. Rather, Congress directs that courts must protect "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (emphasis added). Even if others of the same faith may consider the exercise at issue unnecessary or less valuable than the claimant, and even if some may find it illogical, that does not take it outside the law's protection. *See* Steven C. Seeger, *Restoring Rights to Rites: The Religious Motivation Test and the Religious Freedom Restoration Act*, 95 Mich. L. Rev. 1472, 1503-04 (1997)

their ability to reach God. He taught that God is universal to all—regardless of religion, nation, race, color, or gender. Nine Sikh gurus succeeded Guru Nanak and further developed this system of religious belief. The collective wisdom of all ten Sikh gurus lives eternally in the form of a holy book: the Guru Granth Sahib. *Id.* at 1, 5.

Central to Sikhism is the requirement that adherents maintain *kesh*—uncut hair on all parts of the body. See Patwant Singh, *The Sikhs* 56 (1999). The particular requirement that Sikhs must maintain *kesh* has been taught since the time of Guru Nanak, who called it "God's divine Will." Opinderjit Kaur Takhar, *Sikh Identity: An Exploration of Groups Among Sikhs* 30 (2005). The Sikh holy book confirms that "on each and every hair, the Lord abides." *The Guru Granth Sahib* 344. Sikhs therefore must keep their hair long.

Sikhs who fail to maintain *kesh* confront grave consequences. "Trimming or shaving is forbidden [for] Sikhs and constitutes for them the direst apostasy." 2 *The Encyclopaedia of Sikhism*, *supra*. The unique Sikh philosophy of hair, which has both spiritual and physical dimensions, explains this principle. *First*, Sikhism teaches that God put meticulous thought into crafting mankind. *Ibid.* Specifically, "He gave men beard, moustaches, and hair on the head." *Ibid.* Sikhs live in harmony with God by leaving all hair unshorn on their bodies. *Second*, *kesh* is central to Sikh identity—the gurus and their followers have maintained *kesh* since the religion's founding in the fifteenth century. *Ibid.* In the eighteenth century, Sikhs in South Asia were persecuted by the Mughal Empire. *Ibid.* They were humiliated and pressured to abandon their faith, often by having their turbans torn and their hair forcibly cut. *Ibid.* In resistance to

these forced conversions, many Sikhs chose death instead—thus solidifying the religious significance of *kesh*. *Ibid.*

In fact, the cutting of *kesh* represents one of just four "cardinal prohibitions" in the religion. These prohibitions state in no uncertain terms that practicing Sikhs (1) must not commit adultery, (2) must not use tobacco, (3) must not eat meat that has been ritually prepared (*e.g.*, kosher or halal), and (4) must not have their *kesh* cut. W.H. McLeod, *The A to Z of Sikhism* 119 (2005).

Surely no prison would force a Sikh inmate to violate the first three of these norms. The fourth should be no different. In the historical and spiritual context of Sikhism, the cutting of any hair on the human body constitutes the most humiliating and hurtful physical injury that can be inflicted upon a believer. To do so would substantially burden his exercise of his faith.

B. Islam And The Commandment To Wear A Beard.

In accord with longstanding teachings of Islamic jurisprudence, a distinct subset of Muslims wear beards. For these Muslims, this is a vitally important expression of their faith. As then-Judge Alito explained, for example, "[t]he refusal by a Sunni Muslim male who can grow a beard, to wear one is a major sin. . . . [T]he non-wearing of a beard by the male who can, for any reason is as serious a sin as eating pork." *Fraternal Order of Police*, 170 F.3d at 360-61 (alteration omitted).

Because there is a wide variety of religious practice within the broader Islamic faith—based, in part, on the rich diversity of teachings passed down through Islamic oral traditions—it is difficult to generalize

about particular practices exercised by all Muslims. But broadly speaking, Sunni Muslims, like petitioner, typically follow the teaching of one of four *madhhabs* (commonly known as "schools of jurisprudence" or "schools of thought")—the *Hanafi*, *Hanbali*, *Maliki*, or the *Shafi'i*. Wael B. Hallaq, *An Introduction to Islamic Law* 2 (2009) These schools, which date back the eighth century, adhere to interpretations of the Qur'an and early Islamic traditions formulated by each madhhab's founding *Imam* (leader).

Although these madhhabs differ subtly on certain issues of Islamic law, they are unanimous in their views on growing a beard. For example, Imam Abu Hanifa (the eponymous founder of the Hanafi school) held that that to shorten the beard less than a fist length is *haraam* (strictly forbidden), and suggested that his followers hold their beards in their fists and shave off only the excess. See 5 *Fathul Qadeer, Shaami, Fataawa Mahmoodiyyah* 93, 105, 108; see also *The Translation of the Meanings of Sahih Al-Bukhari* ¶ 5893 (Muhammad Muhsin Khan trans., Darussalam Pubs. 1997); ("Allah's Messenger said, "Cut the moustaches short and leave the beard (as it is)."). Others have expanded on this precept, explaining that "[t]he Prophet said 'Do the opposite of what [the pagans] do. Grow abundantly the beards and cut the moustaches short.'" *Sahih al-Bukhari*, *supra*, ¶ 5892. Likewise, Imam al-Shafi'i held that, for Shafi'ites, to shave one's beard is *makruh* (discouraged). 1 *al-Majmoo* 290; see *Sahih Muslim* ¶ 501 (Abdul Hamid Siddiqi trans., Sh.Muhammad Ashraf 1971) ("Abu Huraira reported: The Messenger of Allah (may peace be upon him) said: Trim closely the moustache, and grow beard, and thus act against the fire-worshippers."). Imam Malik, too, explained that "[t]o shave the beard is without doubt haraam

according to all Imams." 7 *al-Muntaqa min Akhbar al-Asmai* 266. And Imam Ahmad ibn Hanbal prescribed that "[t]o grow the beard is essential and to shave it is haraam." 1 *al-Mustaw'ib* 260; 1 *Kitabul Furoo* 130.

Even today, more than twelve centuries later, while there are some divisions about the particulars of the issue, mainstream Islamic scholars still consider wearing a beard to be a core religious obligation. See Oppenheimer, *supra*, at A12 ("[A]ll over the Muslim world, the full beard has come to connote piety and spiritual fervor."). For those who follow this tradition strictly, "[t]his is not a discretionary instruction; it is a commandment. A . . . male will not be saved from this major sin because of an instruction of another, even an employer to shave his beard and the penalties will be meted out by Allah." *Fraternal Order of Police*, 170 F.3d at 360-61. Accordingly, rather than cut their beards, adherents of these schools have long endured persecution in the form of job-related sanctions and prison discipline. See *id.* at 360 (enjoining police department from disciplining two Islamic officers who had refused to shave their beards for religious reasons); see also *Garner* v. *Kennedy*, 713 F.3d 237, 247 (5th Cir. 2013) (upholding Muslim prisoner's right to wear a beard and enjoining prison from further disciplining him for doing so); *EEOC* v. *United Parcel Serv., Inc.*, 587 F.3d 136, 137-38 (2d Cir. 2009) (per curiam) (recounting parcel service's discharge of Muslim employees based on no-beard policy); Anuj Gupta, *Islamic Group Says Bias Rising in U.S.; Discrimination: Annual Report Says that Complaints of Prejudice Were Up 15% Last Year. Most Involved Curbs on Religious Practices*, L.A. Times, Aug. 23, 2001, at A9 ("Among the most common complaints received . . . are instances in

which Muslim women are not allowed to wear their traditional hijab scarves on their heads in the workplace or men are asked to shave their beards."); Bruce Lambert, *Muslim Officer Suspended Over Goatee*, N.Y. Times, July 4, 1999, *available at* http://goo.gl/jJ1X2E (detailing New York State Park Police officer's suspension for growing a beard "to comply with Muslim teachings"); Sophia Pearson, *Philadelphia Tells Muslim Police to Trim Beards or Lose Jobs*, Bloomberg, Oct. 19, 2005, http://goo.gl/yn694d (detailing plights of Muslim police officer and Muslim firefighter both serving suspensions for refusing to shave their beards).

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In sum, the religious grooming requirements of Sikhs and Muslims —and specifically of petitioner— are sincerely held religious beliefs. Restricting an adherent's ability to abide by them is a substantial burden on his exercise of religion.

II. THE EIGHTH CIRCUIT'S UNCHECKED DEFERENCE TO PRISON OFFICIALS UNJUSTIFIABLY THREATENS MINORITY RELIGIONS.

The Eighth Circuit's deferential view of the "least restrictive means" nullifies RLUIPA and, in the process, unnecessarily and disproportionately harms minority religions

Under RLUIPA, once an inmate demonstrates that his religious exercise is substantially burdened, the prison officials must show that their policies advance a compelling interest using the least restrictive means. See 42 U.S.C. §§ 2000cc-2(b), 2000cc-5(2); *United States* v. *Lee*, 455 U.S. 252, 257-58 (1982) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish

an overriding governmental interest."); *Yoder*, 406 U.S. at 215 ("[O]nly those interests of the highest order," such as public safety, "can overbalance legitimate claims to the free exercise of religion.").[5] No one disputes that prisons have compelling interests in safety, security, hygiene, and identification; what is contested is what constitutes the "least restrictive means."

Petitioner submitted several less restrictive means that the Arkansas prison officials could employ to maintain a safe prison environment while accommodating his growth of a half-inch beard. Many of these practices have been implemented elsewhere with success. Nonetheless, the Eighth Circuit held that such evidence was entitled to little or no weight, and that the "least restrictive means" test is irrebuttably satisfied by a prison official's self-determination that beards threaten the prison's safety concerns. J.A. 186-87 (construing *Fegans* v. *Norris*, 537 F.3d 897, 903 (8th Cir. 2008)).

At the outset, *amici* stress that the unfettered deference the Eighth Circuit gives to prison officials entirely ignores the "least restrictive means" test. RLUIPA does not require prison officials to refute "every conceivable option." *Hamilton* v. *Schriro*, 74 F.3d 1545, 1556 (8th Cir. 1996) (interpreting least restrictive means prong of Religious Freedom Restoration Act). But where there is evidence that less restrictive alternatives exist, most circuits require prison officials to evaluate the substance of the

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[5] Notably, RLUIPA establishes that protection of religious exercise is itself a compelling governmental interest that should be advanced. *See* 42 U.S.C. § 2000cc-3(g) ("This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.").

requested accommodation and to show that they have "actually considered and rejected the efficacy of" feasible alternatives." *Warsoldier*, 418 F.3d at 999; see, *e.g., Washington* v. *Klem*, 497 F.3d 272, 284 (3d Cir. 2007) (similar); *Murphy* v. *Mo. Dep't of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004) (similar).

The Eighth Circuit, however, puts the burden of persuasion on prisoners, see J.A. 186-87 (requiring plaintiffs to submit "substantial evidence . . . that response of prison officials to security concerns is exaggerated" (construing *Fegans*, 537 F.3d at 903), flipping RLUIPA's allocation of burdens on its head and effectively insulating prison officials' decisions from judicial review. Indeed, RLUIPA requires prisons to "*demonstrate*[]" their interests and the "least restrictive means" of advancing it, not to simply "state" or "articulate" them. 42 U.S.C. § 2000cc-1 (emphasis added). "Demonstrate[]" means to meet the burdens of going forward and of persuasion. *Id.* § 2000cc-5(2); see, *e.g.*, *United States* v. *Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011) ("[Courts] have an obligation to ensure that the record supports the conclusion that the government's chosen method of regulation is least restrictive and that none of the proffered alternative schemes would be less restrictive while still satisfactorily advancing the compelling governmental interests." (interpreting RFRA)); *Ashcroft* v. *ACLU*, 542 U.S. at 669 ("The Government's burden is not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective.").

The Eighth Circuit's approach undermines RLUIPA's purpose and leaves its protections hollow. As concerns *amici* especially, this rule also (A) disproportionately harms members of minority religions, such as Sikhs and Muslims; and as *amici*'s experience

with this issue demonstrates, (B) lacks practical merit, as Sikh and Muslim religious grooming practices have been accommodated in many prisons without negative consequence.

A. The Irrebuttable Deference Prison Officials Received Here Makes Sikhs And Muslims Prone To Discrimination And Their Religious Practices Prone To Misunderstanding.

It is difficult enough to square the Eighth Circuit's approach with RLUIPA jurisprudence in general. But its approach especially harms practitioners of minority religions, such as Sikhs and Muslims, whose beliefs are far likelier to be misunderstood by prison officials, and, as a result, to be unfairly burdened.

A central purpose of RLUIPA was the recognition that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations" were indefensible. 146 Cong. Rec. at 16,699 (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) (quoting S. Rep. No. 103-111, at 10 (1993)). In *Cutter*, for instance, this Court noted that "'frivolous or arbitrary' barriers [that] impede[] institutionalized persons' religious exercise" frequently arise where a religious practice is outside of mainstream experience, citing state prisons that serve kosher food to Jewish inmates but refuse to serve halal food to Muslim inmates; prisons that refuse to provide sack lunches to Jewish inmates to allow them to break fasts after nightfall; and prisons that refuse to allow Chanukah candles while allowing smoking and votive candles. 544 U.S. at 716 & n.5. RLUIPA's "least restrictive means" test thus ensures an evenhanded application of prison regulations, and guards against the

manifestation of uninformed "speculation" and ignorant "fear."

Sikhs and Muslims have religious practices with which most American prison officials may be unfamiliar—precisely the type of practices this Court recognized RLUIPA was designed to protect. Although the importance of unshorn hair in the Sikh faith and beards in the Muslim faith should lead prisons to acknowledge readily that hair-length regulations pose religious issues for Sikh and Muslim inmates, many prisons lack familiarity with such religious practices. When judicial rules allow prison officials to defend their ignorance by demanding proof from the inmates that their professed anxieties about safety are exaggerated, they perpetuate ignorance of the religious foundation of these practices as well as of the options available to accommodate them. Such a rule threatens Sikhs and Muslims with immeasurable harm to their ability to maintain their religious identity and undermines RLUIPA's purposes.

Unfamiliarity with the practices of Sikh and Muslim inmates likely reflects their small numbers in the United States generally. The first Sikhs moved to America only at the turn of the twentieth century. Juan L. Gonzalez, Jr., *Asian Indian Immigration Patterns: The Origins of the Sikh Community in California*, 20 Int'l Migration Rev. 40, 41 (1986). And today, just 500,000 Sikhs live here, meaning Sikhs constitute a fraction of a percent of the United States population. See S. Con. Res. 74, 107th Cong. (2001). Moreover, the Sikhs who live in the United States are concentrated in a few places, meaning they represent even less of the population—and their religion is even less understood—elsewhere.

Likewise, while the number of Muslims in America has risen in the last 20 years, to 2.6 million, Muslims

still comprise less than 1 percent of the U.S. population. See Pew Research Ctr., *Table: Muslim Population by Country* (Jan. 27, 2011), http://goo.gl/FJQVKS. Moreover, not all of those Americans who identify as "Muslims" adhere to the belief that they—like petitioner—are compelled to wear beards.

These small general populations have translated into similarly small prison populations: only 74 inmates in the federal prison system (or .03%) self-identify as Sikhs, and only 12,106 (or 5.5%) self-identify as Muslim of any type; still fewer are among those who are compelled to wear beards. See Letter from Wanda M. Hunt, Chief FOIA/PA Section, Bureau of Prisons, to Hemant Mehta, Patheos (July 5, 2013), http://goo.gl/1PRcxf. Statistics from state prisons suggest numbers that track the federal prison population. In a recent study, for instance, Sikhs, Baha'is, Rastafarians, practitioners of Santeria, and certain other non-Christian religions together comprise just 1.5% of the prisoner population, suggesting that the Sikh population falls well below 1% in state prisons as well. Pew Research Ctr., *Religion in Prisons: A 50-State Survey of Prison Chaplains* 48 (2012), available at http://goo.gl/gwALJh. Likewise, Muslims of all schools appeared to comprise between 5 and 10% of the state prison population, and those who believe in wearing beards represent a somewhat smaller portion.

These figures indicate that many, if not most, prisons may have little to no experience with the practices and beliefs of Sikhism or petitioner's form of Islamic practice. Consequently, prison officials unfamiliar with such beliefs are less likely to craft their regulations—such as grooming policies—with those practices in mind, creating a higher risk of conflicts between prison policy and religious practice. When such con-

flicts do arise, the Eighth Circuit permits those same officials, who are already unfamiliar with the religion they are burdening, to ignore what other prisons have done to accommodate the burdened practice. This creates creating intolerable room for discrimination.

Ungrounded suspicion, fear, and discrimination of Muslims and Sikhs in this country has been well documented. See Gregory C. Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 Iowa L. Rev. 231, 278 (2012) ("Pejorative news stories suggesting that Muslims in the West were cultural invaders and sought to coercively impose 'Sharia law' further fueled moral panic." (quotation and footnote omitted)); Pew Research Ctr., *Sikh-Americans and Religious Liberty* (Dec. 3, 2009), http://goo.gl/fjJqx3 ("[M]any non-Sikhs . . . find the distinctive appearance [of Sikhs] strange or perhaps even threatening."). Simply by acknowledging their faith in public, whether through the wearing of religious garb, the recitation of prayers, or wearing a beard, Muslims and Sikhs have recently come under intense scrutiny because of unfounded fears of terrorism. See, *e.g.*, Neil MacFarquhar, *U.S. Muslims Say Terror Fears Hamper Their Right to Travel*, N.Y. Times, June 1, 2006, at A1 (reporting on plight of bearded Muslims who are discriminated against when traveling because their appearance evokes fear of terrorism); PolitiCal, *Jerry Brown Signs Law Protecting Sikhs, Muslims, From Workplace Bias*, L.A. Times, Sept. 8, 2012, http://goo.gl/9LmGkl ("'Sikhs and other religious minorities continue to experience job discrimination on account of their religion,'" making necessary a new California law prohibiting discrimination for "wearing turbans, beards and hijabs"); Sikh Coal., *"Go Home Terrorist": A Report on Bullying Against*

Sikh American School Children 4-5 (2014), *available at* http://goo.gl/hWT5hh (finding that the majority of Sikh children experience bullying in schools, in part because "[b]rown skin and turbans have popularly become associated with terror"); *Sikh-Americans and Religious Liberty*, *supra* ("[I]n the wake of the 9/11 terrorist attacks [Sikhs have been] subjected to violence or discrimination because of their appearance."); Pew Research Ctr., *Muslim Americans: No Signs of Growth In Alienation or Support for Extremism* 43-52 (2011) (reporting that nearly half of Muslim Americans had experienced intolerance or discrimination within the previous year). In fact, in 2004, a poll showed that nearly half of Americans believed that, to protect against terrorism, the government should go so far as to affirmatively "'curtail civil liberties for Muslim Americans.'" Sisk & Heise, *supra*, at 281.

In many instances, this prejudice goes beyond mere discrimination, and has, of late, manifested itself in the form of hate crimes and shocking acts of violence. See Lee Romney, *Ever Misunderstood, Sikhs Savor Teaching Moments*, L.A. Times, Nov. 19, 2012, at AA1 ("[A]fter 9/11[] [m]istaken for Muslims because of their turbans, Sikhs were targeted. . . . The Sikh Coalition has since tracked about 700 attacks or bias-related incidents, including the slaying last year of two elderly Elk Grove men who were out for a walk. Then came the Oak Creek shootings in August."); Lee Romney, *Attack on Sikh Men Triggers Outcry in Elk Grove, Calif., and Beyond*, L.A. Times, Apr. 11, 2011, at A1 (reporting, after hate crime murder of two Sikhs, that "Sikhs have often found themselves targets of discrimination . . . . They are sometimes mistaken for Hindus or Muslims and heckled for their appearance. A survey . . . found that 10% [of Sikhs]

had experienced hate crimes. The vast majority involved physical attacks, while the rest were vandalism-related."); John Seewer, *Man: Toledo-area Mosque Fire Set as Revenge*, Columbus Dispatch, Dec. 20, 2012 (reporting that the arson of Toledo mosque was committed out of the offender's desire for "revenge for the killings of American troops overseas"); Steven Yaccino et al., *Gunman Kills 6 at a Sikh Temple Near Milwaukee*, N.Y. Times, Aug. 6, 2012, at A1 ("Though violence against Sikhs in Wisconsin was unheard of before the shooting, many . . . sensed a rise in antipathy since the attacks on Sept. 11 and suspected it was because people mistake them for Muslims"); see also Fed. Bureau of Investigation, *2012 Hate Crime Statistics: Incidents and Offenses*, http://goo.gl/UKcsWo (last viewed May 28, 2014) (noting that Muslims are the second-most-targeted victim of religion-related hate crimes); S. Poverty Law Ctr., *FBI: Bias Crimes Against Muslims Remain at High Levels* (2013), http://goo.gl/Hc0gNr (reporting that "the real number of anti-Muslim hate crimes during 2011 may have been somewhere between 3,000 and 5,000," due to "intensification of anti-Muslim rhetoric").

Such an atmosphere of hostility, violence, and mistrust puts the Muslim and Sikh inmate communities at particular risk of being prejudiced by bias-driven regulations or restrictions that superficially appear, or are subjectively believed by those who enforce them, to be neutral. Overt discrimination is both illegal and socially unacceptable, so even those who harbor prejudicial beliefs are unlikely to declare them as such. R. Randall Rainey, *Law and Religion: Is Reconciliation Still Possible?*, 27 Loy. L.A. L. Rev. 147, 186 (1993) ("anti-religious bigotry is largely hidden, and will not readily be admitted"). And there is no record

of intended harm in the record here. But scholars have shown that prejudice often comes out in less obvious and often unintentional ways. See Seymour Epstein, *Cognitive-Experiential Self Theory of Personality*, *in* 5 *Handbook of Psychology: Personality and Social Psychology* 159, 160-61 (Theodore Millon et al. eds., 2003) (describing the unconscious side of cognition as "emotionally driven," and explaining that the unconscious system "adapts by learning from experience rather than by logical inference," and is particularly impacted by traumatic or emotional events such as the attacks of September 11).

These sorts of hidden or unconscious "[s]tereotypes,"—*e.g.*, that "Muslims [are] security risks and Islam [i]s a religion of violence"—"are especially likely to be activated in contexts that already breed negative stereotypes, such as claims by prisoners." Sisk & Heise, *supra*, at 262, 283. When such subconscious prejudice does manifest itself, it is doubly damaging, insofar as it both cultivates unintentionally discriminatory policies in the first place and then clouds subsequent decisionmaking about accommodations. See *id.* at 262, 283. Indeed, as substantial research has borne out, imprisoned "Muslims appear to be at a pronounced disadvantage in obtaining accommodations for religious practices in federal court [precisely] *because* they are Muslims." *Id.* at 262; see also William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308, 311 (1991) (arguing that a "court is more likely to find against a claimant on definitional grounds when the religion is bizarre, relative to the cultural norm, and is more likely to find that a religious belief is insincere when the belief in question is, by cultural norms, incredulous."). This consequence also holds true for Sikhs, who in addition to being a minority religion in their

own right, are frequently targeted because of their perceived resemblance to members of Al-Qaeda or the Taliban. See, *e.g.*, Yaccino, *supra* (quoting witnesses, in the aftermath of a hate crime shooting at a Sikh temple, complaining that "'[m]ost people are so ignorant they don't know the difference between religions . . . . they see the turban [and] they think you're Taliban'").

A rule in accordance with the approach of the majority of circuits—which requires prison officials who may lack exposure to some faiths to inquire about how uncommon religious practices might safely be accommodated—would protect against such manifestations of ignorance, bias, and limited experience. The Eighth Circuit's rule plainly does not. Its interpretation of RLUIPA should therefore be reversed.

B. Multiple Other Penal Institutions Have Successfully Accommodated Religious Grooming Practices Similar To Petitioner's Without Undermining The State's Security Interests.

The Eighth Circuit's holding is all the more remarkable because the "least restrictive means" test is, in these circumstances, so simple to apply. No groundbreaking research or hypothetical alternatives needed to be conjured. All the Court had to ask the Arkansas prison officials to do was examine whether other prisons have been successfully able to accommodate similar practices. Had they done so, they would readily have found numerous examples of prisoners' religious grooming habits being successfully accommodated.

Arkansas is a complete outlier. As a rule, 44 state and federal prison systems permit at least half-inch beards for prisoners with religious motivation, and

the level of enforcement in the remaining states varies. See Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 964-72 (2012) (noting some qualitative limits for hygiene, identification, or security). Further, many jurisdictions permit prisoners to maintain unshorn beards and uncut hair without any length limits whatsoever, either as a general rule for all prisoners, regardless of justification, see, *e.g.*, 28 C.F.R. § 551.2 ("An inmate [in the federal prison system] may wear a mustache or beard or both."); Alaska Admin. Code tit. 22, § 05.180(c) ("A prisoner must be permitted to adopt any hair style or length, including a beard and mustache if they are kept clean."); Colo. Dep't Of Corr., Administrative Regulation, No. 850-11, § IV.A.3 (2011) (allowing inmates "freedom in personal grooming," including beards that "are kept neat and clean"); N.J. Admin. Code § 10A:14-2.5(a), (b) ("Inmates shall be permitted to have the hair style or length of hair they choose, including beards and mustaches, provided their hair is kept clean and does not present a safety hazard, or a health, sanitary or security problem."); Ohio Admin. Code 5120-9-25(A), (D), (F) (similar); or as an expressly provided exception for religious adherents, see, *e.g.*, Ariz. Dep't Of Corr., Inmate Regulations § 704.02(1.3) (2013) ("Full beards or partial beards . . . shall not be authorized. Exceptions for full beards may only be granted for medical or religious reasons. Authorized beards shall be kept clean, trimmed and well-groomed at all times."); N.M. Corr. Dep't, Inmate Grooming And Hygiene, No. CD-151101 §§ (H)(5), (J)(1), *available at* http://goo.gl/RkOceP ("Beards and goatees are not permitted and no other facial hair is permitted." "Inmates having a sincerely held religious belief which prohibits the inmate from cutting his hair may request an except-

ion to the grooming standards . . . ."); N.Y. Dep't Of Corr. Servs., Directive: Inmate Grooming Standards, No. 4914, §§ (III)(A)(2)(b), (A)(5), (B)(1)(b) (2014), *available at* http://goo.gl/vwXALr (similar); Pa. Dep't Of Corr., Policy Statement: Religious Activities, No. DC-ADM 819, § 4(B)(1)(c), (2)(e)-(f), (3) (2013), *available at* http://goo.gl/pYtkBe (similar).

It is difficult to comprehend how a rule that is not followed in nearly four dozen states—all of which have the same compelling interests in prisoner safety, hygiene and security—can, at the same time, be the "*least* restrictive means" of ensuring prisoner safety, hygiene, and security. See *Garner*, 713 F.3d at 247 ("We . . . find it persuasive that prison systems that are comparable in size to Texas's—California and the Federal Bureau of Prisons—allow their inmates to maintain beards, and there is no evidence of any specific incidents affecting prison safety in those systems due to beards."); *Warsoldier*, 418 F.3d at 1000 ("[T]he failure 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."). Yet the Eighth Circuit would permit the deprivation of a minority inmate's right to exercise his religion based on little more than "the government's bare say-so." *Yellowbear* v. *Lampert*, 741 F.3d 48, 59 (10th Cir. 2014) (Gorsuch, J.) ("RLUIPA's compelling interest test is a strict one: Congress borrowed its language from First Amendment cases applying perhaps the strictest form of judicial scrutiny known to American law. That test . . . can[not] be satisfied by the government's bare say-so." (citing *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500-01 (1989))).

Amici have repeatedly seen where prisoners who have been allowed to practice their faith through growing their hair and beards have done so without jeopardizing any of the security, hygienic, or identification concerns raised by respondents. In fact, research bears out that permitting religious adherents to practice their faith in prison can lead to *better* security and reduce the likelihood of recidivism. See *Religion in Prisons: A 50-State Survey of Prison Chaplains*, *supra*, at 63 ("73% of the chaplains surveyed consider access to high-quality religion-related programs while in prison absolutely critical to rehabilitation"); Todd Clear et al., *Prisoners, Prison, and Religion: Religion and Adjustment to Prison*, 35 J. Offender Rehab. 152 (2002) (finding a statistically significant inverse relationship between inmates' religiousness and their confinement for disciplinary infractions); Criminal Justice Policy Council, *Initial Process and Outcome Evaluation of the InnerChange Freedom Initiative: The Faith-Based Prison Program in TDCJ* 23 (2003), *available at* http://goo.gl/NPTwyu (finding a far lower rate of recidivism among Texas prisoners who had completed faith-based programs in prison).

One such example is the case of Sukhjinder S. Basra, a Sikh man imprisoned in California. See Sikh Coal., *Legal Victory: Sikh Prisoners Can Maintain Kesh*, (June 10, 2011), http://goo.gl/HKWWCb. Like other Sikhs, Mr. Basra believed firmly in the importance of maintaining a beard. However, at the time he was imprisoned, California's Code of Regulations prohibited inmates from wearing facial hair that extends more than one-half inch in length. See Cal. Code Reg. tit. 15, § 3062(h) (2011). After petitioning California officials, the State agreed that the facial hair length restrictions were not justified

when imposed on Sikh prisoners, and that Mr. Basra's proposed beard would not threaten other prisoners' health or safety. The State thus agreed to permit Mr. Basra to grow his beard and eventually rescinded the regulation. See Settlement Agreement, *Basra* v. *Cate*, No. 2:11-cv-1676 SVW(FMOx) (C.D. Cal. filed June 5, 2011) (Dkt. No. 40-1). After this, Mr. Basra never became a security concern.

Similarly, Paramjit Singh Basra, a Sikh prisoner in Washington State's Clallam Bay Corrections Center, has been permitted to wear a turban and to maintain unshorn hair and beard while incarcerated, and has done so without incident. Sikh Coal., *Guru Granth Sahib Added to Special Handling List by Washington Prison*, http://goo.gl/7yY258 (last visited May 28, 2014) (detailing efforts by Sikh Coalition to afford special status to Sikh holy book on behalf of Mr. Basra who maintains a turban, uncut hair, and an unshorn beard).

Furthermore, under an injunction in force since 2002, more than 300 Muslim prisoners incarcerated at California's Solano state prison have worn half-inch beards in accordance with their faith. See *Mayweathers* v. *Terhune*, 328 F. Supp. 2d 1086, 1090-91, 1096 (E.D. Cal. 2004) (recounting procedural history of case and granting permanent injunction protecting Muslim prisoners' rights to wear beards); Richard Fausset, *Lawsuit May Force Change in Prison Ban on Beards*, L.A. Times, Oct. 7, 2002, sec. 2 (Metro), at 1 ("The 300 Muslims at Solano state prison have been allowed to wear beards since February, when U.S. District Court Judge Lawrence K. Karlton granted a preliminary injunction."); Henry Weinstein, *Court Backs Muslim Inmates*, L.A. Times, Dec. 28, 2002, sec. 2 (Metro), at 1. In the intervening

decade, there have been no reports of any beard-related security or hygiene problems.

These examples demonstrate that other prisons—which all have the same compelling interests and safety concerns held by the Arkansas prison—have accommodated religiously mandated beards without jeopardizing prison security, and that such accommodation promotes rehabilitation. Accordingly, the Arkansas prison's rule and the Eighth Circuit's approval of it are irreconcilable with RLUIPA. The judgment below should be reversed.

CONCLUSION

For the forgoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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