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

BRIEF FOR *AMICI CURIAE* AMERICAN JEWISH COMMITTEE, UNION FOR REFORM JUDAISM, CENTRAL CONFERENCE OF AMERICAN RABBIS, WOMEN OF REFORM JUDAISM, BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

ADAM S. LURIE
SAMANTHA A. DREILINGER
KATHERINE A. PRESTON
CADWALADER, WICKERSHAM & TAFT LLP
700 6th Street, NW
Washington, DC 20002
(202) 862-2200
adam.lurie@cwt.com

MARC D. STERN
Counsel of Record
AMERICAN JEWISH COMMITTEE
165 East 56th Street
New York, NY 10022
(212) 891-1480
sternm@ajc.org

Counsel for Amici Curiae

May 29, 2014

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Arkansas Department of Correction violated the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq*., when it denied Petitioner's request to grow a one-half-inch beard in accordance with his religious beliefs with only speculative evidence of a compelling state interest and no evidence that its grooming policy presented the least restrictive means of meeting its purported interests.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE* [1]

The American Jewish Committee ("AJC") is a nonprofit international advocacy organization that was established in 1906 to protect the civil and religious rights of Jews. As a strong advocate on behalf of religious liberty for people of all backgrounds, AJC has two interests in this case. First, AJC opposes the Arkansas Department of Correction's ("ADC's") refusal to grant religious exemptions to its Grooming Policy ("No Beard Policy") for short beards because this refusal has severe implications for Muslims, Jews, Sikhs, Rastafarians, and people of other faiths that prohibit shaving or cutting facial hair.[2]

---

[1] Letters of consent from all parties to the filing of this brief have been submitted to the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Many Muslims, including Salafi Muslims such as Mr. Muhammad, believe that wearing a beard is a key tenet of Islam. *See* Muhammed al-Jibaly, *The Beard Between the Salaf & Kalaf*, ch. 1 (1999). Similarly, ultra-Orthodox Jews and many Orthodox Jews believe that beards are an important part of their relationship with the divine. Jews trace the requirements of wearing a beard to their foundational text, the Torah, and can point to centuries of religious practices that include maintaining beards and, in some cases, growing side curls (*payot*). Eric J. Zogry, *Orthodox Jewish Prisoners and the* Turner *Effect*, 56 La. L. Rev. 905, 905 (1996). Sikhs are likewise required to keep their hair "unshorn," with the Sikh Code of Conduct identifying "dishonoring the hair" as the first forbidden practice of a Sikh. Dawinder S. Sidhu & Neha Singh Gohil, *Civil Rights in Wartime: The Post-9/11 Sikh Experience*, at 1, 23, 43 (2009). Rastafarians also are prohibited from shaving or cutting their hair, believing that a "fundamental tenet of the religion is that a Rastafarian's

Second, AJC believes that this case provides the Court with an opportunity to clarify the appropriate balance between scrutiny and deference under RLUIPA. While a majority of the Circuits apply a relatively limited form of deference to the testimony of prison officials, a minority (including the Eighth Circuit) are very deferential to prison officials' explanations of state interests. Allowing the inconsistent treatment of prisoners on an issue as important as religious freedoms is troubling—especially when the minority approach allows a prison to deny a religious exemption based on nothing more than an "almost preposterous" explanation of speculative state interests. AJC believes that in order for RLUIPA to meet its legislative purpose, it must be applied uniformly across the country in a way that provides meaningful protections to prisoners' religious freedoms.

The Union for Reform Judaism, whose 900 congregations across North America include 1.3 million Reform Jews, the Central Conference of American Rabbis ("CCAR"), whose membership includes more than 2,000 Reform rabbis, and the Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue out of a commitment to religious freedom. RLUIPA affirms our nation's founding promise to protect the rights of religious expression from undue state interference. Americans of all faiths must be free to follow the dictates of their conscience.

---

hair is not to be combed or cut." *Brown v. F.L. Roberts & Co.*, 896 N.E.2d 1279, 1283 (Mass. 2008); *see Benjamin v. Coughlin*, 905 F.2d 571, 573 (2d Cir. 1990).

The Baptist Joint Committee for Religious Liberty ("BJC") serves fifteen cooperating Baptist conventions in the United States, with supporting congregations throughout the nation, as an advocate for religious liberty and church-state separation. The BJC believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans. As chair of the Coalition for the Free Exercise of Religion, BJC worked with dozens of religious and civil liberties organizations toward the passage of RLUIPA and has defended its constitutionality and applicability in numerous cases in the courts.

SUMMARY OF ARGUMENT

Mr. Muhammad's case is a relatively easy one. ADC violated RLUIPA when it imposed a substantial burden on Mr. Muhammad's religious beliefs by capriciously denying his sincere request for an exemption to the No Beard Policy without showing that this decision was the least restrictive means to further a compelling government interest. *See* 42 U.S.C. § 2000cc-1(a). It is beyond dispute that the No Beard Policy imposed a substantial burden on Mr. Muhammad; it required him to shave a beard that he believed was mandated by his religion. *See Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981) (noting that it is for the prisoner to "correctly perceive[] the commands of [his or her] faith").

It is also painfully clear that ADC failed to meet its burden of proof. Under RLUIPA, the government must do more than invoke specters of generally accepted penological interests; it must provide individualized reasons and particularized evidence showing why the specific policy at issue furthers

those interests. Yet ADC's verbal assertions of state interests are speculative, at best, and severely undercut by the pre-existing exemption to the No Beard Policy for inmates with certain medical conditions, which allows beards almost identical to that requested by Mr. Muhammad.

Similarly, ADC has failed to establish that its grooming policy is the least restrictive means of furthering its interests. The overwhelming majority of prisons and jails in the United States allow their inmates to grow short beards for religious reasons. *See* Pet'r's Brief at 24-26. And neither ADC nor the lower courts have sufficiently explained why allowing a one-half-inch beard for religious reasons endangers prison residents and staff, but allowing a one-quarter-inch beard for medical reasons does not. Both of these facts make it impossible for ADC to establish that its prohibition on religious beards is truly the least restrictive policy that promotes its safety and security concerns. Because ADC cannot carry its burden under RLUIPA's statutory test, this Court should reverse the Eight Circuit's decision.

There is, however, another potentially more significant issue at play in this case. In reversing the Eighth Circuit, the Court should also clarify that deference does not completely control the analysis of a RLUIPA claim. The split among the Circuits shows that the appropriate level of deference to prison officials, a test that is fundamental to the purpose of RLUIPA, is an open question. This case offers an extreme example; ADC barely lifted a finger to support its speculative claims of security concerns, and there is hard evidence that the district court was far from persuaded. And yet ADC prevailed, because the Eighth Circuit's interpretation of RLUIPA is

so deferential that it requires the state to do nothing more than say the magic words of safety and security for prison staff and inmates. Whatever effect deference may have in a close case, it should not excuse the state from producing evidence to carry its burden, as any other litigant would have to do in any other case. To hold otherwise would read strict scrutiny out of the statute and defy congressional intent to protect prisoners' religious rights.

When Congress enacted RLUIPA, its message was loud and clear: religious rights should receive the highest possible protection in institutional settings. Certainly, "[c]ontext matters" in the unique environment of prisons and jails. *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) (alteration in original) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2006)) (internal quotation marks omitted). But it is entirely possible for courts to account for that context while also giving significant protection to inmates' religious practices. Accordingly, this Court should reverse the Eighth Circuit's holding and, in doing so, adhere to the traditional meaning of strict scrutiny in its interpretation of RLUIPA.

APPLICABLE LAW

I. RLUIPA IS INTENDED TO PROTECT PRISONERS FROM FRIVOLOUS BURDENS ON RELIGIOUS EXPRESSION BY REQUIRING STRICT SCRUTINY

Congress drafted RLUIPA to ensure protections in two specific arenas with established records of religious discrimination. First, in the context of land use, Congress found that religious organizations such as churches received unfair treatment by local zoning boards. *Yellowbear v. Lampert*, 741 F.3d 48, 53

(10th Cir. 2014) (citing Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest and Under-Enforced*, 39 Fordham Urb. L.J. 1021, 1025-41 (2012)) (other citations omitted). Second, in the context of prisons and other state facilities, Congress found that "institutionalized persons . . . 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*, 544 U.S. at 721. Indeed, prior to RLUIPA's passage, testimony from Congressional hearings clearly established that, "[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." *Id.* at 716 (quoting 146 Cong. Rec. 16,698, 16,699 (2000) (joint statement of Sens. Hatch & Kennedy on RLUIPA)) (internal quotation marks omitted).

In order for RLUIPA to accomplish its objective of protecting the religious rights of prisoners, both Congress and this Court have explicitly, and repeatedly, made clear that strict scrutiny should be applied to any prison decision that denies an inmate's request for a religious accommodation. In *Turner v. Safley*, 482 U.S. 78 (1987), and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), this Court held that prisons could deny religious exemptions and other constitutional claims as long as the prison officials' explanations were rationally related to a legitimate penological interest. *Id.* at 89. Under *Turner* and its progeny, courts applied minimal scrutiny to prison officials' policy decisions and provided little to no consideration of prisoners' religious freedoms. *O'Lone*, 482 U.S. at 349-53; James D. Nelson, Note, *Incarceration, Accommodation, and Strict Scrutiny*, 95 Va. L. Rev. 2053, 2059 (2009). In response to *Turner* and the subsequent case, *Employment Division, Department of*

Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), in which the Court held that neutral laws of general applicability needed only to satisfy a rational basis review to survive claims for religious exemptions, Congress passed the Religious Freedom Restoration Act ("RFRA"), which reinstated strict scrutiny to *all* laws that substantially burdened the free exercise of religion. *Id.* at 2058; *see* 42 U.S.C. § 2000bb(a), (b). After this Court held that RFRA exceeded the scope of congressional power as it applied to the states, however, courts across the country reverted to a deferential approach to prison administrators in cases involving state prisoners. Nelson, *supra*, at 2059. Congress responded to this development by passing RLUIPA, which explicitly re-established strict scrutiny for government actions that impeded the religious exercise of all prisoners and other individuals in state facilities. *Id.*; *see* 42 U.S.C. § 2000cc-1. In *Cutter*, this Court recognized RLUIPA's strict scrutiny requirement, noting that the statute was part of Congress's "long running [effort] to accord religious exercise heightened protection from government imposed burdens." 544 U.S. at 714. Thus, both Congress and this Court have rejected a rational basis or deferential standard of review for RLUIPA claims and explicitly adopted and approved strict scrutiny for all prison actions or policies that burden an inmate's religious freedoms.

II. RLUIPA'S STRICT SCRUTINY REQUIRES PRISON OFFICIALS TO PROVIDE CREDIBLE EVIDENCE OF COMPELLING INTERESTS AND LEAST RESTRICTIVE MEANS

RLUIPA's strict scrutiny requirement comes from the text of the statute: "No government shall impose

a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability." 42 U.S.C. § 2000cc-1(a). A plaintiff bringing a RLUIPA claim bears the initial burden of proving the existence of a "substantial burden," which is generally defined as either compelling an individual to do that which violates his or her religious beliefs or prohibiting an individual from that which he or she believes is a necessary part of his or her religious practices. *Id.* § 2000cc-2(b); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1314-15 (10th Cir. 2010); *see also Lying v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988); *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963). If the plaintiff fulfills this requirement, the burden shifts, and the government must "demonstrate[] that [the] imposition of the burden on that person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000cc-1(a).

In evaluating whether a prison has met its burden of proof, courts must navigate simultaneously the ideas that prison policies are "normally left to the discretion of prison administrators," but that "[w]hen a prison regulation or practice offends a fundamental guarantee, federal courts will discharge their duty to protect constitutional rights." *Rhodes v. Chapman*, 452 U.S. 337, 349 n.14 (1981); *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974); Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 956-57 (2012). The Circuits are split on the appropriate level of deference that courts should afford prison officials' explanations, which has led to contradictory rulings. *Compare Yellowbear*, 741 F.3d 48, *Garner v. Kennedy*, 713 F.3d

237 (5th Cir. 2013), *Couch v. Jabe*, 679 F.3d 197 (4th Cir. 2012), *Jova v. Smith*, 582 F.3d 410 (2d Cir. 2009), *Koger v. Bryan*, 523 F.3d 789 (7th Cir. 2008), *Washington v. Klem*, 497 F.3d 272 (3d Cir. 2007), *Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33 (1st Cir. 2007), *and Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005), *with Knight v. Thompson*, 723 F.3d 1275 (11th Cir. 2013), *petition for cert. filed*, 2014 WL 546539 (U.S. Feb. 6, 2014) (No. 13-955), *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008), *and Hoevenaar v. Lazaroff*, 422 F.3d 366 (6th Cir. 2005). *See generally* Nelson, *supra*, at 2071-107 (explaining the two principal approaches, the "deferential model" and the "hard look model," taken by federal courts when deciding RLUIPA claims).

While there is disagreement among the Circuits about the appropriate level of deference to prison officials, given the strict scrutiny required by RLUIPA's statutory language, it should be beyond dispute that courts must engage in *some* meaningful inquiry into the prison officials' purported compelling interests and least restrictive means. At the very least, a prison should be required to provide credible evidence that granting the requested religious accommodation would have a detrimental impact on the inmate's facility. *Yellowbear*, 741 F.3d at 55 (citing 42 U.S.C. § 2000cc-1(a)). This is the only way that courts may reasonably evaluate whether the prison's specific penological interests are important enough, and its policies narrowly tailored enough, to trump a prisoner's rights to religious freedom and expression. As explained by this Court in the context of interpreting the essentially identical statutory language of the Religious Freedom Restoration Act ("RFRA"), courts must "look[] beyond broadly formulated interests" and "scrutinize[] the asserted harm of

granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 431 (2006); *see also Yellowbear*, 741 F.3d at 58 ("Just because other prisons may have had a compelling interest in denying access to a sweat lodge in other circumstances doesn't necessarily prove, without more, that all prisons have a compelling interest in denying access to sweat lodges in all circumstances.").

ARGUMENT

I. ADC'S NO BEARD POLICY IMPOSES A SUBSTANTIAL BURDEN ON MR. MUHAMMAD

Here, there is no denying that Mr. Muhammad has met his initial burden of proof. The No Beard Policy expressly prohibits Mr. Muhammad from growing a beard pursuant to his religious beliefs. *See* J.A. 164 ("No inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip." (quoting ADC Admin. Directive 98-04) (internal quotation marks omitted)). Furthermore, each and every time ADC personnel enforce the No Beard Policy by subjecting Mr. Muhammad to a forced shave from a prison barber, Mr. Muhammad must choose between violating one of the key tenets of his religious beliefs or refusing the shave, which would undoubtedly lead to punishment or the withholding of benefits. Pet'r's Brief at 7 ("The warden stated: '[Y]ou will abide by ADC policies and if you choose to disobey, you can suffer the consequences.'" (alteration in original) (quoting Plaintiff's Exhibits at 6, ECF No. 13)).

II. ADC'S BARE ASSERTIONS ARE NOT SUFFICIENT TO SATISFY STRICT SCRUTINY UNDER RLUIPA

As this Court has previously observed, Congress expected courts to apply RLUIPA's strict scrutiny standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Cutter*, 544 U.S. at 723 (quoting 146 Cong. Rec. at 16,699 (joint statement of Sens. Hatch & Kennedy on RLUIPA); S. Rep. No. 103-11, at 10 (1993)) (internal quotation marks omitted); *see also id.* at 725 n.13 (noting that "deference is due to institutional officials' expertise" in prison security). This combination of strict scrutiny with the need for deference is both novel and complex, raising many interpretive questions for federal courts adjudicating RLUIPA cases. For example, what role should deference play in a close case, where both the inmate and the state have introduced equally persuasive evidence? How much of a thumb does deference place on the scale in any RLUIPA case?

This Court need not, and should not, answer those questions here. In this case, the Court should merely clarify that deference cannot overwhelm strict scrutiny to such an extent that RLUIPA becomes a dead letter. As noted above, in the instant case, the lower court openly commented on the unconvincing nature of ADC's evidence; yet under the Eighth Circuit's extremely deferential precedent, the Magistrate felt he had no choice to but to rule in ADC's favor. By so grossly exaggerating the role of deference under RLUIPA, the Eighth Circuit has transformed strict

scrutiny into a forgiving test under which the state need only say the magic words—security of prison staff—and the court will rule in its favor, without doubting, questioning, or forcing the state to explain any of its reasoning.

This interpretation plainly contradicts the purpose and statutory text of RLUIPA. By citing the practical need for deference to prison officials' judgment in RLUIPA's legislative history, Congress could not have intended to relieve officials of their burden of producing any evidence, other than vague speculation regarding security concerns, as laid out in the statutory text. Such minimal proof would not suffice for any other litigant in any other context, and deference is not enough here. ADC's bare assertions do not suffice to carry its statutory burden on either element of RLUIPA, and therefore, this Court should reverse the judgment of the Eighth Circuit.

A. ADC Failed to Provide a Compelling Interest in Support of Its Denial of Mr. Muhammad's Exemption Request

The ADC claims that it properly denied Mr. Muhammad's request for an exemption to the No Beard Policy because an exemption could have negatively impacted the security of ADC's prison. Specifically, ADC speculated, without stopping to offer concrete evidence, that providing an exemption to Mr. Muhammad could: (1) hinder identification in the event of an escape, (2) make it easier for inmates to distribute contraband, (3) put officers tasked with searching beards for contraband at risk, and (4) lead to the perception that Mr. Muhammad received preferential treatment from the prison. Brief Opposing Writ of Cert. at 2-4. As support for its

position, ADC points to theoretical possibilities such as: the existence of contraband, such as SIM cards, that "would fit in an inmate's [one-half-inch] beard"; that the population entering the ADC is younger and more violent than previous populations; that there are numerous difficulties in attempting to monitor more than 15,000 inmates, and giving them an additional place to hide contraband would only compound the problem; that the inmates in Mr. Muhammad's Cummins Unit work "outside the fence," which provides additional opportunities for smuggling contraband; and that inmates had smuggled at least 1,000 telephones into ADC facilities in 2011. *Id.* at 2-6.

The ADC's security hypotheticals do not meet its burden of showing a compelling government interest. "[T]he mere assertion of security . . . is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement." *Washington*, 497 F.3d at 283. The ADC must show that an exemption *for Mr. Muhammad* would undermine security *at his facility*: the Cummins Unit where he was initially held, or the Varner Unit where he is now incarcerated. *See Gonzales*, 546 U.S. at 431; *see also Yellowbear*, 741 F.3d at 58. Here, ADC has provided no such evidence, despite the fact that Mr. Muhammad has been able to maintain a one-half-inch beard since October 2011.[3] If Mr. Muhammad's religious exemption posed a threat to prison security, it seems logical that ADC would be able to cite exam-

[3] In October 2011, Mr. Muhammad won a preliminary injunction allowing him to wear a one-half-inch beard while his case remained pending. Both the district court and this Court subsequently stayed the lifting of that injunction, and it remains in effect pending the outcome of this appeal. Brief Opposing Writ of Cert. at 2-3, 7-8.

ples illustrating that over the past two and a half years Mr. Muhammad's beard had made the Cummins Unit or Varner Unit more dangerous. Yet, as the record below further demonstrates, ADC has failed to proffer any, let alone substantial, evidence supporting its claims that granting Mr. Muhammad an exemption to the No Beard Policy would in fact undermine a compelling state interest.

First, ADC has provided no evidence or explanation as to how Mr. Muhammad's beard grown for religious reasons undermines ADC's purported state interests while the beards that ADC allows for inmates with certain medical conditions do not. J.A. 164 ("Medical staff may prescribe that inmates with a diagnosed problem may wear facial hair no longer than one quarter of an inch." (quoting ADC Admin. Directive 98-04) (internal quotation marks omitted)). Under the ADC's logic, the fact that ADC could deny an inmate's request for a religious exemption because some inmates could hide contraband or weapons in their beards or cheeks should similarly serve as grounds to prohibit medically necessary beards. There is no indication, however, that ADC is considering ways to foreclose inmates from requesting medical exemptions or has ever denied an inmate's request to grow a beard for medical reasons. It is difficult to understand why ADC used claims of security concerns against an individual who sought a religious exemption, but ignored these very issues with respect to those needing medical exemptions, especially for concerns that ADC asserts rise to the level of "compelling." Other courts have found that similarly contradictory positions of correctional facilities failed to establish a compelling interest. As Justice Alito wrote while still on the Third Circuit: "We are at a loss to understand why religious exemptions threaten important city interests but

medical exemptions do not." *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 367 (3d Cir. 1999) (Alito, J.).

Second, the ADC's speculative security concerns are contradicted by its own policies with regard to health exemptions, as well as by RLUIPA's own statutory requirements. One of ADC's main arguments is that an inmate who qualifies for the religious exemption could grow a beard, escape from prison, and then shave to change his appearance and avoid detection (or, alternatively, that an inmate could shave and thereby avoid identification within one of ADC's facilities). But the premises of this argument conflict fundamentally with RLUIPA's requirement that the inmate *sincerely hold* the religious belief substantially burdened by the prison's policies. *See Cutter*, 544 U.S. at 725 n.13 (noting that RLUIPA "does not preclude inquiry into the sincerity of a prisoner's professed religiosity"); *see also, e.g.*, *Koger*, 523 F.3d at 797-98 (holding that an inmate's sincere religious beliefs meet RLUIPA's statutory definition, 42 U.S.C. § 2000cc-5(7)(A)). To argue that a Muslim inmate like Mr. Muhammad would opportunistically shave his beard to disguise himself is to assume that Mr. Muhammad does not sincerely hold the religious beliefs requiring him to maintain that beard. Indeed, it seems much more likely that an inmate who grew a beard only for medical reasons would choose to endure some physical discomfort if shaving a beard would allow him a better chance of avoiding detection. Moreover, as one prison official noted in a similar case, an inmate could also significantly change his appearance by shaving his head or dying his hair. *See Garner*, 713 F.3d at 247. ADC does not, however, appear to require all of its inmates to preemptively shave their heads in order to eliminate this risk.

Finally, ADC's wild conjecture that allowing Mr. Muhammad to maintain a beard could potentially lead to wide-spread contraband, prisoners on the run, and officers "being exposed to being cut, stabbed, and the like" when searching inmates' beards for contraband is insufficient to establish a compelling interest. Brief Opposing Writ of Cert. at 2-6. ADC's stated security concerns insinuate that a significant number of inmates would try to circumvent the No Beard Policy by claiming religious exemptions and that, masked in beards, they would be able to undermine the security in ADC facilities. Speculative concerns of "copycat" requests, however, are insufficient to establish a compelling government interest. *See Love v. Reed*, 216 F.3d 682, 690-91 (8th Cir. 2000); *see also Tolver v. Leopold*, No. 2:05CV82 JCH, 2008 WL 926533, at *3 (E.D. Mo. Apr. 3, 2008) (noting that denying an inmate a religious exemption due to "the risk of increased religious requests . . . is not rationally related to any legitimate economic or administrative concern"). ADC offers no proof that there has been a run of applications for beards, or that there would be if a religious exemption were available. Moreover, ADC's concerns of copycat requests cannot possibly be sufficient to establish a compelling government interest, because to hold otherwise would gut RLUIPA. Presumably, Congress both understood and accepted the risk of increased requests for accommodation when it enacted the statute allowing such accommodations in the first place.[4]

---

[4] ADC also proposed as a compelling security interest the risk of retaliation against Mr. Muhammad by other inmates due to perceived preferential treatment. This unpersuasive assertion rightly received minimal analysis from the district court, so it will not be addressed at length here. ADC fails to explain why

Upholding the Eighth Circuit's decision on these very weak facts would ignore the strict scrutiny required for RLUIPA claims and eviscerate the statutory protection of prisoners' religious beliefs. Congress could not have intended to pass a law under which a judge could find an asserted compelling interest to be "almost preposterous"—yet still be "constrained" to find for the state. Surely, in circumstances like these, on an issue for which the government carries the burden of proof, the demanding nature of strict scrutiny should require the court to engage in a meaningful inquiry and, absent a legitimate and compelling government interest, rule in favor of the inmate. Accordingly, the ADC has not carried its burden of proof by providing credible evidence of its compelling interest, and this Court should reverse the Eighth Circuit's judgment.

B. ADC's Bare Verbal Assertions Do Not Establish That the No Beard Policy Is the Least Restrictive Means of Furthering a Compelling Government Interest

The Court's inquiry does not end at determining whether the state's asserted interests are compelling. To pass muster under RLUIPA, a policy must also be the least restrictive means of furthering those interests. 42 U.S.C. § 2000cc-1(a)(2). Moreover, the

---

granting special grooming privileges to Mr. Muhammad—but not to the other inmates who receive a medical exemption to the grooming policy—would subject Mr. Muhammad to possible retaliation. Moreover, ADC's cited concerns regarding *Mr. Muhammad's* safety, rather than the safety of other parties, are inconsistent with its focus on the security of the guards and other prison officials.

government bears the burden of persuasion on this element of the test. *Id.* § 2000cc-2(b).

Because ADC has not met its burden, the Court should reverse the holding below. The Eighth Circuit's extremely (and erroneously) deferential RLUIPA precedent prevented the district court from giving full consideration to Petitioner's proposed alternatives to the No Beard Policy. To the extent that RLUIPA actually requires states to prove that their policies are the least restrictive means, they must be required to explain why the practices of other institutions across a wide range of security classifications permit the exact religious accommodations that they claim are impossible to grant to their own inmates. Absent any proof that Arkansas prisons are different, ADC cannot successfully argue that other prisons' policies are irrelevant to identical considerations within its walls. Moreover, with respect to alternative, less restrictive policies—whether they originate in other institutions or not—the burden is on ADC to explain why such policies are impractical in their facilities. By allowing ADC to rely on bare verbal assertions that its policies are the least restrictive means, the Eighth Circuit has rewritten RLUIPA to relieve the state of its burden. This is insufficient under RLUIPA's strict scrutiny test.

1. The Vast Majority of American Prisons Allow Inmates to Grow Short Beards, Despite Identical Safety and Security Interests

In considering whether the ADC's No Beard Policy is the least restrictive means of furthering a compelling interest, this Court should compare that policy with the grooming policies of other institutions. This comparative analysis is both logical and

necessary under RLUIPA's statutory text, since "the phrase 'least restrictive means' is, by definition, a relative term [that] necessarily implies a comparison with other means." *Washington*, 497 F.3d at 284. Multiple courts have engaged in such comparisons when deciding similar cases. *E.g.*, *Garner*, 713 F.3d at 247; *Spratt*, 482 F.3d at 42; *Warsoldier*, 418 F.3d at 999. *But see Knight*, 723 F.3d at 1286 ("The RLUIPA does not force institutions to follow the practices of their less risk-averse neighbors, so long as they can prove that they have employed the least restrictive means . . . .").

Courts need not compare policies blindly or without paying attention to possible differences among institutions. For example, minimum-security prisons may be materially different from medium- or maximum-security prisons, such that the appropriate policy in one setting "may not be identical" to the best fitting policy in another. *Warsoldier*, 418 F.3d at 999; *see also Yellowbear*, 741 F.3d at 58. Institutional size is another factor that may enter into the analysis, as larger facilities doubtless have different needs than smaller ones. *See Garner*, 713 F.3d at 247 (holding that a grooming policy prohibiting beards was not the least restrictive means, in part because of the more permissive policies of "prison systems that are comparable in size"). But if comparable institutions are able to safely impose less restrictive grooming policies, that information is highly relevant to determining whether a particular institution's policy is truly the *least* restrictive.

With respect to its No Beard Policy, ADC is in a tiny minority of states that fail to provide any way for religiously observant prisoners to grow facial hair. As Mr. Muhammad has already explained, at least 42

states—along with the District of Columbia and the Federal Bureau of Prisons—all permit inmates to maintain neatly groomed beards, or beards of a short length, for religious reasons. Pet'r's Brief at 24-26. In other words, Arkansas is one of just seven states that do not allow incarcerated Muslims, Jews, Sikhs, Rastafarians, and other individuals to grow beards in accordance with their beliefs.

It is possible that Arkansas has a good reason for deviating from this trend. There may be unique circumstances in that state,[5] or among its prison population, that make less restrictive policies exceedingly difficult or inadvisable to implement. For example, contraband items could be especially dangerous or common in Arkansas prisons, such that allowing beards there would simply pose too great of a risk. *Cf. Dothard v. Rawlinson*, 433 U.S. 321, 334-35 (1977) (finding Alabama prisons to be particularly violent and dangerous, therefore justifying certain employment restrictions for prison guards). But the burden is on the state to submit evidence explaining what those unique circumstances are. If ADC can provide "no explanation as to why [other] prison systems are able to meet their indistinguishable interests without infringing on their inmates' right to freely exercise their religious beliefs," then this Court should not rule in its favor. *Warsoldier*, 418 F.3d at 1000.

Surely, RLUIPA requires ADC to do more than simply say the magic words—safety and security of

---

[5] Notably, the Federal Bureau of Corrections operates a medium- and a low-security prison in Forrest City, Arkansas, both of which have less restrictive grooming policies than ADC's facilities.

inmates and staff—in order to carry its statutory burden of persuasion. Yet under ADC's theory of RLUIPA, the government need only make such bare assertions, and strict scrutiny has been satisfied. Regardless of how many other institutions have allowed exactly the accommodation that Mr. Muhammad requests, there is no evidence that ADC has tried or even contemplated the grooming policies that appear to be functioning in 42 other states, the District of Columbia, and the Federal Bureau of Prisons (as well as in Mr. Muhammad's facility itself). Moreover, just as the experience and judgment of ADC's prison officials deserve some judicial deference, so do the experience and judgment of officials in the numerous U.S. prisons with less restrictive grooming policies. Unless ADC has actually performed an analysis showing that those policies would not work in Arkansas, it has not carried its burden of persuasion on this element of RLUIPA. To hold otherwise would remove the comparative element from the least restrictive means test and thereby rob the phrase of its core meaning.

2. ADC Did Not Show That It Actually Considered and Rejected Less Restrictive Alternatives, Including the Less Restrictive Medical Exemption

A second factor that this Court should consider is the extent to which ADC actually considered and rejected less restrictive alternatives, as well as its reasons for doing so. This inquiry is necessary under RLUIPA because, as explained above, whether a policy is the "least restrictive means" is an inherently comparative question. Thus, to carry its burden, the government must explain why it rejected alternative, less restrictive policies. *See Yellowbear*, 741 F.3d at

63 ("[T]he government's burden here isn't to mull the claimant's proposed alternatives, it is to demonstrate the claimant's alternatives are ineffective to achieve the government's stated goals."). Multiple lower courts have performed such analyses when reviewing RLUIPA claims. *E.g.*, *Washington*, 497 F.3d at 284; *Spratt*, 482 F.3d at 40-41; *Warsoldier*, 418 F.3d at 999; *see also Couch*, 679 F.3d at 203.

In this case, it would be especially difficult for ADC to argue that it considered and reasonably rejected one particular alternative—allowing inmates to grow a one-quarter-inch beard—because ADC already provides exactly this accommodation to inmates with certain medical conditions.[6] This medical exemption makes it extremely difficult for ADC to show that its No Beard Policy for religious inmates is truly the least restrictive means of furthering its security interests, because, as discussed above, the existence of that exemption demonstrates that a less restrictive facial hair policy is actually feasible within ADC's facilities. Surely, the same compelling interests that weigh against relaxing ADC's grooming policy for religious inmates also weigh against providing a medical exemption. Yet ADC has decided to tolerate these risks for medical reasons.

---

[6] Below, Petitioner did not "assert 'that the medical exemption would satisfy his religious beliefs.'" J.A. 176 (quoting *Fegans*, 537 F.3d at 906)). Indeed, Petitioner's requested accommodation involves a slightly longer beard (one-half inch, rather than one-quarter inch) than the medical exemption allows. Nonetheless, the burden rests on ADC to establish (1) that Petitioner's requested one-half-inch exemption is significantly more burdensome or dangerous than the medical exemption, and (2) that ADC cannot provide at least a one-quarter-inch exemption for religious inmates.

This choice is unacceptable under RLUIPA. Part of RLUIPA's purpose is to elevate religious needs to a similar level as other considerations. And as the Tenth Circuit recently recognized, "[t]he whole point of . . . RLUIPA is to make exceptions for those sincerely seeking to exercise religion." *Yellowbear*, 741 F.3d at 62. In light of the high degree of protection that RLUIPA gives to inmates' religious rights, it is illogical for the same institution to provide an almost identical accommodation for medical reasons, while denying that same accommodation for religious purposes. *Cf. Fraternal Order of Police*, 170 F.3d at 366 (holding that a police department violated the Free Exercise Clause when it provided a medical exemption, but not an identical religious exemption, to its facial hair policy). RLUIPA tilts the balance in favor of the inmate in such cases.

To be sure, granting a religious exemption may involve some additional costs or administrative burdens on ADC, if only because a new exemption would increase the number of inmates eligible for special grooming privileges. But RLUIPA "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." *Garner*, 713 F.3d at 245 (quoting 42 U.S.C. § 2000cc-3(c)) (internal quotation marks omitted). Those costs are part of the legislative compromise struck by RLUIPA, and part of the burden that states voluntarily accept in exchange for receiving federal funding for their prisons and jails. Because ADC has failed to justify its rejection of less restrictive alternatives in this case, the Court should reverse the holding in ADC's favor below.

3. Even Under a More Deferential Version of the Least Restrictive Means Test, the Lower Court Decided Mr. Muhammad's Case Incorrectly

Even if this Court opts for a more deferential version of the least restrictive means element—for example, if it declines to compare institutions, or to analyze whether ADC actually considered and rejected alternative means—it should still reverse the judgment of the Eighth Circuit. The district court's opinion, which the Eighth Circuit summarily affirmed, incorrectly reached two interrelated conclusions: (1) that ADC had met its burden of persuasion on the least restrictive means element, and (2) that the instant case is indistinguishable from *Fegans*, 537 F.3d 897. Reversal or remand is warranted because the lower court failed to justify either of these conclusions.

First, the lower court did not provide any explanation as to why ADC's No Beard Policy is actually the least restrictive means of furthering the state's alleged compelling security interest. In particular, the lower court failed to address at least one of Mr. Muhammad's proposed alternatives: taking two different photographs of each inmate who grows a beard for religious reasons. J.A. 176. The lower court dismissed Mr. Muhammad's proposal because it was based on another state's policy, and comparisons between institutions are not required under the Eighth Circuit's more deferential interpretation of RLUIPA.[7] But even if courts are not required to

[7] The only other point that the court mentioned in favor of ADC is an official's testimony "that an inmate might enter the ADC with a beard and maintain said beard until he escapes." *Id.* The

engage in prison-to-prison comparisons, or to give weight to other prisons' more permissive policies, they are nonetheless obligated to consider the feasibility of all less restrictive alternatives that the plaintiff actually proposes in order to determine whether the government's policy is actually the *least* restrictive. Here, the lower court did not fully explain why Mr. Muhammad's proposal was inadequate, and thus, it did not explain how ADC met its burden of persuasion on the least restrictive means element of the case. Accordingly, at the very least, this Court should vacate and remand to the district court for a fuller analysis of Mr. Muhammad's evidence.

The district court also incorrectly concluded that Mr. Muhammad's case was indistinguishable from *Fegans*. In fact, the compelling interests—and especially the security concerns—in the two cases are dissimilar, because the *Fegans* plaintiff wanted to wear an uncut beard, whereas Mr. Muhammad has requested a much shorter one-half-inch beard. 537 F.3d at 906 (noting that the *Fegans* plaintiff's faith "requires that he refrain from 'rounding the corners' of his beard, and [that] he was disciplined for wearing a beard that was uncut altogether"). The *Fegans* Court reasoned that "uncut beards create safety and security concerns that are not presented by clean-shaven faces or quarter-inch beards." *Id.* at 907. According to *Fegans*, uncut beards better enable inmates to disguise themselves and to transport contraband than quarter-inch beards. *Id.* *Amici* do not agree with *Fegans'* conclusion that uncut beards are impermissibly dangerous under RLUIPA. Still, even if *Fegans* were correct, it would strain credibility to argue that

---

court provided no analysis or explanation of this remote possibility.

an extra quarter-inch of facial hair is enough to render a one-half-inch beard as dangerous as a beard that is completely uncut. Because the district court erred in concluding that a one-half-inch beard was more like an uncut beard than like a one-quarter-inch beard, the Eighth Circuit's judgment should be reversed.

For all of these reasons, ADC has not carried its burden of persuasion on the "least restrictive means" element of this case. Accordingly, the Court should reverse the holding in ADC's favor below.

CONCLUSION

For all the reasons stated above, the judgment of the Eighth Circuit should be reversed.

Respectfully submitted,

ADAM S. LURIE
SAMANTHA A. DREILINGER
KATHERINE A. PRESTON
CADWALADER, WICKERSHAM & TAFT LLP
700 6th Street, NW
Washington, DC 20002
(202) 862-2200
adam.lurie@cwt.com

MARC D. STERN
Counsel of Record
AMERICAN JEWISH COMMITTEE
165 East 56th Street
New York, NY 10022
(212) 891-1480
sternm@ajc.org

Counsel for Amici Curiae

May 29, 2014