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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Respondents do not dispute that they offered no record example of any prisoner hiding anything in any beard; that they permit many hiding places better than a half-inch beard; or that their ban on beards conflicts with national accreditation standards and the policies of over forty states. They argue that such facts are irrelevant in light of the "great" and "wide-ranging deference" due to prison officials. Resp. Br. 29. They reject every possible means by which courts might evaluate their testimony, leaving only absolute deference.

But Congress enacted a different standard. It replaced rational-basis review with strict scrutiny, and shifted the burden of proof from prisoners to prison officials. Respondents may prefer a standard of "great and wide-ranging deference." But their standard has no basis in RLUIPA's text and would effectively repeal the statute.

ARGUMENT

I. Respondents Would Effectively Repeal RLUIPA's Statutory Standard of Compelling Interest and Least Restrictive Means.

RLUIPA provides "heightened protection" for religious exercise by requiring the government to satisfy strict scrutiny. *Cutter* v. *Wilkinson*, 544 U.S. 709, 714 (2005). Respondents argue that courts should instead give "great" and "wide-ranging deference" to prison officials. Resp. Br. 29. But their theory lacks textual support and would render RLUIPA nugatory.

A. Respondents start with a policy argument, claiming that "great deference" is required because judges "[i]n the calm serenity of judicial chambers" are

"ill-suited to appreciate the magnitude of a particular security risk." Resp. Br. 29-30. "[P]rison officials know better." Resp. Br. 30. Prison officials may know about prison security, but Congress found that they systematically undervalue religious freedom, often restricting it "in egregious and unnecessary ways." Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. 16698, 16699 (2000). Thus, Congress tasked courts with "striking sensible balances between religious liberty and competing prior governmental interests." *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (quoting RFRA); *id.* at 2791 (Ginsburg, J., dissenting) (same).

Respondents claim that judicial review of prison policies raises "separation-of-powers" concerns. Resp. Br. 30-31. But the legislative and executive branches "plainly contemplate[d] that *courts* would recognize exceptions — that is how the law works." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006) (emphasis in original). This Court, when considering RFRA and RLUIPA, has repeatedly affirmed "the feasibility of case-by-case consideration of religious exemptions." *Id.* at 436 (characterizing *Cutter*).

Nor does RLUIPA create "federalism concerns." Resp. Br. 31. RLUIPA is Spending Clause legislation. 42 U.S.C. § 2000cc–1(b)(1). If respondents find it burdensome, they can decline federal funds, which are a tiny fraction of their budget. See Arkansas Department of Correction, *Annual Report 2013,* at 3, http://adc.arkansas.gov/resources/Documents/2013annualReport.pdf.

Next respondents claim (at 31-32) that their extreme version of deference is required by RFRA's legislative history, which cited *Weaver* v. *Jago*, 675 F.2d 116 (6th Cir. 1982). Even assuming that legislative history could override statutory text, respondents mischaracterize *Weaver*. *Weaver* held that prison officials' claims of necessity should be "but one factor in weighing the competing interests." *Id.* at 119. And "only those *interests of the highest order* and those *not otherwise served* can overbalance legitimate claims to the free exercise of religion." *Ibid.* (emphasis added); S. Rep. 103-111 at 10 (1993). That is a description of strict scrutiny.

Finally, respondents argue that total deference is required to avoid violating the Establishment Clause. Resp. Br. 34-35. But this Court unanimously rejected an Establishment Clause challenge in *Cutter*, because RLUIPA "alleviates exceptional government-created burdens on private religious exercise" and does not create "an absolute and unqualified right." 544 U.S. at 720, 722 (quoting *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 709 (1985)). The Court assumed that the compelling-interest test would be applied with "due deference" to prison administrators. *Id.* at 723. But it did not suggest absolute deference, or great and wide-ranging deference. Rather, it anticipated that the compelling-interest test would be applied "in an appropriately balanced way." *Id.* at 722. Appropriate balance requires that weight be given to religious interests as well as to security interests.

B. After invoking policy considerations, legislative history, and constitutional avoidance — but not the statutory text — respondents offer four principles for interpreting RLUIPA. Resp. Br. 36-43. None has any basis in the text or even legislative history. All are

drawn from pre-RLUIPA cases involving rational-basis review. Respondents do not deny that the courts below applied the pre-RLUIPA constitutional standard, Pet. Br. 52-55, and respondents argue for the same mistake here.

1. First, respondents say that prison officials need not provide any "studies, data, or concrete examples" to satisfy strict scrutiny. Resp. Br. 36. They need "prophylactic rules." *Ibid.* Nor must their testimony have any indicia of reliability, *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), or power to persuade, *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). Resp. Br. 36-37, 38 n.11; see Pet. Br. 49-52. Courts must accept their testimony even if it seems "almost preposterous." Resp. Br. 30.

In support, respondents cite four decisions from this Court. Resp. Br. 36-39. All four involved constitutional claims, where the Court applied rational-basis review and placed the burden of proof on the prisoner. See *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977) ("[t]he burden was not on appellants [prison officials]," but on prisoners to offer "substantial evidence" that "officials have exaggerated their response"); *Bell* v. *Wolfish*, 441 U.S. 520, 561-562 (1979) (prisoners bear a "heavy burden of showing that these officials have exaggerated their response"); *Turner* v. *Safley*, 482 U.S. 78, 89 (1987) (prison regulation "is valid if it is reasonably related to legitimate penological interests"); *Beard* v. *Banks*, 548 U.S. 521, 529 (2006) (plaintiff "bears the burden of persuasion").

But RLUIPA places the burden of production and persuasion "squarely on the Government." *O Centro*, 546 U.S. at 429 (citing parallel provision of RFRA); 42

U.S.C. §§ 2000cc–1(a), 2000cc–5(2); U.S. Br. 22. And the burden is not just to establish a "logical" connection to penological objectives, Resp. Br. 36, but to satisfy strict scrutiny. Under that standard, "data" or at least "concrete examples" are often required. Respondents cannot wave "prophylaxis" like a magic wand.

In strict scrutiny cases, this Court has repeatedly held that "[b]road prophylactic rules in the area of free expression are suspect." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); see *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 800 (1988) (invalidating "prophylactic" rules); *McCutcheon* v. *FEC*, 134 S. Ct. 1434, 1458 (2014) ("This 'prophylaxis-upon-prophylaxis approach' requires that we be particularly diligent in scrutinizing the law's fit."). Even under the more relaxed rules governing commercial speech, "broad prophylactic rules may not be so lightly justified." *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 649 (1985). Rather, the government must provide "evidence or authority" regarding "particular evils" that the rule would prevent. *Id.* at 648-649; see also *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2534-2541 (2014) (prophylactic rules failed intermediate scrutiny).

When respondents finally cite a RLUIPA case, they cite a dissent. Resp. Br. 37-38 (quoting *Moussazadeh* v. *Texas Dep't of Criminal Justice*, 709 F.3d 487, 493 (5th Cir. 2013) (Jolly, J., dissenting from denial of rehearing en banc)). But *Moussazadeh* illustrates our point. There, Texas denied a kosher diet to a Jewish inmate despite the fact that Texas had been providing kosher diets to other inmates for two years without any security problems. *Moussazadeh* v. *Texas Dep't of Criminal Justice*, 703 F.3d 781, 794 (5th Cir. 2012).

The court properly ruled against the state because it "failed to produce evidence of security concerns." *Ibid.*[1]

2. Second, respondents argue that "the fact that a statute or rule has made exceptions or failed to address the entire scope of a problem does not cast doubt on the strength of the governmental interest." Resp. Br. 40. But *O Centro* and *Lukumi* say the opposite: "[A] law cannot be regarded as protecting an interest of the highest order * * * when it leaves appreciable damage to that supposedly vital interest unprohibited." *O Centro*, 546 U.S. at 433 (quoting *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 547 (1993)); see Pet. Br. 36 (collecting cases); U.S. Br. 25. Respondents quote (at 41) *Fromer* v. *Scully*, 874 F.2d 69, 75 (2d Cir. 1989), but *Fromer* was a "pre-RLUIPA decision" that was "much more deferential than the strict-scrutiny standard adopted by Congress in RLUIPA." *Young* v. *Goord*, 67 F. App'x 638, 640 (2d Cir. 2003). *Fromer* is no authority here.

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[1] Respondents mention four lower-court cases, all easily distinguishable. Resp. Br. 39-40 n.12. Two were decided under the deferential *Turner* standard. *Casey* v. *Lewis*, 4 F.3d 1516 (9th Cir. 1993); *Fromer* v. *Scully*, 874 F.2d 69 (2d Cir. 1989). One involved both RLUIPA and *Turner*, but respondents quote from only the *Turner* discussion. *Kuperman* v. *Wrenn*, 645 F.3d 69, 75, 79-80 (1st Cir. 2011). The RLUIPA claim in *Kuperman* was distinguishable as well; the inmate wanted not "to shave at all," *id.* at 71, and the court appeared unaware of rules in other states. The prisoner in the fourth case wanted entirely uncut beard and hair, *Ragland* v. *Angelone*, 420 F. Supp. 2d 507, 510 (W.D. Va. 2006), and prison officials described "numerous instances" of "specific security problems" prior to the policy, *id.* at 515. There was no suggestion that any incident involved anything so short as a half-inch beard. Similarly in the Alabama Brief (at 26-27), all the examples involve hair instead of beards, or hair *and* beards, and there is no claim that any of these were only half an inch.

Respondents also argue that alternative hiding places are irrelevant, because "prison officials are not put to the choice of either requiring prisoners to go naked or allowing beards." Resp. Br. 41. But that begs the question. The point of considering alternative hiding places (Pet. Br. 33-34) is that respondents have arbitrarily singled out religious practices for more stringent regulation than other activities presenting similar or greater risks. Respondents must demonstrate a compelling reason for the differential treatment — not just the fact that they value prisoners' shoes, socks, pockets, and hair but accord no value to religiously motivated beards. Respondents insist on absolutely zero risk with respect to religious beards — and only with respect to religious beards. Cf. *Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.) (exemption for medical beards but not religious beards indicates "a value judgment in favor of secular motivations").

Moreover, RLUIPA requires courts to focus on "the marginal interest in enforcing" a challenged policy, *Hobby Lobby*, 134 S. Ct. at 2779, and "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown* v. *Entertainment Merchants Association*, 131 S. Ct. 2729, 2741 n.9 (2011). Given the many superior hiding places that respondents allow, they must show why prohibiting a half-inch beard significantly advances their interest in stopping contraband — which they have not done. Pet. Br. 33; U.S. Br. 24, 31.

3. Third, respondents argue that courts must allow "divergent assessments of risk" (at 42), even when prison officials reject the overwhelming consensus of prison systems across the country. Of course RLUIPA does not require uniformity across all prison systems.

But respondents must show that plausible alternatives would not work, and when more than forty other prisons have adopted a religious accommodation, that showing is all but impossible. Pet. Br. 21-32; U.S. Br. 19-20, 28-29; Wardens Br. 14-16. Here, respondents were not even aware of the policies in other prison systems, much less able to explain why they would not work. Pet. Br. 28-29.

4. Fourth, respondents claim that prison systems need not even consider less restrictive alternatives before rejecting them. Resp. Br. 42-43. But RLUIPA requires the government to "demonstrate[]" that it used the "least restrictive means." 42 U.S.C. § 2000cc–1(a). The government cannot meet this burden without considering alternatives. Just as a university must show that it seriously considered race-neutral alternatives before adopting a race-based admissions policy, *Fisher* v. *University of Texas*, 133 S. Ct. 2411, 2420 (2013), and a state must show "that it considered different methods that other jurisdictions have found effective" before restricting speech, *McCullen*, 134 S. Ct. at 2539, prisons must consider alternatives before they can satisfy strict scrutiny. Pet. Br. 44 (collecting cases); U.S. Br. 18-19; Wardens Br. 7-10.

C. Respondents' extra-textual limitations would gut the statute, eliminating every effective method by which courts might evaluate prison officials' testimony. If they need not even offer examples, if they can treat religion worse than other practices posing similar or greater risks and they need not explain why, if they can disregard accreditation standards and the overwhelming practice of other jurisdictions, if they need not even consider alternatives — *and* if judges must credit their testimony even when it appears "almost preposterous," Resp. Br. 30 — courts would have

no means whatever to evaluate their testimony.

Take, for example, Florida's current attempt to deny a kosher diet to Jewish inmates. *United States* v. *Secretary, Florida Dep't of Corrections*, No. 1:12-cv-22958, 2013 WL 6697786 (S.D. Fla. 2013). At least thirty-five states and the federal government offer kosher diets without security problems. *Id.* at *6. Florida itself offered a religious diet for three years without security problems. *Id.* at *1. And Florida offers "at least 15 medical and therapeutic diets at each facility" without security problems. *Id.* at *2.

But under respondents' theory, all it takes is one official to testify that kosher diets threaten security — that there might be "retaliation against inmates receiving Kosher meals," or that kosher meal trays could be "used to conceal contraband." Appellees' Br. 6-7, 13, *Rich* v. *Secretary, Florida Dep't of Corrections*, 716 F.3d 525 (11th Cir. 2013) (No. 12-11735) (brief filed Oct. 1, 2012). It would not matter if officials had no examples of security problems with kosher diets anywhere in the country; they could act prophylactically. Resp. Br. 36. It would not matter if they successfully managed fifteen different therapeutic diets; they could "address part of a problem." Resp. Br. 40. It would not matter if they had no idea that thirty-five states and the federal government provide kosher diets; they could make "divergent assessments of risk." Resp. Br. 42. And it would not matter if they refused to consider safer ways of providing kosher diets; actual consideration is an "extra-statutory administrative requirement." *Ibid.* Nor would it matter if they offered testimony that was "almost preposterous." Resp. Br. 30. Courts would have to take them at their word.

If that is what RLUIPA means, it is a dead letter.

II. Respondents Have Not Proved Either Compelling Interest or Least Restrictive Means.

Respondents concede that petitioner has shown a substantial burden on his religious exercise. Resp. Br. 43. The only issue is whether respondents have demonstrated compelling interest and least restrictive means. They have not come close.

A. Respondents Have No Compelling Interest in Prohibiting What At Least Forty-Three American Prison Systems Permit.

At least forty-three state and federal prison systems, several large municipal systems, and national accreditation standards would allow petitioner's beard. Pet. Br. 24-27.[2]

Respondents offer two arguments for ignoring their departure from the overwhelming norm. First, they say that "[p]etitioner does not offer any evidence regarding the 'experiences' of other prison systems." Resp. Br. 59. But it is a reasonable inference that if experience had been bad, these jurisdictions would have changed their policies. The briefs of Wardens and of Corrections Officials report favorable experience

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[2] We initially counted New Hampshire as number forty-four. Pet. Br. 25. This was mistaken; after a change of leadership, New Hampshire allows quarter-inch beards, and no more, for all inmates. N.H. Dep't of Corrections, Manual for the Guidance of Inmates § II.B.4.d (2011), http://www.nh.gov/nhdoc/divisions/publicinformation/documents/manual.pdf. We have also learned that Virginia permits uncut beards in one of its prisons, but the process of being transferred there is onerous. Virginia Department of Corrections, Operating Procedure: Offender Grooming and Hygiene, No. 864.1 § IV.I (2013), http://vadoc.virginia.gov/about/procedures/documents/800/864-1.pdf. Counting Virginia makes forty-four prison systems that would allow petitioner's beard; excluding Virginia leaves forty-three.

elsewhere. Most important, the burden is on respondents to explain why they cannot allow petitioner's beard when so many other prisons would. U.S. Br. 28-29.

Second, respondents argue that RLUIPA allows prison systems to make a "calculated decision not to absorb the added risks that its fellow institutions have chosen to tolerate." Resp. Br. 60. But respondents must demonstrate that these "added risks" are sufficiently substantial to create a compelling interest that cannot be served by any less restrictive means. U.S. Br. 28-31; Wardens Br. 14-16; Corrections Officials Br. 5-8. Respondents weren't even aware of the practices in other states, so there was no "calculated decision" to depart from national norms. They were uninformed not only about California and New York, Resp. Br. 59 n.15, but about every state. J.A. 119 (Harris not "aware of what other states are doing"); J.A. 105 (Lay didn't "know what goes on nationally across the country").

Respondents need not take discovery from other states. Alabama Br. 10. They can try "the common practice of picking up the phone to call other prisons," Wardens Br. 5, read literature from national prison bodies, *id.* at 11-12, consult accreditation standards, *id.* at 13, and attend continuing education programs, *id.* at 12, J.A. 101.

Respondents say in their statement of the case that their Cummins Unit is unusual in assigning even maximum security prisoners to work outside the fence. Resp. Br. 16-17. This is yet another example of respondents accepting much greater risks for nonreligious reasons than for religious exercise. In any event, petitioner is no longer at the Cummins Unit and

doesn't work outside the fence. See Pet. Br. 29-30. And whether inside the fence or out, respondents must show that a half-inch beard "would materially affect respondents' security situation." U.S. Br. 31; Pet. Br. 33. They have not done so. U.S. Br. 31-33; Pet. Br. 29-30, 33.

B. Respondents' Conclusory Testimony and Extra-Record Evidence Prove Neither Compelling Interest Nor Least Restrictive Means.

In the courts below, respondents relied on conclusory testimony that did not satisfy strict scrutiny. Pet. Br. 32-43. Recognizing that fact, they now seek to supplement the record with new interests and new evidence never presented below. *E.g.*, Resp. Br. 47-48 (identification within prison); Resp. Br. 14, 25, 51, 54 (contraband "hidden inside the mouth"). Either way, they have not met their burden.

1. Respondents' testimony in *Jones* v. *Meinzer*.

Seeking new evidence, respondents repeatedly cite their own testimony and affidavits, and the magistrate's summary of that testimony, in *Jones* v. *Meinzer*, No. 5:12-cv-00117, 2013 WL 5676886, *recommendation rejected*, 2013 WL 5676801 (E.D. Ark. 2013). Resp. Br. 14, 46, 50-51, 54-55, 61-62. But their argument and sworn testimony in *Jones* contradict their argument and sworn testimony here.

Here, respondents claim that quarter-inch and half-inch beards are significantly different, so that the medical exception for quarter-inch beards does not undermine their reasons for banning petitioner's half-inch beard. Resp. Br. 20, 25-26, 49-52, 58; J.A. 124-125 (Harris). But *Jones* involved a *religious* request for a

quarter-inch beard. 2013 WL 5676801 at *1; Transcript of Hearing, *Jones* v. *Meinzer*, DE 91 at 5 ("*Jones* Tr."). And there, respondents claimed that a quarter-inch beard posed all the same problems as longer beards. *Jones* Tr. 11-17, 22, 28, 48 (Harris); *id.* at 88 (Hobbs); *id.* at 42 (counsel).

So quarter-inch beards are dangerous in *Jones*, but safe in *Holt*. Such inconsistent testimony cannot prove a compelling interest. It shows only that respondents reflexively oppose religious exemptions and testify to whatever supports that opposition. Pet. Br. 41, 42-43.

2. Hiding contraband.

a. Respondents claim that prisoners can hide contraband in a half-inch beard. But they offered no record evidence of any prisoner ever hiding contraband in any beard of any length. They admit that inmates have many other hiding places, Resp. Br. 41, and those hiding places are clearly better, Pet. Br. 34-35. As the Wardens Brief explains (at 16), "the last place an inmate would choose to hide contraband is in a half-inch beard."

Respondents summarize the testimony of Lay and Harris, listing small items that "could be concealed" in a half-inch beard. Resp. Br. 46. But Lay and Harris began working for respondents in 1975 and 1979, respectively (J.A. 110, 113), and Arkansas did not restrict beards until it adopted "a new grooming policy" in 1998. Resp. Br. 8; *Jones* Tr. 75 ("beards allowed up until 1998"). Thus, Lay and Harris had a combined 42 years of experience in a system with unrestricted beards, but offered no example of anything ever hidden in a beard.

Respondents cite their *Jones* testimony that a short beard might conceal contraband hidden inside an inmate's mouth. Resp. Br. 14, 54. But Lay and Harris thought so little of this possibility that they never mentioned it in this case. And they offered no example of it ever happening in either case.

Most dramatically, respondents claim that in 2013, "an inmate with a beard arrived from a county jail," "concealed a razor blade in his beard," and "used it to commit suicide later that evening." Resp. Br. 46 (citing *Jones* Tr. 78-79 (testimony of Director Hobbs)). But if the razor blade was not discovered until the inmate was dead, how would respondents know where he had hidden it?

The truth is different. The Department's spokesman was quoted saying that the inmate "had the razor blade *because he had been given it to shave*." Christina Huynh, *Inmate found dead at Malvern prison*, ArkansasOnline, Aug. 9, 2013, http://www.arkansasonline.com/news/2013/aug/09/inmate-found-dead-malvern-prison/ (emphasis added). That account is confirmed by contemporaneous police reports, photographs of the razor, and a declaration from the coroner. (We have asked permission to lodge this documentation under Rule 32.3.) The inmate committed suicide with an orange Bic razor issued by the prison and too large and brightly colored to be hidden in a beard. This clearly false testimony, presumably based on rumor or misinformation received from subordinates, highlights the danger of abject judicial deference.

The fact that respondents issue razors to prisoners also undermines their claims. See Coroner's Declaration ¶ 4; Arkansas Department of Correction, *Inmate*

Handbook 7 (2013), http://adc.arkansas.gov/resources/Documents/inmate_handbook.pdf (prisoners "are issued personal hygiene items" and may buy "additional grooming items from the commissary"); *Jones* Tr. 14 (describing another incident where an inmate "had broken his safety razor"). Respondents cannot issue thousands of razors to prisoners and then claim to fear that part of a razor blade might be smuggled into the prison in a half-inch beard.

b. Even assuming a half-inch beard could conceal contraband, respondents fail to demonstrate that a complete ban is the least restrictive means. Respondents can search the beard, require inmates to run their hands through their beards, or require inmates to shave if contraband is ever found in their beard — most of which respondents do for inmates' hair, and all of which other prisons do for beards. Pet. Br. 37-38.

Respondents claim that searching beards "would pose legitimate safety concerns," because an officer "could get cut or pricked with dirty needles or broken razorblades." Resp. Br. 55. But the same is true of searching hair. U.S. Br. 24. Respondents also claim that "putting hands around a person's mouth is particularly invasive," which could lead to "an altercation" or "bit[ing]." Resp. Br. 55. But it is no more invasive than respondents' strip searches or visual body-cavity searches. See *Jones* Tr. 30 ("[W]hen we shakedown, we run our hands, with gloves on, through inmates' hair when we're doing a strip search, and we do check their facial hair, and we do ask them to bend over and cough and squat.").

Respondents claim that requiring an inmate to vigorously run his own hands over the entire area of a half-inch beard "is not a realistic solution," because the

inmate could "manipulate the self-search in ways that avoid detection." Resp. Br. 55-56. But how? The only authority respondents cite involved long, uncut hair. *Ibid.* (citing *Limbaugh* v. *Thompson*, No. 2:93-cv-1404, 2011 WL 7477105 at *7 (M.D. Ala. 2011)). A half-inch beard has much less hair to search. See Wardens Br. 16-17 (self-search is used "often" and is effective even for longer beards).[3]

Respondents ignore the alternative of requiring an inmate to shave if contraband is ever found in his beard. Pet. Br. 37-38. This is a significant deterrent. It is what respondents already do for contraband hidden in the hair. Ark. Admin. Code 004.00.1-I(C)(6). And respondents don't even attempt to explain why it works for hair but not beards.

Finally, respondents say nothing about the real question, which is whether half-inch beards significantly increase the risk of contraband. Given all the other places for hiding anything that might conceivably be hidden in a half-inch beard, respondents have offered no reason to believe that the flow of contraband would increase in the slightest. Pet. Br. 33-34.

3. Changing appearance.

Respondents also argue that banning petitioner's half-inch beard furthers a compelling interest in prisoner identification. Resp. Br. 47-49. Respondents relied below on the risk that an inmate might change his appearance by shaving his beard *after an escape*. J.A. 80, 96.

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[3] It is not true that petitioner raised self-search "for the first time in this Court." Resp. Br. 55. He raised it in the district court, DE 86 ¶ 12, and in his Eighth Circuit brief at 7 (filed Oct. 25, 2012).

Respondents now seek to supplement the record in two ways. First, they try to bolster the evidence on identification *after an escape* by offering five newspaper articles from the last thirty years. Resp. Br. 48 n.14. Second, they seek to introduce a new interest never raised below — identifying inmates *within the prison* in order to prevent escape or other harms — by citing five more newspaper articles from the last twenty years. Resp. Br. 47 n.13.

Respondents cannot meet their burden by conducting Westlaw searches of old newspaper articles after certiorari is granted. The new arguments are waived, and they only underscore respondents' failure to satisfy strict scrutiny on the record.

The new arguments and news stories also fail on the merits. First, respondents' alleged interest in identification is severely undermined by the exception for quarter-inch medical beards. Pet. Br. 40 (citing *Newark*). Respondents claim that medical beards are "a rare exception," Resp. Br. 25, 51, but elsewhere they admitted that 5-6% of all inmates (*i.e.*, 750 to 900 inmates) have medical beards. *Jones* Tr. 35-36. And they testified that quarter-inch medical beards present the same problem of "changing the appearance." *Jones* Tr. 28. If the interest in identification is not compelling with respect to medical beards, it is not compelling with respect to petitioner's half-inch beard. U.S. Br. 25; Wardens Br. 21.

Second, respondents cannot show that they used the least restrictive means. Respondents already require a new photograph whenever "the growth or elimination of hair, mustaches, sideburns and/or beard significantly changes your [an inmate's] appearance." Pet. Br. 39 (quoting Ark. Admin. Code 004.00.1-

I(C)(6)). Many other prison systems have the same policy. *Ibid.*; Wardens Br. 19-21. Digital cameras make it "easy and inexpensive" to maintain multiple photos. Wardens Br. 20. Obtaining both a bearded and clean-shaven photo actually furthers respondents' interest in capturing escaped prisoners, because it thwarts attempts to change appearance by either shaving or growing a beard. See J.A. 104-105 (prisoner grew beard after escape); U.S. Br. 25.

Respondents argue that their rephotography policy provides only "limited help" in identifying inmates who "quickly and momentarily" change their appearance in prison, and that an inmate "could refuse to shave his beard upon entry into ADC." Resp. Br. 56-57. But respondents rely on this policy for inmates who "quickly and momentarily" change their appearance by shaving mustaches, sideburns, medical beards, or hair. And Virginia requires a clean-shaven photograph of any prisoner who grows a beard. Pet. Br. 40 n.11. Whether there is compelling need to require new inmates to shave for one photograph is not a question presented here. But such a rule is less restrictive than requiring inmates to remain clean-shaven forever. U.S. Br. 25-26.

4. Measuring half an inch.

Respondents have abandoned their claim that 15,000 inmates will seek beards, Pet. Br. 40-41, arguing instead that "hundreds or thousands" will do so. Resp. Br. 62. But we now know that hundreds of inmates have medical beards. See p. 17, *supra*.

Respondents also assert that "it is not easy to determine visually whether a beard has grown longer than half an inch." Resp. Br. 58. But respondents do

not "determine visually" whether inmates are complying with the quarter-inch medical limit. Rather, they require inmates to shave with clippers "[a]t a minimum once a week, if not twice." *Jones* Tr. 22-23. It would be a "simple solution" to require regular clipper shaves of religious beards. *Jones* Tr. 86; U.S. Br. 28. And if it is so hard to monitor the precise length of beards, respondents could impose qualitative limits rather than length limits, as other prisons do. Pet. Br. 42.

Respondents also claim that allowing half-inch beards would "greatly increase the time and expense of running the prison system." Resp. Br. 58-59. But there is no reason to think the "time and expense" would be any different from that of administering medical beards. The two cases respondents cite (at 58-59) involved "unshorn hair," *Limbaugh*, 2011 WL 7477105 at *4, or the deferential *Turner* standard, *Green* v. *Polunsky*, 229 F.3d 486, 489-490 (5th Cir. 2000).

Nor have respondents demonstrated that a complete ban on religious beards is the least restrictive means of handling supposed administrative problems. A clipper guard, a sketch, a ruler, or even a marked popsicle stick would all be less restrictive means of achieving respondents' purported interest in precise beard length. Pet. Br. 41-42.

5. No exceptions ever.

Respondents argued below that accommodating petitioner's religious exercise could endanger prison security by making petitioner a "target" or enabling him to become a "leader." Pet. Br. 42-43 (citing J.A. 86-87, 118-119). They abandon that argument here, although

their amici try to revive it, Alabama Br. 20, and respondents still claim a "compelling interest in uniform enforcement." Resp. Br. 62. Neither brief responds to the point that if preventing exceptions is in itself a compelling interest, then RLUIPA is a dead letter. Pet. Br. 43; U.S. Br. 27; Wardens Br. 23-24.

6. Failure to consider less restrictive means.

Respondents also failed to consider whether less restrictive means were available. Pet. Br. 43-46. They first claim that they are not required to "consider-and-reject" less restrictive alternatives. Resp. Br. 42-43 (citing *Knight* v. *Thompson*, 723 F.3d 1275, 1286 (11th Cir. 2013), *cert. pending*, No. 13-955; *Fegans* v. *Norris*, 537 F.3d 897, 907 (8th Cir. 2008); *Wos* v. *E.M.A.*, 133 S. Ct. 1391, 1409 (2013) (Roberts, C.J., dissenting)). But two of these cases are on the wrong side of a lopsided circuit split, and the other is a dissent in a Medicaid preemption case, arguing that the state bore no burden of proof. This Court and at least six circuits hold that prisons must consider less restrictive alternatives. See Pet. Br. 43-44 (collecting cases; discussing *Turner*); U.S. Br. 18-19; Wardens Br. 8; *Jova* v. *Smith*, 582 F.3d 410, 416 (2d Cir. 2009).

Respondents do not claim that they considered alternatives. Their reaction to all prisoner claims has been fierce opposition, not good-faith consideration. Even now they offer no response to several proposed less restrictive means. Pet. Br. 45.

Respondents also claim that petitioner's proposed alternatives are irrelevant, because "[a] proposed alternative rule constitutes a less restrictive alternative *only if* it would be equally as effective in achieving the

compelling governmental interest." Resp. Br. 52 (emphasis added). But respondents' cases do not treat equal effectiveness as a *necessary* element of a valid less restrictive alternative; they treat it as *sufficient*. Compare, *e.g.*, *Reno* v. *ACLU*, 521 U.S. 844, 874 (1997) (burden on speech "unacceptable *if* less restrictive alternatives would be at least as effective") (emphasis added) with Resp. Br. 52 ("only if" and "must be"). In any event, the burden is not on the prisoner to prove that the alternatives are equally effective; it is on "the Government, presented with a plausible, less restrictive alternative, to prove the alternative to be ineffective." *United States* v. *Playboy Entertainment Group, Inc.*, 529 U.S. 803, 823 (2000). Respondents have not carried that burden.

Nor is it enough to show that a less restrictive means "may be inconvenient, or may not go perfectly every time." *Id.* at 824. Even under rational basis review, the government may be required to adopt alternatives that impose "*de minimis* cost" — not *zero* cost — on prison security. *Turner*, 482 U.S. at 91, 98. Strict scrutiny requires more. *Brown*, 131 S. Ct. at 2741 n.9 (government does not have "compelling interest in each marginal percentage point by which its goals are advanced").

C. Enforcing RLUIPA According to Its Terms Will Not Wreak Havoc on Prison Administration.

Respondents argue that if RLUIPA is enforced according to its terms, terrible results will follow. They offer two variations on this slippery-slope argument.

1. The first is an extended *ad hominem*, in which respondents attack prisoners generally and petitioner specifically. They start with a press report of a prison

murder committed with "a 6-inch metal shank" (according to the cited source, Resp. Br. 1 n.1), which obviously wasn't hidden in a half-inch beard. And they recount petitioner's crimes, both proven and alleged. Resp. Br. 1-2, 9-12.

But Congress knew that many prisoners had been convicted of violent crimes. If RLUIPA cannot be faithfully enforced in prisons, it is *de facto* repealed. Nor do respondents ban beards only for petitioner. They ban all religious beards, and the ruling in this case will affect all prisoners whose religious practices are restricted, often in "egregious and unnecessary" ways. Joint Statement, 146 Cong. Rec. at 16699.

2. The second half of respondents' argument is that faithfully applying RLUIPA will unleash "thousands" of claims. Resp. Br. 4. Prisons will have to let inmates have "functional knives," engage in "sparring," or worse. Resp. Br. 5-6.

These horribles fall apart upon inspection. The violent character of many prisoners can of course be relevant to RLUIPA's balancing test. Where a risk is real and substantial, proof will often be easy. Thus, respondents' example of a Sikh kirpan (at 5) is an easy case. No prison in the country allows kirpans, and the danger of allowing substantial metal blades in prisons is obvious. The safeguards that suffice for schoolchildren (dull blade, sewn in sheath) do not suffice for convicted prisoners with time on their hands.

Nor does RLUIPA mandate Tulukeesh sparring. Resp. Br. 5-6. As the Second Circuit explained, "the obvious security implications of allowing inmates to practice potentially violent physical activities render the prohibition of such activities the least restrictive means of ensuring institutional safety." *Jova*, 582 F.3d

at 416-417. Prisoners who hone their fighting skills may use those skills outside the gym, or use them too aggressively inside the gym.

Respondents' worries about Hindu yoga performed "in a vulnerable position," Resp. Br. 5, may present an easy case the other way. The plaintiff in that case alleges that Muslims are permitted to pray five times daily near cellmates in a similarly vulnerable position. Complaint ¶ 32, *Bargo* v. *Kelley*, No. 5:14-cv-00078 (E.D. Ark. 2014). If respondents are discriminating between faiths, a compelling justification is hard to show.

These three cases thus illustrate Congress's finding that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5). And this Court has affirmed "the feasibility of case-by-case consideration of religious exemptions" under RFRA and RLUIPA. *O Centro*, 546 U.S. at 436 (characterizing *Cutter*). "Nothing in our [*Cutter*] opinion suggested that courts were not up to the task." *Ibid.* The task is not difficult here.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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