No.

In the Supreme Court of the United States

IRON THUNDERHORSE,

Petitioner,

v.

BILL PIERCE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals misinterpret the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, to require only a minimal showing that a prison grooming rule that concededly imposes a substantial burden on religious exercise is the "least restrictive means of furthering [a] compelling governmental interest," contrary to the decisions of other circuits and the literal terms of the statute?

PARTIES TO THE PROCEEDINGS

Petitioner Iron Thunderhorse was the plaintiff in the District Court and the appellant in the Court of Appeals. Respondent Bill Pierce is the Director of Chaplaincy Services of the Texas Department of Criminal Justice and respondent Brad Livingston is the Executive Director of the Texas Department of Criminal Justice. Both respondents were sued in their personal and official capacities.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional and Statutory Provisions

Legislative Materials

Administrative Materials

Miscellaneous

Blank Page

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Fifth Circuit (App., *infra*, 1a-19a) is reported at 2010 WL 454799 and U.S. App., LEXIS 2713. The opinion of the District Court (App., *infra*, 20a-83a) is reported at 2008 U.S. App. LEXIS 58842. The prior opinions in this case (on rulings not sought to be reviewed by this petition for certiorari) are reported at 232 Fed. Appx. 425, 2007 WL 1455940, 2007 U.S. App. LEXIS (5th Cir. May 18, 2007); 418 F.Supp.2d 875, 2006 WL 359723, 2006 U.S. Dist. LEXIS 9997 (E.D. Tex. Feb. 13, 2006); 2006 U.S. Dist. LEXIS 9985 (E.D. Tex. Feb. 13, 2006); 2005 WL 1398644, 2005 U.S. Dist. LEXIS 23154 (E.D. Tex. June 10, 2005).

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2010. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 2 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1, provides:

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

Section 3 of RLUIPA, 42 U.S.C. § 2000cc-2, provides in relevant part:

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

Section 4 of RLUIPA, 42 U.S.C. § 2000cc-3, provides, in relevant part:

(e) Governmental discretion in alleviating burdens on religious exercise

A government may avoid the preemptive force of any provision of this chapter by changing the

> policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

Section 6 of RLUIPA, 42 U.S.C. § 2000cc-5, provides, in relevant part:

> In this chapter:
> (1) Claimant
> The term "claimant" means a person raising a claim or defense under this chapter.
> (2) Demonstrates
> The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.
> * * *
> (7) Religious exercise
> (A) In general
> The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

Texas Department of Criminal Justice Offender Orientation Handbook, Ch. 1 § III.A (2004), provides, in relevant part:

> A. Personal Cleanliness and Grooming
> * * *

4. Male offenders must keep their hair trimmed up the back of their neck and head. Hair must be neatly cut. Hair must be cut around the ears. Sideburns will not extend below the middles of the ears. No block style, afro, natural or shag haircuts will be permitted. No fad or extreme hairstyles/haircuts are allowed. No Mohawks, tails, or designs cut into the hair are allowed.

5. Female offenders will not have extreme hairstyles. No Mohawk, "tailed" haircuts or shaved/partially-shaved heads will be allowed. Female offenders may go to the beauty shop on their unit; however, going to the beauty shop is a privilege. Female offenders may be restricted from going to the beauty shop as the result of disciplinary action.

STATEMENT

This case presents a single question: whether the courts below incorrectly interpreted RLUIPA to require only a minimal showing that a prison grooming rule is the least restrictive means of furthering a compelling governmental interest. The rule in question prohibits male inmates from having long hair and it makes no exception for petitioner, a prisoner who adheres to a Native American religion that requires long hair. Petitioner is 66 years old, suffers from diabetes, a heart condition, and failing eyesight, and his earliest possible release date is 2023. He seeks to practice his religion in the years

remaining to him and to enter the next life in a condition acceptable under the tenets of his faith. The District Court found that petitioner's religious beliefs were sincere, App., *infra*, at 66a, and recognized "that the wearing of long hair is important to practitioners of Native American religions." *Id.* at 69a (footnote omitted). The Court of Appeals agreed. *Id.* at 8a-9a. Under RLUIPA, respondents therefore had the burden of proving that this restriction on religious freedom was "the least restrictive means of furthering [a] compelling governmental interest." § 2(a), 42 U.S.C. § 2000cc-1(a). In deciding to the contrary, the Court of Appeals aggravated a conflict among the circuits and misinterpreted the literal terms of RLUIPA.

A. Statutory Framework

Congress has twice acted to protect the religious freedom of prison inmates, in the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, and in its predecessor, the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.* In particular, RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden is shown to further "a compelling governmental interest," and does so by "the least restrictive means." § 2(a), 42 U.S.C. § 2000cc-1(a). This Court upheld the constitutionality of RLUIPA in *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005), acknowledging that Congress condemned "frivolous or arbitrary" barriers to the exercise of religion by

institutionalized persons, and holding that strict scrutiny under RLUIPA did not impermissibly favor religion. *Id.* at 713-17.

A plaintiff under RLUIPA bears the initial burden of demonstrating that the challenged prison policy substantially burdens the exercise of his sincerely held religious beliefs. If the plaintiff proves that the burden on the exercise of his religion is substantial, the defendant must demonstrate that the challenged policies are the least restrictive means of furthering a compelling governmental interest. RLUIPA § 2(a), 42 U.S.C. § 2000cc-1(a). "Demonstrates" means carrying "the burdens of going forward with the evidence and of persuasion." *Id.* § 6(2), 42 U.S.C. § 2000cc-5(2). This case comes down to the question whether respondents carried these burdens under a correct interpretation of RLUIPA.

The prison regulation in this case makes no exception for religious practices and provides as follows: "Male offenders must keep their hair trimmed up the back of their neck and head." Texas Department of Criminal Justice Offender Orientation Handbook, Chapter 1 § III.A.4 at p. 10 (2004), *supra*, at 3-4.

B. Proceedings Below

Petitioner Iron Thunderhorse practices Native American shamanism and is an inmate of the Texas Department of Criminal Justice (TDCJ). App., *infra*,

at 20a. Thunderhorse is 66 years old and is serving a 99-year prison term.[1] Thunderhorse has been incarcerated for more than three decades. *Id.* at 4a. While an inmate of the TDCJ, Thunderhorse has sought to engage in numerous rituals of his Native American religion. From 1994 to 2003, at the Stiles Unit, and at earlier times at various other units of the TDCJ, Thunderhorse was permitted to practice certain of these rituals and, pertinent to this petition, grew his hair long enough to wear it in braids—a fact that is undisputed in this case. *Id.* at 4a & n.1.

In August 2004, Thunderhorse was transferred to the Polunsky Unit of the TDCJ for treatment of various disabilities. App., *infra*, at 29a. At the Polunsky Unit, he no longer received religious accommodations regarding his religious practices and he faced discipline for continuing to have long hair. *Ibid.*; *id.* at 5a. Thunderhorse filed grievances challenging these restrictions, including the restriction on hair length, and has exhausted prison grievance procedures. Only the restriction on hair length is at issue in this petition.

Thunderhorse filed this action asserting claims under RLUIPA and the Constitution for denial of the right to exercise his religion and for denial of other federal rights. Jurisdiction in the District Court was based on 28 U.S.C. §§ 1331, 1343. By consent of the parties, the lawsuit was referred for all proceedings

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[1] Thunderhorse was originally convicted of robbery, rape, and kidnapping. He received an additional 20-year sentence for attempted escape in 1991.

to a magistrate judge pursuant to 28 U.S.C. § 636(c). In 2006, the magistrate judge granted summary judgment for defendants, a decision which was vacated by the Fifth Circuit because Thunderhorse had not received sufficient notice to allow him to submit evidence in response to defendants' motion. *Thunderhorse* v. *Pierce,* 418 F.Supp.2d 875, 899 (E.D.Tex. 2006), rev'd, 232 Fed. Appx. 425 (5th Cir. 2007).[2] Upon remand, Thunderhorse submitted additional evidence in a bench trial before the magistrate judge.

The magistrate judge denied Thunderhorse's claim under RLUIPA for an exemption from the rule against long hair, but granted him relief in other respects. App., *infra*, at 82a-83a. In particular, the magistrate judge entered an injunction requiring the TDCJ to recognize Native American shamanism as a valid faith. *Id. at* 82a. Respondents took no appeal or cross-appeal from this ruling. Also undisputed is the magistrate judge's finding that the "wearing of long hair is important to practitioners of Native American religions." App., *infra,* at 69a (footnote omitted).

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[2] These rulings are not at issue in this petition, the first because it was vacated and the second because it was in petitioner's favor. Also not at issue are the rulings by the District Court in denying a preliminary injunction and in dismissing defendant Teel from the case because he was no longer employed by the TDCJ. *Thunderhorse* v. *Pierce*, 2006 U.S. Dist. LEXIS 9985 (E.D. Tex. Feb. 13, 2006); 2005 WL 1398644, 2005 U.S. Dist. LEXIS 23154 (E.D. Tex. June 10, 2005). Petitioner no longer contests these rulings.

At trial, Thunderhorse presented evidence of the TCDJ's arbitrary enforcement of the rule against long hair and evidence of the policies of other prisons permitting long hair. *Id.* at 28a, 30a, 34a-35a, 44a. With respect to the arbitrary enforcement of the rule against long hair, the magistrate judge noted that one TDCJ inmate, a witness at the trial, let down his hair "to show the Court that it was well past his collar," in apparent violation of the prison's grooming policy. *Id.* at 35a. When questioned by the magistrate judge, the regional director of the TDCJ, William Stephens, admitted that the witness's long hair resulted from a shortage of officers "and so some matters were overlooked." *Id.* at 44a. The magistrate judge nevertheless held that there was no violation of RLUIPA under governing Fifth Circuit precedent and denied all relief on this claim. *Id.* at 69a-70a, 83a. The District Court's judgment was entered on July 30, 2008, and Thunderhorse filed a timely notice of appeal on August 7, 2008.

On February 9, 2010, the Fifth Circuit affirmed the judgment of the District Court, agreeing that prior Fifth Circuit precedent foreclosed Thunderhorse's claim under RLUIPA. App., *infra*, at 8a-10a. In a footnote, the court rejected Thunderhorse's arguments that the rule was enforced arbitrarily, that it did not apply in the Texas prisons for women, and that other prison systems permit long hair, including the Federal Bureau of Prisons. *Id.* at 10a n.3. The court recognized that the Ninth Circuit had reached a contrary decision in considering exactly the same arguments. *Warsoldier* v. *Woodford*, 418 F.3d 989, 998-1001 (9th

Cir. 2005). But the Fifth Circuit did not analyze the Ninth Circuit's opinion or consider the evidence presented by Thunderhorse because circuit precedent did not permit it to do so. App., *infra*, at 10a n.3.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are in Sharp and Fundamental Conflict Over the Interpretation of Strict Scrutiny Under RLUIPA, as Their Divided Decisions on Prison Grooming Rules Reveal

RLUIPA requires government regulations that impose substantial burdens on prisoners' religious exercise to be "the least restrictive means of furthering [a] compelling governmental interest." RLUIPA § 2(a), 42 U.S.C. 2000cc-1(a). In *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005), this Court observed that lower courts should apply RLUIPA with "due deference to the experience and expertise of prison and jail administrators." *Id.* at 723 (citations omitted). But the courts of appeals have disagreed over how much deference can be given to prison officials consistently with the statutory standard of strict scrutiny. The Fifth Circuit stands at the extreme of deferring to the dated and conclusory assertions of prison officials.

The circuit split over hair length restrictions presents a sharply defined, concrete example of a broader and deeper split over the meaning of strict

scrutiny under RLUIPA. Nine circuits have heard challenges under the statute. Seven circuits—the First, Second, Third, Fourth, Seventh, Eighth, and Ninth—require the government to submit specific evidence and closely examine it on the issue of least restrictive means. *Spratt* v. *Rhode Island Dep't of Corrections*, 482 F.3d 33, 38-43 (1st Cir. 2007); *Jova* v. *Smith*, 582 F.3d 410, 415-417 (2d Cir. 2009) (per curiam), cert. denied, No. 09-9237 (Apr. 19, 2010); *Washington* v. *Klem*, 497 F.3d 272, 284-286 (3d Cir. 2007), *Lovelace* v. *Lee*, 472 F.3d 174, 189-193 (4th Cir. 2006); *Koger* v. *Bryan*, 523 F.3d 789, 801 (7th Cir. 2008); *Murphy* v. *Missouri Dep't of Corrections*, 372 F.3d 979, 988-989 (8th Cir. 2004), cert. denied, 543 U.S. 991 (2004); *Warsoldier* v. *Woodford*, 418 F.3d 989, 998-1001 (9th Cir. 2005). Two circuits—the Fifth and Sixth—accept the government's own assertion of what constitutes least restrictive means. *Baranowski* v. *Hart*, 486 F.3d 112, 125-126 (5th Cir. 2007), cert. denied, 552 U.S. 1067 (2007); *Hoevenaar* v. *Lazaroff*, 422 F.3d 366, 369-372 (6th Cir. 2005), cert. denied, 549 U.S. 875 (2006). A comprehensive survey of lower court decisions has identified an even broader and more severe division among the circuits. James D. Nelson, Note, *Incarceration, Accommodation, and Strict Scrutiny*, 95 Va. L. Rev. 2053, 2068-2071 (2009).

The seven circuits which have required specific evidence have scrutinized both inconsistent applications of prison policy and alternatives used in other institutions. The Seventh Circuit's decision in *Koger* illustrates this approach. The court examined whether a rule requiring clergy to verify prisoners'

dietary requests was the least restrictive means to achieve orderly food service. 523 F.3d at 801. The Seventh Circuit compared the rule to the practice in federal prisons of only requiring a written statement from the prisoner for dietary accommodations. *Ibid.* Concluding that this was a less restrictive alternative, the Seventh Circuit determined that "the prison officials failed to meet their burden that they were employing the least restrictive means," and accordingly ordered summary judgment for the plaintiff. *Ibid.* Other circuits have applied the same level of scrutiny. *Spratt*, 482 F.3d at 41 n.11 (First Circuit held that the prison could not satisfy its burden with "a blanket statement that all alternatives have been considered and rejected"); *Jova*, 582 F.3d at 417 (Second Circuit remanded for more specific evidence on least restrictive means with respect to prison policies on diet); *Washington*, 497 F.3d at 284 (Third Circuit required government to show that it considered and rejected alternatives to prove its chosen policy is the least restrictive means); *Lovelace*, 472 F.3d at 190 (Fourth Circuit held that "the superficial nature of defendant's explanation" required remand on whether prison's interest was compelling and its policy the least restrictive means); *Murphy*, 372 F.3d at 988-989 (Eighth Circuit remanded for more evidence on consideration of alternatives to ban on group worship); *Warsoldier*, 418 F.3d at 998-1001 (Ninth Circuit required evidence that prison officials considered and rejected less restrictive alternatives).

By contrast, only two circuits—the Fifth and Sixth—have held simple assertions of security or

budgetary interests to be sufficient and rarely considered alternatives from other prison systems. The Fifth Circuit exemplified this approach in *Baranowski*, affirming summary judgment for defendants. The prisoner there sought a kosher diet under RLUIPA, but the Fifth Circuit accepted the assertion of prison officials that denial of a religious diet was "related to maintaining good order and controlling costs and, as such, involves compelling government interests." 486 F.3d at 125. The Sixth Circuit took the same approach in *Hoevenaar*, reversing a preliminary injunction based on the general testimony of prison officials about the difficulty of making individualized exceptions. 422 F.3d at 371.

When this deep-seated difference in approach has been applied to prison rules against long hair, it has resulted in decisions that are all over the lot. Of the seven courts of appeals that have addressed challenges to hair length restrictions under RLUIPA, one has required a religious exception, two have taken the categorical approach of the court below, two have engaged in more detailed analysis to uphold the restriction, and two have upheld restrictions in some cases and required more evidence in others. The Ninth Circuit has held that a prison rule against long hair did not satisfy RLUIPA's least restrictive means requirement. *Warsoldier*, 418 F.3d at 998. The Fifth and Sixth Circuits upheld such restrictions based on minimal evidence, App., *infra*, at 8a-10a; *Hoevenaar*, 422 F.3d at 371-372, while the Seventh and Eighth have relied on more specific evidence to reach the same

conclusion. *Williams* v. *Snyder*, No. 08-1908, 2010 WL 750105, 2010 U.S. App. Lexis 4777 (7th Cir. Mar. 5, 2010); *Fegans* v. *Norris*, 537 F.3d 897, 902-906 (8th Cir. 2008). The Fourth and Eleventh Circuits have upheld some hair length restrictions, while they have required more evidence to support others. Compare *McRae* v. *Johnson*, 261 Fed. Appx. 554, 560 (4th Cir. 2008) (upholding) and *Brunskill* v. *Boyd*, 141 Fed. Appx. 771, 776 (11th Cir. 2005) (upholding) with *Smith* v. *Ozmint*, 578 F.3d 246, 254 (4th Cir. 2009) (more evidence); *Lathan* v. *Thompson*, 251 Fed. Appx. 665, 667 (11th Cir. 2007) (more evidence).

In a conflicting decision explicitly acknowledged by the court below, App., *infra*, at 10a n.3, the Ninth Circuit held that California's hair length policy was not the least restrictive means of achieving prison security. *Warsoldier*, 418 F.3d at 998. The court ordered the entry of a preliminary injunction because the state had offered only conclusory statements that the policy was the least restrictive means. *Ibid.* Instead, the state was required to demonstrate "that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Id.* at 999. The court explicitly noted that the Federal Bureau of Prisons and other state institutions allowed prisoners to choose their own hairstyle without sacrificing prison security. *Id.* at 999-1000. The court also rejected the disparate treatment of male and female inmates because the government had not shown cause for the difference. *Id.* at 1000-01.

At the opposite extreme, the Fifth Circuit in this case did not examine any new evidence to justify the rule against long hair. Instead, the panel decision relied on a precedent, which in turn relied on a precedent, which was ultimately based on evidence that is now more than fifteen years old. App., *infra*, at 8a-10a, relying on *Longoria* v. *Dretke*, 507 F.3d 898, 903-04 (5th Cir. 2007), relying on *Diaz* v. *Collins*, 114 F.3d 69, 72-73 (5th 1997), aff'g 872 F.Supp. 353 (E.D.Tex.1994). In *Longoria*, the Fifth Circuit upheld the district court's dismissal of an RLUIPA challenge to the TDCJ policy even without a response from the state. 507 F.3d at 903-04. The court held this claim to be foreclosed by its prior decision in *Diaz*, which involved a RFRA challenge to the same policy. *Ibid.* In *Diaz*, the Fifth Circuit summarily accepted that the hair length policy was the least restrictive means of achieving prison security. 114 F.3d at 73. It did not consider a single alternative policy, nor did it examine the cost of an individual accommodation. *Ibid.*[3]

As noted, the Sixth Circuit stands with the Fifth in requiring the least support for hair length restrictions. In *Hoevenaar*, the Sixth Circuit accepted a blanket rule against long hair as the least restrictive means for achieving security based on

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[3] In unpublished decisions, the Fifth Circuit has narrowed the scope of *Diaz*, while affirming that it remains dispositive for cases within its scope. E.g., *Odneal* v. *Pierce*, 324 Fed. Appx. 297, 301 (5th Cir. 2009). In the present case, the Fifth Circuit explicitly recognized the continuing force of *Diaz* and the conflict that it creates with the Ninth Circuit. App., *infra*, at 10a n.3.

assertions that recognizing individual exceptions would cause problems, despite the absence of any evidence that previously recognized exceptions had resulted in security incidents. 422 F.3d at 369-71.

The Seventh and Eighth Circuits have upheld hair length restrictions against challenges under RLUIPA, but with the consideration of more specific evidence. *Williams* v. *Snyder*, No. 08-1908, 2010 WL 750105, at *3-*4, 2010 U.S. App. Lexis 4777 at *7-*8 (7th Cir. March 5, 2010); *Fegans*, 537 F.3d at 902-906. In these cases, prison administrators testified to specific examples of hidden contraband and less restrictive policies they had considered and rejected. *Williams*, 2010 WL 750105, at *3-*4, 2010 U.S. App. Lexis 4777 at *7-*8; *Fegans*, 537 F.3d at 902-06. Nevertheless, as the separate opinion in *Fegans* pointed out, none of these cases has required evidence supporting different rules for men and women, beyond generalizations that women simply are less violent than men. 537 F.3d at 912 (Melloy, J., concurring in part and dissenting in part).

The Fourth and Eleventh Circuits have come to different conclusions in different cases. In *Smith*, the Fourth Circuit addressed a South Carolina prison policy which differentiated between male and female inmates and allowed prison officials to forcibly cut inmates' hair to conform to prison rules. 578 F.3d at 249. The Fourth Circuit rejected the government's affidavit—prepared for another case involving a different security unit—attesting that this policy was the least restrictive means for achieving security. *Id.* at 253. In fact, the Fourth Circuit

suggested that accepting such conclusory statements would violate the principles set forth by this Court in *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006), which required a case-by-case analysis of the government's interest in denying an exemption under RFRA. 546 U.S. at 430-31. In *McRae*, however, the Fourth Circuit upheld Virginia's hair length restriction based on specific examples of contraband in prisoners' hair and medical problems hidden by their hair. 261 Fed. Appx. at 558.

Similarly, the Eleventh Circuit rejected a RLUIPA challenge to a Florida policy limiting inmates to "medium length" hair. *Brunskill*, 141 Fed. Appx. at 774-76. The court provided little analysis, saying only that "the hair length policy * * * [is] the least restrictive means in furthering compelling governmental interests in the security, health, and safety of inmates and staff." *Id.* at 776. Yet in *Lathan*, the Eleventh Circuit vacated the district court's grant of summary judgment because it was dissatisfied with the ten-year-old evidentiary record. 251 Fed. Appx. at 667 (remanding for trial).

The multiple circuit splits—on results, methods, and reasoning over permissible hair length restrictions—reflect the deeper conflict over just what strict scrutiny means under RLUIPA. The circuits are divided on the fundamental question of how much deference can be given to prison officials consistent with strict scrutiny. The courts of appeals have given no indication that they will be able to resolve these conflicts themselves. If anything, the

disarray among the circuits is likely to increase, resulting in increasing disagreement over the meaning of RLUIPA and over the rights that it protects. Review by this Court is necessary to restore the uniformity of federal law.

II. The Conflicting Decisions of the Circuits Raise Important and Recurring Issues of Religious Freedom and Strict Scrutiny, Which Are Clearly Presented by This Case

This case presents an important and recurring question on the standard for judicial review of prison rules that "impose a substantial burden on the religious exercise of a person residing in or confined to an institution." RLUIPA § 2(a), 42 U.S.C. § 2000cc-1(a). In the wake of *Cutter* v. *Wilkinson,* 544 U.S. 709 (2005), prison administrators and inmates have vigorously contested whether specific regulations run afoul of the protections afforded by RLUIPA. As noted above, challenges to institutional rules specifically against long hair have arisen in seven circuits, generating substantial confusion and uncertainty over the scope of the rights protected by RLUIPA. These claims represent only a small fraction of the total number of claims brought under RLUIPA, which extend across the full range of religious practices, from religious meetings, to diet, to religious objects. Nelson, *supra*, 95 Va. L. Rev. at 2071-79, 2092-98. As of 2008, the lower federal courts faced prisoner claims for accommodation under RLUIPA in hundreds of cases, and this

number has only grown since then. *Id.* at 2054 & n.4.

The continuing disarray among the circuits reveals the need for guidance from this Court on what satisfies strict scrutiny under RLUIPA. The statute specifically requires prison officials to prove that rules which substantially burden an inmate's religious exercise are "(1) in furtherance of a compelling governmental interest; and (2) the least restrictive means of furthering that compelling governmental interest." § 2(a), 42 U.S.C. § 2000cc-1(a). As this Court recognized in *Cutter*, Congress anticipated that "courts would apply [RLUIPA's] standard with due deference to the experience and expertise of prison and jail administrators." 544 U.S. at 723 (citations omitted). This Court expressed confidence that the lower federal courts would apply RLUIPA's standard "in an appropriately balanced way." *Ibid.* The conflict among the circuits, however, reveals that they have failed to strike any stable balance at all. Whether RLUIPA requires religious exemptions from prison rules against long hair appears to depend entirely on the circuit in which the inmate finds himself incarcerated.

The confusion among the circuits stands in stark contrast to this Court's application of strict scrutiny to protect religious freedom. In *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520 (1993), a local ordinance restricting religious sacrifices was struck down under the First Amendment. As this Court said, "if the object of a law is to infringe upon or restrict practices because

of their religious motivation, the law is not neutral and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* at 533 (citations omitted). Likewise, in *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), this Court subjected a federal statute to strict scrutiny under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.* A religious group sought an exemption from the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, for the use of a hallucinogen in religious ceremonies. This Court upheld the claim for an exemption because "RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rule[s] of general applicability.'" *O Centro*, 546 U.S. at 436 (citation omitted).

The Fifth Circuit's excessively deferential review in this case vividly illustrates how it undermines the standards for strict scrutiny in other cases. As this Court observed in *Employment Division* v. *Smith,* 494 U.S. 872, 888 (1990): "If the 'compelling interest' test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded." Otherwise, "watering it down here would subvert its rigor in the other fields where it is applied." *Ibid.* These risks extend well beyond claims for religious freedom to other claims, including those arising in a prison setting. For instance, in *Johnson* v. *California,* 543 U.S. 499 (2005), this Court struck down a practice of racially segregating inmates upon their arrival at a state prison. The prison officials invoked a compelling

interest in prison safety, but this Court held that that alone was insufficient: "Prison administrators, however, will have to demonstrate that any race-based policies are narrowly tailored to that end." *Id.* at 514.

Strict scrutiny also applies, of course, across a range of other constitutional issues. E.g., *Citizens United* v. *Federal Election Comm'n*, 130 S. Ct. 876, 898 (2010) ("[l]aws that burden political speech are subject to strict scrutiny") (citations omitted); *Parents Involved in Community Schools* v. *Seattle School District, No. 1*, 551 U.S. 701, 720 (2007) ("when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny"); *United States* v. *Playboy Entertainment Group*, 529 U.S. 803, 813 (2000) ("if a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest"). The erosion of strict scrutiny in this case does more than depart from the standard adopted by Congress—although that is worrisome enough. It also compromises the integrity of that standard throughout constitutional law.

This case serves as an especially suitable vehicle for resolving the conflicts over the interpretation of RLUIPA. It presents a rare example of prisoner litigation finally resolved on the merits after trial, presenting a single issue for review. This case stands at the opposite extreme from *Jova* v. *Smith*, 582 F.3d 410 (2d Cir. 2009) (per curiam), cert. denied, No. 09-9237 (Apr. 19, 2010), in which two

prisoners petitioned for review of a judgment which was, in some respects, interlocutory. The court of appeals remanded that case for consideration of a religious diet, while the prisoners sought review on related issues. This case presents no such complications.

Petitioner properly exhausted his administrative remedies, as required by the Prison Litigation Reform Act of 1996, 42 U.S.C. § 1997e. He fully presented all available evidence and he fully argued the merits to both of the courts below.

III. The Court of Appeals Erred in Concluding That the Prison Grooming Rule Was the Least Restrictive Means of Furthering a Compelling Governmental Interest

The decision of the Court of Appeals cannot be allowed to stand uncorrected. Respondents have not met their burden of proving that an absolute prohibition against long hair, without any exception for religious practices, is the least restrictive means of furthering an interest in prison security. Any such contention is belied by the absence of similarly inflexible policies in numerous prison systems, the complete inapplicability of the rule to women within the TDCJ, and the TDCJ's own inconsistent application of the rule to men. Under RLUIPA, respondents had the burden of demonstrating that the rule is the least restrictive means of furthering a compelling governmental interest. § 2(a), 42 U.S.C. § 2000cc-1(a). They failed to do so.

Numerous prisons systems throughout the country, including the Federal Bureau of Prisons (BOP), do not find it necessary to restrict men's hair length. The BOP's own statement of policy "permits an inmate to select the hair style of their personal choice," 28 C.F.R. § 551.1, and explicitly limits the authority of wardens to do otherwise: "The Warden may not restrict hair length if the inmate keeps it neat and clean." *Id.* § 551.4(a) The BOP does not stand alone in allowing prisoners to have control over their own hair length. A number of the states have adopted the same or similar policies. Evidence in the record, which was admitted and not challenged at trial, reveals that a majority of states either do not restrict hair length or allow exceptions for religious practices. Exh. 5, App., *infra*, at 84a-86a, Tr. at 16, 115 (admission of exhibit at trial and cross-examination of witness who compiled it).

Several prison systems have made their policies on permitting long hair available in publications. E.g., Colorado Department of Corrections, Administrative Regulation: Hygiene and Grooming § IV.A. 1.d (2009), available at https://exdoc.state.co.us/userfiles/regulations/pdf/0850_11.pdf ("An offender who claims that long hair and/or a beard is a fundamental tenet of a sincerely held religious belief will not be required to have a hair cut as long as the offender obtains documentation from the Office of Faith and Citizens Programs' coordinator."); Kentucky Department of Corrections, Policies and Procedure: Hair, Grooming, and ID Card Standards § 2.A (2008), available at http://www.corrections.ky.

gov/NR/rdonlyres/E3C6E5A8-3782-48C8-B162-ACA0923D73A0/160611/1598.pdf ("An inmate may * * * [c]hoose the length of his hair."); Michigan Department of Corrections, Policy Directive: Humane Treatment and Living Conditions of Prisoners § D (2009), available at http://www.michigan.gov/documents/corrections/03_03_130_270875_7.pdf ("Prisoners shall be permitted to maintain head and facial hair in accordance with their personal beliefs provided that reasonable hygiene is maintained."); Oregon Department of Corrections, Inmate Hygiene, Grooming, and Sanitation Standards, Or. Admin. R. 291-123-0015 § 2(a) (2010) ("Head and facial hair must be maintained daily in a clean and neat manner.").

These prison systems include the full range of range of prisons, from minimum to maximum security, and they face the same issues of preserving prison security as the TDCJ. Following their example, the TDCJ could allow a narrow religious exemption as envisioned by RLUIPA, which provides that the government may accommodate religious practices by "retaining the policy or practice and exempting the substantially burdened religious exercise." § 4(e), 42 U.S.C. § 2000cc-3(e). The TDCJ has failed to articulate why other prison systems, with an indistinguishable interest in prison security, can accommodate religious practices while it cannot.

Respondents have presented nothing more than conclusory statements to meet their burden of proof under RLUIPA. At trial, the regional director of the TDCJ advanced only unsubstantiated opinions about

possible problems of identification, hidden contraband, and hair pulling. Tr. at 222-25. He offered no specific examples in which long hair had actually caused such problems and he did not refer at all to the experience of other prison systems. Far from supplying specific reasons why a religious exception would never be feasible, the director admitted that other exceptions occurred anyway because the prisons were understaffed. *Id.* at 222; App., *infra*, at 44a.

So far from establishing that the rule against long hair is narrowly tailored, the TDCJ's own policies demonstrate the contrary. While the TDCJ requires that men keep their hair short, it allows women to have almost any hairstyle they choose, so long as it is not "extreme." Texas Department of Criminal Justice Offender Orientation Handbook, Ch. 1 § III.A.5 at p. 11 (2004), *supra*, at 3-4. Respondents have presented no evidence that women are less able than men to hide contraband in their hair, that they can less easily change their appearance, or that they are less vulnerable to attack because of their long hair.

This inconsistency directly undermines any assertion that the absolute rule against long hair is narrowly tailored. In *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), this Court held that a statutory exception for peyote use by Native Americans demonstrated that the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, could accommodate other exceptions for religious practices. The defendants in that case accordingly

failed to meet the requirements of strict scrutiny under RFRA. *Id.* at 432-34. Even more so in this case, the wholesale exception for women demonstrates the need to allow an exception for petitioner's religious exercise. Respondents have failed to explain how the double standard in the TDCJ's grooming policy serves the asserted interest in prison security.

Wholly apart from these defects, the inconsistent and arbitrary enforcement of the rule against long hair defeats any claim that it is narrowly tailored. There are several visible exceptions to the rule, despite respondents' claims that it must be uniformly enforced. Thunderhorse, in fact, was originally allowed to have long hair while in administrative segregation in the Stiles Unit. App., *infra*, at 28a. It was only when he was transferred to a different prison that Thunderhorse was no longer permitted to grow his hair long or to keep his braids, once cut, with his personal property. *Id.* at 28a-29a. In addition, as the magistrate judge noted, Thunderhorse was not the only prisoner allowed to keep hair longer than the regulations prescribed. One of the inmate witnesses, Sidney Byrd, had hair that fell down "well past his collar." *Id.* at 34a-35a.[4] In explanation, the regional director of the TDCJ could only observe that the prison was understaffed, "and so some matters were overlooked." *Id.* at 44a. If the Texas prisons cannot afford to enforce the rule

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[4] The transcript of the trial reveals that Byrd was disciplined for this violation of the rule against hair length only after he was called to testify at trial, long after he had grown his hair to that length. Tr. at 98-99.

they have, then they cannot enforce it against religious practices. If budget constraints result in de facto exceptions, then the same constraints cannot be invoked to deny exceptions for religion.

In *O Centro*, this Court "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." 546 U.S. at 431. An existing exception in that case, as in the present one, demonstrated the feasibility of the proposed accommodation. *Id.* at 434-35. Strict scrutiny requires a specific inquiry into the religious exemption sought by petitioner. There is no indication that the TDCJ has made such an inquiry. Petitioner is an elderly, diabetic, and legally blind inmate, with the safest possible security rating in the Texas prison system. The TDCJ has done no assessment indicating that inmates with similar religious beliefs and a similar security rating should be subject to the same restrictions as the general prison population. More than one circuit has held that the failure to consider exemptions on such grounds defeats any attempt to prove that a policy is narrowly tailored. *Warsoldier* v. *Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); *Smith* v. *Ozmint*, 578 F.3d 246, 253-254 (4th Cir. 2009).

Whatever deference is due to prison officials, it must be to a policy based on more than conclusory assertions about the need for general rules. The TDCJ's policy typifies the "inadequately formulated prison regulations and policies grounded on mere

speculation, exaggerated fears, or post-hoc rationalizations" that Congress subjected to strict scrutiny in RLUIPA. 146 Cong. Rec. S7774 at S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy). Respondents' arguments fare no better than those of the federal officials in *O Centro*: "The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." 546 U.S. at 436.

The TDCJ's ostensibly absolute rule against long hair has limited scope, inconsistent enforcement, and little justification. Respondents have failed to prove that the rule, in its present form, is the least restrictive means of furthering a compelling governmental interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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