No. 13-6827

In The
Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A ABDUL MAALIK MUHAMMAD,

Petitioner,

v.

RAY HOBBS, DIRECTOR, ARKANSAS
DEPARTMENT OF CORRECTION, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit**

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the Arkansas Department of Correction's grooming policy violates the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.*, to the extent that it prohibits petitioner from growing a one-half-inch beard in accordance with his religious beliefs.

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INTRODUCTION

On January 20, 2012, Latavious Johnson, who was already serving time in an Arkansas prison for first-degree murder, killed a correctional officer named Barbara Ester by stabbing her with an improvised metal knife or "shank."[1] Murders and other violent crimes in prisons have not been unusual in our nation's history. After all, "[p]risons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent conduct," and inmates are typically incarcerated precisely because they have "shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint. . . ." *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (discussing published statistics regarding instances in which prison personnel have been murdered, inmates have killed other inmates, and riots have erupted).

Petitioner, who describes himself as a Yemen-trained Muslim fundamentalist, is no exception to the violent nature of the inmates housed in Arkansas's maximum-security prisons. In January 2005, for example, he was indicted by a federal grand jury for threatening to kidnap and harm the two daughters of

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[1] *See* Nick Valencia, CNN (Jan. 20, 2012), *Inmate Fatally Stabs Guard in Arkansas*, *available at* http://www.cnn.com/2012/01/20/justice/arkansas-prison-guard-killed/.

President George W. Bush.[2] A few years after pleading guilty to those charges, he broke into the home of his ex-girlfriend, slit her throat, and stabbed her chest, reminding her that he could break in "anytime [he] wanted to" and that nobody else could "have" his victim if Petitioner could not. *Holt v. State*, 384 S.W.3d 498, 502 (Ark. 2011). Prior to his trial, Petitioner advised Randy Morgan, Chief of Detention at the Pulaski County Detention Facility, that should his trial "go south," he intended to "wage jihad against any court personnel, detectives, [and] adverse witnesses. . . ." *Id*. at 505. He warned that he would "do whatever it takes to get these individuals, as Allah is my witness." *Id*. Petitioner told Chief Morgan that his attention to the matter "could save lives." *Id*. Petitioner also wrote Detective Damon Whitener at the Little Rock Police Department – whom Petitioner addressed as a "kafir pig" – and asked that Allah grant him the highest level of paradise "should [he] die waging jihad in this case." *Id.* at 505-06.

Petitioner's threats were not merely isolated statements made in the heat of the moment. After arriving at the Arkansas Department of Correction (ADC) for the purpose of serving his life sentence, for example, Petitioner made similar threats of jihad against public officials in Iowa. He was also caught holding a knife against a fellow inmate's throat following a religious dispute.

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[2] *United States v. Holt*, No. 2:05-cr-20012-PM-APW, DE 1 (W.D. La. Jan. 12, 2005).

The real-life stories of inmates such as Latavious Johnson and Petitioner offer powerful glimpses into prison life in a way that bland statistics regarding prison violence, such as those discussed in *Hudson*, cannot. But the point made by those stories and statistics is obvious: Prisons are dangerous places. Correctional officers regularly work within the striking distance of inmates who may decide to injure or kill the moment an opportunity avails itself. Prison officials create rules intended to strike a delicate balance between safety and security, on the one hand, and giving inmates a sense of dignity and achieving rehabilitative goals, on the other hand; inmates spend countless hours plotting ingenious measures designed to circumvent prison rules so as to achieve violent or criminal ends; and prison officials respond with a broader set of prophylactic countermeasures, altering the original balance.

When it comes to making prison policies, the stakes are high; lives can be lost if the wrong decision is made. ADC takes religious freedom seriously, but it takes seriously its paramount interests in safety and security, too. It is against this backdrop that this Court has consistently taken a pragmatic, deferential approach in defining what it means to enjoy a *constitutional* right to freely exercise one's religion within the confines of prison walls. *See*, *e.g.*, *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348-49 (1987) (noting that "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations

underlying our penal system" and that "the appropriate balance" of the relevant factors requires courts to give "appropriate deference" to prison officials "who are actually charged with and trained in the running of the particular institution under examination") (quotations and citations omitted).

This case, of course, involves a Muslim inmate's claim that he has a statutory right to maintain a half-inch beard under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq*., even though such beards are prohibited by ADC's grooming policy. But, because this is the Court's first opportunity to apply RLUIPA, other questions lurk in the background. Lawsuits and grievances regarding religious accommodations under RLUIPA are made by hundreds of ADC inmates every year, and they are made by thousands of other prisoners across the country. This Court now has an opportunity to establish the legal framework by which such claims are decided. Questions that lower courts will decide under the framework the Court establishes in this case may include the following:

- Must a violent offender who has not been caught hiding contraband or harming others within the prison be afforded the right to possess metal bells and wands (which could be ground into shanks or modified into weapons, notwithstanding the absence of studies to prove the point) for use in Wiccan rituals? *Levie v. Ward*, No. 05-1419, 2007 WL 2840388 (W.D. Okla. Sept. 27, 2007).

- Should an inmate be allowed to fulfill his religious obligation to perform yoga next to a cellmate outside of recreation time, absent an individualized feasibility study regarding the potential expenses associated with assigning a correctional officer to monitor the particular yoga practitioner, who has placed himself in a vulnerable position?[3]

- To what extent must prison officials allow Sikh inmates to possess kirpans, which are functional knives that Sikhs are required by their religion to carry, based only on prison officials' suspicions and predictive judgments (rather than real-life examples or empirical studies) that kirpans are dangerous – even if they have dull edges and are sewn to the sheath. *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995) (affirming an injunction requiring a school district to afford Sikh students the right to have kirpans during the school day under RFRA, despite the school district's safety concerns).

- Must prisons allow Tulukeesh inmates to comply with their religious duty to spar with other inmates, or does RLUIPA respect a prison official's view

[3] This example is adapted from the claims that an inmate has asserted in *Bargo v. Kelley,* No. 5:14CV00078, DE 2 (E.D. Ark. Feb. 27, 2014).

> that sparring poses "security implications" that are "obvious." *Jova v. Smith*, 582 F.3d 410, 416 (2d Cir. 2009).

There are, of course, numerous other scenarios that lower courts will evaluate based on this Court's opinion here. For example, there are countless cases involving dreadlocks and other long-hair styles, which have been used to smuggle contraband in the past but which the Federal Bureau of Prisons and several state prison systems find to present an acceptable level of risk. If there have been only a couple of documented dreadlock-related incidents in the last few years and the Federal Bureau of Prisons and most state prison systems allow them, is a reluctant state legally obligated to experiment with a much more relaxed policy and hope for the best? What if no multivariate regression study bears out the prison's fears? What if no such statistical study is even possible, under the rigorous standards of social science, given the absence of complete data on the origins of contraband and the means by which it is smuggled into the prison? And, at what point are administrative and cost considerations of this legal regime relevant? *See* Taylor G. Stout, Note, *The Costs of Religious Accommodation in Prisons*, 96 Va. L. Rev. 1201, 1202 (2010) (concluding that RLUIPA imposes significant costs on prisons and that "[t]hese burdens are more onerous than Congress intended when passing the statute and more severe than federal courts initially appreciated").

However federal courts answer these questions in due course, this much is clear: Congress did not intend for RLUIPA to usher in the sort of sweeping changes that Petitioner envisions. Context matters in the application of RLUIPA's compelling-interest standard. The statute must be applied with sensitivity to prison officials' paramount security concerns and federal courts' longstanding practice of giving deference to those officials. *See Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005). Like items that can be modified into weapons, the prison officials in this case determined that beards (including half-inch beards) give rise to unacceptable risks. The courts below properly declined to override the judgments of those highly experienced prison administrators, and this Court should affirm.

STATEMENT

I. Factual Background

A. ADC's Grooming Policy

A seven-member Board of Correction promulgates ADC's prison regulations.[4] Policies are initially developed by a committee and then taken to the Board for final approval. ADC's Director typically

[4] *See* http://adc.arkansas.gov/about/Pages/BoardofCorrection.aspx.

issues more detailed regulations, called administrative directives, to further the Board's policies.

In 1997, the Board asked ADC's Director at the time, Larry Norris, to review the grooming practices of inmates housed inside ADC and to help create a policy that would serve four important goals: (1) provide for the health and hygiene of incarcerated offenders; (2) maintain a standard appearance throughout the period of incarceration; (3) minimize opportunities for disguise; and (4) minimize opportunities for the transport of contraband and weapons. In furtherance of those goals, Director Norris had his staff prepare a memorandum detailing the grooming policies of at least five other states and the Federal Bureau of Prisons to determine what policies other prison systems were utilizing and whether or not their policies would work in Arkansas.[5]

After considering the policies of a number of other prison systems, the Board decided that a no-beard policy would work best for Arkansas in achieving the four goals. In April 1998, Director Norris issued Administrative Directive 98-04 ("AD 98-04"), which set forth a new grooming policy for all Arkansas prisons. The policy states, in part, as follows:

> No inmates will be permitted to wear facial hair other than a neatly trimmed mustache

[5] The background of ADC's development of the grooming policy at issue in this case is set forth in *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008).

> that does not extend beyond the corner of the mouth or over the lip. Medical staff may prescribe that inmates with a diagnosed dermatological problem may wear facial hair no longer than one quarter of an inch. Inmates must present MSF 207 upon demand.

B. Petitioner's Incarceration at ADC

In June 2010, Petitioner was convicted, as a habitual offender, of aggravated residential burglary and first-degree domestic battering. He received a sentence of life imprisonment on the aggravated residential burglary charge and a sentence of forty years on the first-degree domestic battering charge, both of which stemmed from Petitioner stabbing a former girlfriend several times in the neck and chest. *Holt*, 384 S.W.3d at 502.

Petitioner was transferred into ADC's Diagnostic Unit for orientation in mid-July 2010.[6] Upon arriving at ADC, Petitioner was given an order to shave his beard in compliance with ADC's grooming policy so that he could be photographed clean-shaven as a new commitment. He refused. Over the next several weeks, Petitioner repeatedly refused to comply with the grooming policy, preventing a clean-shaven photograph of Petitioner from being taken.

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[6] *See* http://adc.arkansas.gov/inmate_info/search.

A year later, Petitioner submitted a Request for Interview form to Deputy Warden Mark Warner, seeking a religious exemption to ADC's grooming policy. Respondent Gaylon Lay, the warden of the Cummins Unit (where Petitioner was then housed), denied the request. Petitioner then informed Lay that he only answers to Shari'a law and only swears allegiance to an Islamic government or caliphate run by the Shaykhs. Petitioner further stated that when the kafir's rules run into conflict with the laws of Allah, he is duty bound to disobey the kafir.

Petitioner soon submitted another Request for Interview. This time, he informed prison staff of a "blood feud" based on Shari'a law that existed between himself and inmate Abdulhalum Muhammad. Petitioner informed staff that no amount of separation would stop them from achieving their goals of violence and that, in the name of safety, inmate Muhammad should never be transferred to the Cummins Unit where Petitioner resided. In response to the notification, inmate Muhammad was placed on Petitioner's enemy alert list.

A few months later, Petitioner wrote a letter to police officials in Ottumwa, Iowa, and gave them a stern warning: "The purpose of this letter is to inform you that, inshallah, I intend to wage harb in your town as a result of the mother of my child having fled there years ago and not letting me see the baby." Def.'s Resp. to P.'s Mot. for Order of Release, *Holt v. Hobbs*, No. 5:11CV00164, DE 84-1 (E.D. Ark. Feb. 3, 2012) (Notice of Discriplinary Violation). Petitioner

proclaimed that he intended to "take things to another level" by calling upon his "Muslim contacts all over the U.S. that will assist a brother in need." *Id*. Petitioner was disciplined for writing threats of bodily harm or death to the Ottumwa Police Department.

Petitioner eventually submitted to ADC's grooming policy and allowed his beard to be shaved for a while. Then he grew it back. And then he sought (and temporarily won) a pre-hearing preliminary injunction requiring ADC to allow Petitioner to maintain a half-inch beard. After his trim on December 13, 2011, Petitioner wrote to the unit deputy warden, declaring that "a state of war" existed between Petitioner and the inmate barber because, in Petitioner's opinion, his beard was cut shorter than one-half-inch. Petitioner further stated that the inmate barber "*cannot* cross my path again." Given Petitioner's prior behavior, ADC officials took Petitioner's words as a serious threat, and they permanently separated Petitioner from the inmate barber. J.A. 83.

In April 2012, Petitioner was discovered holding a knife to the neck of his cellmate, Andrew Dennison, and demanding to see the lieutenant on duty. Def.'s Resp. to P.'s Mot. for Review, *Holt v. Hobbs*, No. 5:11CV00164, DE 109-1 (E.D. Ark. July 5, 2012). Petitioner threatened to kill Dennison if his demands were not met. In the aftermath of the incident, Petitioner did not deny his actions. He stated he acted out against Dennison when the infidel sat down on the floor inside a hand-drawn diagram, which offended Petitioner's religious beliefs. Petitioner was found

guilty of violating ADC's rules of discipline. As a result of the incident, Petitioner and inmate Dennison were placed on the appropriate enemy alert lists.

II. The Proceedings Below

A. Commencement of the Action

Petitioner sued ADC in June 2011, alleging that the agency's grooming policy violated his constitutional and statutory rights to freely exercise his religion. J.A. 16. Like the plaintiff in *Fegans*, Petitioner contended that his religion prohibits him from shaving altogether. J.A. 54, 55, 58. But compliance with his religious duty to grow an uncut beard was admittedly not an option; Petitioner conceded that, at some point, beards present a security threat. J.A. 139 ("I am not arguing that . . . having unrestricted hair, unrestricted beard does not present a security threat, because it does."). He argued, however, that the security threat is inversely related to the length of the facial hair; with a half-inch beard, for example, "[y]ou can't even barely hide a razorblade in it." J.A. 70.[7]

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[7] Petitioner has never identified the point at which a beard presents a security threat, arguing only that ADC's no-beard policy is overly cautious; at a minimum, the agency should allow half-inch beards as a compromise. The next cases, of course, will concern the potential accommodation of a ¾-inch beard, and a one-inch beard, and so on. "A judge would be unimaginative indeed if he could not come up with something a little less

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Along with his complaint, Petitioner filed a motion for a preliminary injunction, seeking an order (1) prohibiting Warden Gaylon Lay and ADC Director Ray Hobbs from enforcing ADC's grooming policy so as to allow Petitioner to grow a half-inch beard, and (2) requiring Respondents to cease disciplinary efforts against inmates who have grown (or may grow) half-inch beards. P.'s Mot. for Prelim. Inj., *Holt v. Hobbs,* No. 5:11CV00164, DE 3 (E.D. Ark. June 28, 2011). Petitioner asked the district court to enjoin Respondents without affording them an opportunity to learn of Petitioner's filings.

On October 18, 2011, the district court granted Petitioner's motion, temporarily enjoining ADC from forcing Petitioner to trim his beard shorter than one-half-inch in length. J.A. 179. Almost a month later, Respondents first learned about the case after being served with the summons and complaint. The District Judge ordered the Magistrate Judge to hold an individualized evidentiary hearing, reminding the Magistrate Judge that RLUIPA places the burden on Respondents to show that any burden on Petitioner's religious exercise is the "least restrictive means of achieving the security goals sought by the policy." J.A. 35.

'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down." *Illinois State Bd. of Elec. v. Socialist Workers Party,* 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring) (cautioning against using the least restrictive means test in a way that gives rise to a "slippery slope" of uncertainty).

B. Preliminary Injunction Hearing

The Magistrate Judge convened an evidentiary hearing six weeks later. J.A. 48. Respondent Lay – the Warden of the Cummins Unit and a 36-year veteran of ADC – testified regarding his identification-related concerns with allowing Petitioner to have a half-inch beard. J.A. 79. Lay testified that an inmate can quickly alter his appearance if he is allowed to grow even a half-inch beard, such as by shaving his beard immediately upon escape. *Id*.

Lay also testified about his contraband-related concerns with beards. He testified as to his knowledge of inmates hiding contraband on their person, including small items such as homemade darts, bits of razor, and other weapons that can fit in an inmate's half-inch beard. J.A. 80. ADC officials have also testified that contraband can be hidden inside the mouth, and that an alteration to the appearance of the face caused by such contraband (such as a subtle bulge in the cheek) would be masked by facial hair. *Jones v. Meinzer*, No. 5:12CV00117, 2013 WL 5676886, *6 (E.D. Ark. Aug. 30, 2013).

While contraband has been a problem in the past, Lay observed that the population of inmates entering ADC is younger and more violent than ever before, which creates even greater security problems than in previous years. J.A. 86. He testified that there are numerous difficulties in attempting to

monitor 15,000 inmates within ADC; affording them one more place to hide weapons or contraband would not further the interests of security and safety for either employees or inmates. J.A. 80.

Lay also testified about administrative concerns with allowing inmates to have half-inch beards. As an example, he testified about a specific incident involving Petitioner after the district court temporarily enjoined ADC from enforcing the grooming policy against him. As discussed above, Petitioner accused an inmate barber of cutting Petitioner's beard too short, prompting Petitioner to declare "war" against the barber. J.A. 71, 82. For the safety of the inmate barber, prison officials separated the barber from Petitioner. J.A. 83. This type of incident can create administrative problems for ADC because the agency cannot change barbers every time a particular inmate disagrees with the length or style of his beard. *Id*. Lay also expressed his concerns about how to determine the exact length of an inmate's beard in such a way to avoid confrontations in the future and avoid administrative burdens on an already overworked staff. J.A. 80, 83-84.

Lay discussed his understanding of other state prison facilities, including their housing units. He testified that the majority of prison facilities in other states have cellblock units, where inmates are housed in one- or two-person cells. J.A. 101. This separation of inmates can help to reduce the flow of contraband from inmate to inmate, as they have less physical access to one another. In contrast, the Cummins Unit

and most other units within ADC have open barracks, with each barrack holding up to 50 inmates in the same room without partitions. J.A. 101. The structure of ADC's housing allows inmates greater access to one another, which can be positive for rehabilitative purposes. On the downside, open-barrack housing allows for greater opportunities to exchange contraband and use weapons on other inmates. Petitioner did not attempt to refute Lay's testimony on this topic or offer contrary evidence.

Lay was not aware of many other state facilities operating agricultural programs comparable to ADC. J.A. 101. Nor did Petitioner bring any such facilities to the attention of the Magistrate Judge. At the Cummins Unit, many maximum-security inmates perform agriculture work outside the prison's fence. *Id.* As of 2013, ADC utilized 26,665 acres for farming.[8] Inmates who work outside the prison fence attempt to smuggle weapons, drugs, and other contraband left in the fields back into the prison. J.A. 101. Allowing inmates to maintain beards covering the skin on the face would provide inmates who work outside the fence with a quick hiding place for contraband to be transported past the guards and inside the fence. Once inside the fence, the contraband could be picked

[8] *See* Arkansas Department of Correction, 2013 Annual Report, *available at* http://adc.arkansas.gov/resources/Documents/2013annualReport.pdf.

up by another inmate, concealed, and used on staff members or other inmates.[9]

[9] Petitioner contends (Pet. Br. 30 & n.9) that farming operations are common among state prison systems. But while other states may assign jobs outside of their security fences, the classification status of those inmates is often distinguishable from the inmates working the farms in Arkansas. The five prison systems cited by Petitioner, for example, make farm jobs available only to well-behaved, low-security inmates, while ADC assigns farm jobs to class IV inmates (the least desirable classification) and to nearly all newly incarcerated inmates for their initial work assignment. *See* Mississippi Department of Corrections, *Agricultural Enterprises*, http://www.mdoc.state.ms.us/agricultural_enterprises.htm ("Minimum and medium custody inmates are given the opportunity to participate in the Agricultural Enterprises program."); Oklahoma Department of Corrections, *James Crabtree Correctional Center*, http://www.ok.gov/doc/Organization/Field_Operations/West_Institutions/James_Crabtree_Correctional_Center.html (stating that minimum-security inmates support facility maintenance and farm programs); Ohio Department of Rehabilitation and Correction, *Inmate Security Classification Levels 1 Through 4*, http://www.drc.ohio.gov/web/drc_policies/documents/53-CLS-01.pdf at 2, 7 ("Level 1 inmates [who have the lowest security threat level] . . . may work outside of the fence," but those assignments must "be approved by the Managing Officer/designee following a detailed review of the inmate's records and an interview between the staff member making the recommendation and the inmate."); California Department of Corrections and Rehabilitation *Department Operations Manual*, http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/dom%202014/2014%20DOM.pdf at 352, 353 (limiting or exempting "industry" participation, including farming, for inmates with certain convictions or sentences and exempting maximum-security inmates); North Carolina Department of Public Safety, *Dan Riven Prison Work Farm*, https://www.ncdps.gov/index2.cfm?a=000003,002240,002371,002384,

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ADC's Assistant Director of Institutions, Grant Harris, also testified on behalf of Respondents. Harris began his career with ADC in 1979 and worked his way up through the security ranks. J.A. 113. Harris's three decades of experience in corrections includes time as an entry-level correctional officer, 18 years as a warden, and numerous positions in between. J.A. 113, 127-28.

Harris testified about a particular problem involving contraband that ADC has encountered in recent years – namely, the introduction of cellular phones into prisons. In 2011, ADC confiscated in excess of 1,000 cellular phones from inmates. J.A. 114. Cellular phones are the primary covert means by which inmates communicate with the outside world, including for illicit purposes such as running criminal enterprises and arranging for the delivery of contraband. Cellular communications cannot be detected by ADC's call-monitoring equipment.

Harris showed the Court a cellular phone's subscriber identity module (SIM card) that had been confiscated from a facility. Tr. Ex. No. 2; J.A. 116, 128-29. The SIM card is the piece of the phone that contains network identification and other information vital for the operation of a cellular phone. The Magistrate Judge examined the SIM card and noted its 3/8" x 3/8" dimensions. J.A. 128. Harris testified that a

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002289 (stating that minimum-security inmates work at various state facilities).

SIM card can easily be hidden inside a one-half-inch beard, thus severely compromising ADC's efforts to prevent the flow of contraband into, and within, prisons. J.A. 116. The Magistrate Judge was "impressed" by this testimony. J.A. 155.

Harris was also concerned about the possibility of correctional officers having to perform hands-on inspections of facial hair to search for contraband and weapons. Razorblades, dirty needles, or other items could cut correctional officers. J.A. 130.

Petitioner also testified at the hearing. He said that his interpretation of the Islamic faith requires him to maintain an uncut beard. J.A. 18, 54. Because, however, he found a case from a district court within the Ninth Circuit in which Muslim inmates were allowed by the court to maintain half-inch beards,[10] he asked ADC to allow him to maintain a beard of a similar size. J.A. 56. He conceded that Respondents have compelling interests in maintaining safety and security within the institution and that an uncut beard would jeopardize those interests. J.A. 18, 57. He also testified that not all Muslims believe a man must maintain a beard. J.A. 58. Finally, he acknowledged that ADC permits him to honor his religion in a variety of other ways, such as by using a prayer rug during his worship times, reading and studying the Koran, communicating with a religious advisor,

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[10] *Mayweathers v. Terhune*, 328 F. Supp. 2d 1086 (E.D. Cal. 2004).

maintaining the required diet, and observing religious holidays. J.A. 60-62.

Petitioner cross-examined Lay and Harris regarding alternative ways to administer a prison that Petitioner believed would allow him to maintain a beard while addressing ADC's concerns. Lay and Harris explained why Petitioner's proffered options were unworkable, and they provided support for their opinions. They explained, for example, why quarter-inch beards, which some inmates with diagnosed dermatological conditions are allowed to maintain, are different from half-inch beards. J.A. 75 (testifying that quarter-inch beards are so short that officers can see the skin and, therefore, such beards do not present the same security and administrative concerns as half-inch beards).

Petitioner did not offer any testimony other than his own. Nor did he offer any documentary evidence at the hearing.

In addition to receiving the testimony of Petitioner, Lay, and Harris, the Magistrate Judge studied the testimony and evidence submitted in *Fegans*, a prior challenge to ADC's grooming policy under RLUIPA. During the bench trial in *Fegans*, Director Norris testified that ADC's prohibition on inmate facial hair helped prevent inmates from changing their appearances and made it easier for law enforcement officers to track and identify inmates following escapes. J.A. 168.

C. Lower Court Decisions

The Magistrate Judge issued a written recommendation in favor of ADC. He began his written analysis by revisiting the testimony: "According to Warden Lay, a one-half-inch beard can conceal razor blades, drugs and homemade darts." J.A. 166. Such a beard can also allow an inmate to change his appearance during an escape. *Id*. The "most compelling testimony," according to the Magistrate Judge, came from Harris, who testified that inmates could conceal syringe needles in their beards, which can potentially wound an officer charged with inspecting the beard. J.A. 167. The Magistrate Judge also highlighted Harris's testimony that cellular phones have become an "emerging threat" to prison security; inmates try to circumvent the phone system though such devices. *Id*. A SIM card, which the Magistrate Judge measured to be only 3/8" x 3/8", is the "critical piece" of a cellular phone. *Id.*

The Magistrate Judge evaluated Petitioner's First Amendment claim under the *O'Lone* standard and concluded that it failed. J.A. 172. He then turned to the RLUIPA claim, noting that Congress added "additional protection" for prisoners and that the statute uses a "compelling interest standard." J.A. 173. But the Magistrate Judge found that deference to prison officials is still relevant to the analysis under *Cutter*, and he recommended that the district court deny the motion for a preliminary injunction and dismiss the case. J.A. 173, 175, 177.

The District Judge "carefully" considered the evidentiary record and adopted the Magistrate Judge's recommendations. J.A. 179. On appeal, the Eighth Circuit affirmed. The court of appeals found that Respondents established that ADC's grooming policy "was the least restrictive means of furthering a compelling penological interest." J.A. 186. The practices of prisons in other jurisdictions, the court noted, are relevant to the feasibility analysis; but deference to prison officials is still required under RLUIPA. Given the totality of the evidence, Respondents "met their burden" in this case. J.A. 186-87.

SUMMARY OF ARGUMENT

I. Courts have historically given substantial deference to prison officials in evaluating the legality of prison rules. Congress did not want to overturn that tradition when it enacted the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1 *et seq*., or RLUIPA.

A. There are good reasons why courts have long deferred to prison officials. First, deference leads to better decisions because, compared to prison officials, judges lack the training and experience necessary to understand the nature of a specific safety risk or the administrative and logistical reasons for responding to a security concern in a particular way. Second, the operation of prisons is peculiarly within the province

of the other branches of government, and it implicates core concerns of sovereign states.

B. RLUIPA was largely modeled after RFRA. The lawmakers who supported RFRA did not want courts to cease giving deference to prison officials. They expected that courts would "continue" their "tradition of giving 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 considerations of costs and limited resources." *See* S. Rep. No. 111, 103rd Congress, 1st Sess. (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898-1901.

C. After this Court held that RFRA was unconstitutional as applied to the states, Congress responded by enacting RLUIPA. As with RFRA, Congress anticipated that courts would continue to give deference to prison officials. *Cutter*, 544 U.S. at 723. RLUIPA must be applied "in an appropriately balanced way" and "with particular sensitivity to security concerns." *Id.* at 710. RLUIPA's legislative history and the constitutional avoidance canon support the view that the statute must not be interpreted "to elevate accommodations of religious observances over an institution's need to maintain order and safety." *Id*. at 722. Reviewing courts must, instead, "apply the Act's 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." *Id*. at 723 (internal quotation marks omitted) (quoting 146 Cong. Rec. S7774, S7775 (daily ed. June 27, 2000) (joint statement of Sens. Hatch and Kennedy on RLUIPA)).

The concept of deference within a framework of strict scrutiny means that courts should place substantial weight on the testimony of experienced prison officials when evaluating the entire constellation of evidence. Operationalizing deference means at least four things. *First*, prisons must devise prophylactic rules *before* an escape or violent incident occurs, and so courts should not insist on data, studies, or concrete examples before according deference. *Second*, courts should respect the fact that running a prison involves complicated tradeoffs between competing interests, and prison officials may properly choose to make non-religious exemptions or regulate only part of a problem. *Third*, prison administrators must devise rules that are suitable to their particular prison environments, and the law does not compel them to accept the heightened risks that other jurisdictions have chosen to accept. *Fourth*, courts should not invent administrative requirements that are untethered to RLUIPA's text, such as by requiring an administrative record that facilitates APA-like judicial review.

II.A. ADC's no-beard policy furthers its compelling interests in safety and security. The Court has repeatedly held that prison safety and security are compelling interests. And Petitioner agrees that

policies in furtherance of those goals, such as "staunching the flow of contraband," are lawful policy objectives. J.A. 18.

B. ADC's grooming policy serves two interests that implicate safety and security. First, an inmate could easily hide contraband within a beard. Similarly, a beard could help an inmate secret contraband in his mouth by concealing the contours of the face. Second, ADC's no-beard policy furthers its interests in the rapid identification of inmates and avoiding confusion. Inmates have been known to shave their beards for the purpose of escaping, gaining access to restricted areas, or harming others. The no-beard policy minimizes an inmate's ability to alter his appearance quickly and significantly.

C. The grooming policy has a narrow exception for prisoners who require quarter-inch beards for diagnosed medical conditions. But that does not mean that ADC's reasons for not allowing other prisoners to have longer beards are unworthy of credence. After all, laws and regulations often reflect competing interests. There are *quantitative* differences between the quarter-inch beards permitted under the current policy and the half-inch beards that would be permitted under the more liberal policy that Petitioner wants: ADC officials have described quarter-inch beards as "rare" and often "temporary" in nature. There are also *qualitative* differences: quarter-inch beards are so short that they usually allow correctional officers to see the skin. That means that quarter-inch beards entail reduced contraband and identification-related concerns.

It also means that the administrative problem of monitoring compliance is not so great because a correctional officer can readily determine, by visual inspection, whether the skin can be seen and whether the beard has grown to the point of noncompliance.

III.A. ADC's grooming policy is the least restrictive means of furthering its governmental interests. Other alternatives are not equally effective, and so they do not qualify as less restrictive means.

A.1. A policy allowing for half-inch beards would still give rise to contraband problems because small objects, such as bits of razor and SIM cards, can fit inside a half-inch beard. In addition, half-inch beards hide the skin and, therefore, conceal the contours of the face, making it easier for inmates to hide contraband in their mouths. Correctional officers would also face safety risks in conducting hands-on searches of prisoners' half-inch beards. Allowing prisoners to search themselves, in contrast, would be problematic since inmates can manipulate the self-search. Nor is putting everyone who has a half-inch beard in permanent administrative segregation a viable solution; such a policy poses significant constitutional concerns.

A.2. The identification-related concerns associated with beards would not be solved by limiting beard lengths to half an inch. A half-inch beard would still allow opportunities for disguise, trickery, and confusion. The "dual photograph" option would not help correctional officers locate quickly an inmate

who has momentarily altered his appearance in prison, because the correctional officers would be forced to turn to photographic records rather than relying on their own recognition of an inmate's appearance. Sometimes, an initial clean-shaven photograph is not even available. Petitioner, for example, refused to allow such a photograph. Finally, serial rephotography would create disciplinary and administrative problems. For example, inmates might not cooperate with the taking of additional photographs, and inmates might game the system by shaving before their photographs with a beard can be taken. Saying that a prison will keep up with significant changes in inmates' appearances in a written policy is one thing; having an overtaxed staff fully implement such a policy is something else altogether.

A.3. A policy that allows half-inch beards would also create administrative problems. Measuring half-inch beards for compliance throughout an entire prison system would entail substantial administrative burdens. Increased hands-on searches would be time-consuming and risky. And disagreements between inmates and staff would erupt inevitably.

A.4. The fact that other prison systems allow some inmates (but perhaps not Petitioner, due to his violent past, maximum-security status, previous possession of a shank, and declaration of war against an inmate barber) to wear a half-inch beard does not mean that ADC's grooming policy violates RLUIPA. There is no evidence that other jurisdictions have had positive experiences with their more liberal policies.

Nor is there a publication or record evidence explaining why other jurisdictions have chosen to be more lax than Arkansas and other states; litigation, rather than the comparative efficacy of prison policies, may have something to do with it. As best as we can tell, other jurisdictions are simply more willing to tolerate greater risks and costs. RLUIPA does not require Arkansas to incur those same risks and costs just because other states have.

B. A policy of allowing half-inch beards for all prisoners who claim a religious need to have a beard is not a viable less restrictive alternative. Granting religious-based exceptions to ADC's grooming policy would undermine the very purpose of the policy. A grooming policy that makes religious-based exceptions for half-inch beards, just like a policy that allows half-inch beards for everyone, would entail the same contraband and identification concerns discussed above. Arkansas has a significant population of Muslim inmates, and adherents to other faiths would avail themselves of a religious-based exception, too. The fact that a particular maximum-security inmate has not yet smuggled contraband or tried to escape says little about the probability of such things in the future.

To the extent that Petitioner contends that Respondents should ignore other religious objectors and focus only on him, his argument is even weaker due to his pre- and post-incarceration history of violence, threats, and disputes. Prison officials at

ADC are appropriately concerned about the possibility of allowing Petitioner to wear a half-inch beard.

ARGUMENT

I. Courts should give deference to prison officials under RLUIPA.

Federal courts have historically accorded great deference to prison administrators in determining the constitutionality of prison rules. This Court has held, for example, that prison administrators "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 548 (1979) (citations omitted). There are weighty practical, institutional, and jurisprudential reasons why the Court has always insisted on giving deference to prison officials in First Amendment cases and why Congress wanted that tradition to continue in cases brought under RFRA and RLUIPA.

A. There are strong reasons why the Court has always given deference to prison officials in First Amendment cases.

Judicial deference to prison officials leads to better decisions because judges are often ill-suited to appreciate the magnitude of a particular security risk

or the need for a unique solution to a certain problem. While courts should not abdicate their responsibility to protect inmates' free-exercise rights, judgments regarding prison security are "peculiarly within the province and professional expertise of corrections officials." *Pell v. Procunier*, 417 U.S. 817, 827 (1974). Prison officials, unlike judges, are "actually charged with and trained in the running of the particular institution under examination." *Bell*, 441 U.S. at 562. Their charge carries a heavy responsibility. And their training instills due caution. Prisoners can be very creative in concocting plans for violence or escape. In the calm serenity of judicial chambers, a court might find it almost preposterous to think that an inmate might conceal a sharp blade or glass shards in a body cavity; prison officials know better. *Florence v. Bd. of Chosen Freeholders of Co. of Burlington*, 132 S. Ct. 1510, 1519 (2012) (discussing instances in which sharp blades and knives have been concealed in bodily orifices).

Judicial deference to prison officials is not merely a practical tool for reaching correct decisions; it has constitutional dimensions, implicating both separation-of-powers and federalism concerns. With regard to the separation of powers, the Court has noted that "judicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of

our Government, not the Judicial." *Bell*, 441 U.S. at 548 (citation omitted). And from a federalism perspective, it is "difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Woodford v. Ngo*, 548 U.S. 81, 94 (2006) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973)). Given this backdrop, courts are justified in assuming that, in enacting RFRA and RLUIPA, Congress "intended to modify, but not trample upon, states' traditional prerogatives in this area." *Lovelace v. Lee*, 472 F.3d 174, 217 (4th Cir. 2006) (Wilkinson, J., concurring in part and dissenting in part) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 457-61 (1991)).

B. Courts must give prison officials deference under RFRA.

Applying the teachings of *Bell* to prisoners' claims under the Free Exercise Clause, lower courts often used a balancing test that weighed a prisoner's constitutional interests against the prison system's legitimate governmental interests in operating its prisons. In a Sixth Circuit case endorsed by the Senate Report on RFRA, for example, the court of appeals held that courts should defer to the expert judgment of prison officials in determining the necessity of a particular restriction while also considering other factors. *Weaver v. Jago*, 675 F.2d 116, 118-119 (6th Cir. 1982), *cited in* S. Rep. No. 111, 103rd Congress, 1st Sess. (1993), *reprinted in* 1993

U.S.C.C.A.N. 1892, 1899. The interests asserted by the prison must be "of the highest order," and its officials must "do more than simply offer conclusory statements that a limitation on religious freedom is required for security, health, or safety. . . ." *Id*. at 119 (citation omitted). The prison officials in *Weaver* gave no explanation for why the prison was concerned about long hair beyond stating, in a conclusory affidavit, that the grooming policy was necessary for security, hygiene, and safety. Therefore, the Sixth Circuit remanded for additional proceedings that would allow for greater factual development.

This Court eventually held that prisoners' rights under the Free Exercise Clause are governed by a reasonableness test, *see O'Lone*, 482 U.S. 342, and that the First Amendment does not shield religious practitioners from the burdens of generally applicable laws, *see Employment Division, Dep't of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990). In 1993, Congress "largely repudiated" *Smith* by enacting RFRA. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___ (2014), slip op. at 4. But there is no indication that, in enacting RFRA, Congress intended to overturn courts' historical deference to prison officials. *See* S. Rep. No. 111, 103rd Congress, 1st Sess. (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898-1901 (anticipating that courts would "continue" their "tradition of giving 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 considerations of costs and limited

resources"). In fact, just two years later, Congress enacted the Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e *et seq*., for the very purpose of eliminating "unwarranted federal-court interference with the administration of prisons. . . ." *Woodford*, 548 U.S. at 93 (footnote omitted). The intent of RFRA, then, was "to restore traditional protection afforded to prisoners' claims [under the pre-*O'Lone* balancing test used in cases such as *Weaver*], not to impose a more rigorous standard than the one that was applied." 1993 U.S.C.C.A.N. at 1899.

C. Courts must give prison officials deference under RLUIPA.

The Court subsequently held that RFRA exceeded Congress's enforcement powers under Section 5 of the Fourteenth Amendment and therefore could not be applied to the states. *City of Boerne v. Flores*, 521 U.S. 507 (1997). Resorting to its powers under the Spending and Commerce clauses, Congress responded to *Boerne* by enacting RLUIPA in 2000. The law is much like RFRA, except that it targets only two areas: land-use regulations and persons residing in institutions that receive federal funds. With regard to the latter, Section 3 of RLUIPA provides that governments shall not "impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that imposition of the burden . . . (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).

As with RFRA, "[c]ontext matters" when applying RLUPA's strict-scrutiny standard. *Cutter*, 544 U.S. at 723 (2005) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)). The Court held in *Cutter* that RLUIPA must be applied "in an appropriately balanced way" and "with particular sensitivity to security concerns." *Id.* at 722. A religious accommodation "must be measured so that it does not override other significant interests." *Id.* at 721. RLUIPA was not intended "to elevate accommodation of religious observances over an institution's need to maintain order and safety." *Id*. at 722. In fact, "[l]awmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions. . . ." *Id.* at 710. Therefore, reviewing courts must "apply the Act's standard with due deference to the expertise and experience 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." *Id*. at 723 (internal quotation marks omitted) (quoting 146 Cong. Rec. S7774, S7775 (daily ed. June 27, 2000) (joint statement of Sens. Hatch and Kennedy on RLUIPA)).

The deference passage in *Cutter* was based on more than legislative history. It was also based, in part, on the constitutional avoidance canon of statutory construction. RLUIPA represents Congress's effort to navigate the corridor between the Free

Exercise Clause and the Establishment Clause. A statute that "unyielding[ly]" weighs the interests of those who desire a religious accommodation "over all other interests" is invalid under the Establishment Clause. *Cutter*, 544 U.S. at 722 (citing *Estate of Thorton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985), which invalidated a state statute under the Establishment Clause because it provided Sabbath observers with an unqualified right not to work on their Sabbath day); *see also Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-35 (1987) (noting that, at some point, "accommodation may devolve into an unlawful fostering of religion") (quoting *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 145 (1987)). The Constitution itself therefore requires that prisoners' religious claims be balanced against prisons' legitimate security needs.

Giving prison officials deference does not mean courts should rubber stamp prison officials' conclusory assertions regarding security concerns. But it does mean courts should place considerable weight on the positions taken by cautious prison officials with vast experience. And, given the realities of prison administration, it means reviewing courts should (1) not insist on data, studies, or concrete examples because prisons need to devise prophylactic rules; (2) respect complex tradeoffs that are inherent in prison administration and allow prison officials to address part of a problem or regulate incrementally; (3) allow prisons to adopt policies that diverge from

what some (or even most) other prisons have; and (4) avoid imposing administrative requirements that cannot be found in RLUIPA.

1. Courts should not insist on data, studies, and examples.

A refusal to rubber stamp the policy judgments of prison officials does not mean that courts should insist on studies, data, or concrete examples. In *Beard v. Banks*, 548 U.S. 521, 531-35 (2006), the Court held that a prison official's testimony that a regulation served its intended functions was sufficient because the articulated connections between the regulation and the penological objective were "logical ones." The court of appeals offered "too little deference to the prison officials' judgment" in striking down a prison policy on the basis that the prison failed to show that the policy had "proven effective" with inmates or had a "real" basis in human psychology. *Id*. at 535. Even under a strict-scrutiny standard, prison officials must have flexibility to adopt innovative solutions and prophylactic rules before an incident occurs; the risks are too great to always demand greater proof to justify prison officials' predictive judgments.

In some cases, data will be lacking because prison systems simply do not have it. Running a prison is often more of an art than a science. The framework of *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579 (1993), which requires district judges to

prevent juries from hearing the testimony of junk scientists whose opinions are not formulated with appropriate rigor, makes little sense here. *But see* Pet. Br. 49-50. When a correctional officer finds a small piece of a razor on the floor, for example, he is unlikely to know the means by which it came into the prison. *See, e.g.*, *Smith v. Ozmint*, No. 9:04-01819, 2010 WL 1071388, *4 (D.S.C. Jan. 25, 2010) (noting that a number of handcuff keys had gone missing from a prison; guards speculated that inmates with long hair and beards were able to conceal the keys in their hair or beards; and the keys were eventually located after the inmates were subjected to haircuts and shaves). And even if a correctional officer were to pull a piece of a razor out of an inmate's beard, he will not necessarily input the information into a database that tracks whether contraband has been secreted in facial hair as opposed to an inmate's shoes or a bodily orifice.

Moreover, prisons often adopt prophylactic rules designed to prevent problems *before* they arise. As Judge Jolly has explained,

> [I]t is difficult to imagine what additional evidence the state *could* put forth to demonstrate the legitimacy of its security concern. After all, the state's interest in *preventing* violence, and a prison's firsthand experience of inmate behavior may lead to a subjective determination regarding the threat of future violence over [an accommodation] that defies "proof" in the form of studies or documentation of any sort. Arguably, then, by requiring

> a higher evidentiary showing, [lower courts are improperly] requiring empirical evidence such as an actual outbreak of violence before [they] will cede that a prison's security concern is "legitimate."

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) (emphasis in original).[11]

This Court has long recognized prison officials' need to take prophylactic measures and therefore has not required studies and the like before according deference to prison administrators. *See Turner v. Safley*, 482 U.S. 78, 89 (1987) (noting that prison officials must "anticipate security problems" before they occur and "adopt innovative solutions"; the "intractable problems of prison administration" could not be solved if prison officials must wait passively for inmates to disrupt security before acting); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132-33 (1977) ("Responsible prison officials must be permitted to take reasonable steps to forestall . . . threat[s] [to security], and they must be permitted to act before the time when they can compile a dossier

[11] For this reason, the sliding-scale, multi-factored approach to deference set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) – which has historically been applied to agencies' legal interpretations contained in opinions, letters, and other modes of communication that do not have the force of law – likewise has no relevance to the entirely different situation of a prison official's courtroom testimony in a free-exercise case. *But see* Pet. Br. 50-51.

on the eve of a riot.") (citation and quotation omitted). In *Bell*, for example, the district court criticized security measures that it found to be overreaching and unsupported by evidence that hardback books were actually used to smuggle contraband: "With no record of untoward experiences at places like the [federally operated prison in New York], and with no history of resort to less restrictive measures, [Petitioners'] invocation of security cannot avail with respect to the high constitutional interests here at stake." 441 U.S. at 550-51 & n.32. This Court rejected the district court's reasoning, focusing instead on the *Jones* Court's recognition that prison officials need to devise prophylactic rules before security concerns emerge. In a similar vein, the *Bell* Court upheld the prison's post-visitation "strip search" policy, even though there had been only one documented instance in which an inmate attempted to sneak contraband back into the facility. *Bell*, 441 U.S. at 559. Lower courts have properly followed that reasoning in both pre- and post-RLUIPA cases.[12]

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[12] *See, e.g.*, *Fromer v. Scully*, 874 F.2d 69, 75 (2d Cir. 1989) (holding that a witness's inability to offer examples of contraband discovered in inmates' beards was not persuasive because prison officials must anticipate security problems before they occur); *Casey v. Lewis*, 4 F.3d 1516, 1521 (9th Cir. 1993) (noting that the "failure to specify a past event" that threatened institutional security "does not render irrational the adoption and implementation of a policy" to address future events that might pose a threat); *Kuperman v. Wrenn*, 645 F.3d 69, 75 (1st Cir. 2011) ("[C]ourts do not require an *actual* breach of security before upholding a regulation designed to prevent it."); *Ragland*

(Continued on following page)

2. Courts should respect tradeoffs and allow prison officials to address part of a problem.

No statute or rule "pursues its purposes at all costs," without reference to competing interests. *Rodriguez v. United State*s, 480 U.S. 522, 525-56 (1987). For this reason, 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 a governmental interest. The tax code, for example, contains many religious and secular exemptions; but that does not mean that the government's compelling interest in generating revenue is unworthy of credence or that additional accommodations for religious objectors to the tax code must be made. *Hernandez v. Comm'r*, 490 U.S. 680 (1989); *United States v. Lee*, 455 U.S. 252 (1982); *see also Hobby Lobby*, 573 U.S. ___, slip op. at 40 (acknowledging the Government's argument that "[e]ven a compelling interest may be outweighed in some circumstances by another even weightier consideration").

In the prison context, corrections professionals should not be stripped of deference just because a regulation makes exceptions or only partially addresses a problem. For example, a prison might be able to solve its contraband problem altogether by

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v. Angelone, 420 F. Supp. 2d 507, 514 (W.D. Va. 2006) ("[A] reviewing court generally need not also require prison officials to produce data proving that the predicted problems will occur or did occur before the policy was implemented.").

requiring all of its prisoners to go shoeless and naked, shorn of all bodily hair, permanently shackled, deprived of visitors, confined to solitary cells, and forced to wear a mask that covers the mouth. But that sort of regime would run contrary to the prison's rehabilitative goals and pose grave constitutional concerns. The fact that contraband can be hidden in a variety of other places on the person (*i.e.*, head hair, shirt pockets, pants cuffs, shoes, body orifices, etc.) does not mean that ADC has no compelling interest in preventing contraband from being transported in a beard. As one court explained,

> That argument would have [a court] validate only regulations that left absolutely no hiding places on the person of prisoners. The fact that a prison uniform has one pocket hardly creates a constitutional imperative that several pockets be provided. Such an all or nothing approach would leave prison officials no leeway in designing workable search procedures.

Fromer, 874 F.2d at 75. Thus, contrary to Petitioner's implicit contention (Pet. Br. 35-36), prison officials are not put to the choice of either requiring prisoners to go naked or allowing beards under the theory that only a regulation that forbids both clothes and beards can avoid being labeled "underinclusive."

3. Courts should allow divergent assessments of risk among different prison systems.

RLUIPA does not mandate a one-size-fits-all method of prison administration, and prison officials do not lose their entitlement to deference just because they have not adopted the practices of other jurisdictions. As the Court held in *Bell*, 441 U.S. at 554, the Free Exercise Clause "does not mandate a 'lowest common denominator' security standard, whereby a practice permitted at one penal institution must be permitted at all institutions." That rationale applies with equal force to RLUIPA claims. *Knight v. Thompson*, 723 F.3d 1275, 1286 (11th Cir. 2013) ("While the practices of other institutions are relevant to the RLUIPA analysis, they are not controlling – the RLUIPA does not pit institutions against one another in a race to the top of the risk-tolerance or cost absorption ladder."). Divergent assessments of risk are to be expected in our federal system.

4. Courts should not impose extra-statutory administrative requirements.

Some lower courts have grafted a "consider-and-reject" requirement that has no foundation in RLUIPA's text. *See* Br. for United States as *Amicus Curiae* for Pet. 18-19. In rejecting that reasoning, the Eleventh Circuit correctly observed that RLUIPA's language directs courts "to inquire merely whether the policy under review is the least restrictive means

of furthering a compelling government interest." *Knight*, 723 F.3d at 1286. RLUIPA "asks only whether efficacious less restrictive measures actually exist, not whether the defendant considered alternatives to its policy." *Id.*; *cf. Wos v. E.M.A.*, 133 S. Ct. 1391, 1409 (2013) (Roberts, C.J., dissenting) (noting that "Congress is not obligated . . . to make a record of the type that an administrative agency or court does to accommodate judicial review" and that "[s]overeign States should be accorded no less deference"); *see also Fegans*, 537 F.3d at 907 (holding that RLUIPA does not call "for the federal courts to impose procedural requirements on the internal disciplinary processes used by prison administrators" and that the prisoner was afforded individualized consideration at the bench trial, which is all the statute requires).

II. ADC's grooming policy furthers compelling governmental interests in prison safety and security.

Respondents have not contested Petitioner's assertion that ADC's no-beard policy imposes a substantial burden on his religious exercise. With that threshold showing met, RLUIPA asks whether the policy furthers a compelling governmental interest in the least restrictive manner. 42 U.S.C. § 2000cc-1(a). It does. As an initial matter, the interests ADC has asserted – prison safety and security – are undeniably compelling; and the no-beard policy directly advances those interests.

A. Prison safety and security are compelling governmental interests.

"Central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Bell*, 441 U.S. at 547 (quoting *Pell*, 417 U.S. at 823). "Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry." *Id.* Given the dangerous and "volatile" nature of prisoners, administrators are obligated "to take all necessary steps to ensure the safety of not only prison staffs and administrative personnel, but also visitors . . . [and] the inmates themselves." *Hudson*, 468 U.S. at 526-27.

The Court confirmed the compelling nature of this interest in *Cutter,* where inmates sued prison officials for failing to accommodate the practices of non-traditional sects like the Satanist, Wicca, and Asatru religions. The Court declined to read RLUIPA in the expansive manner urged by the prisoners: "[W]e do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests." 544 U.S. at 722. The Court further stated explicitly that "*prison security is a compelling state interest*," and "deference is due to institutional officials' expertise in this area." *Id*. at 725 n.13 (emphasis added).

B. ADC's no-beard policy furthers its compelling interests.

Prison safety and security is threatened in countless ways, from riots to prisoner-on-prisoner fights, to attacks on correctional officers, to prison gang violence. ADC's no-beard policy enhances prison safety and security by removing an important hiding place for contraband and by facilitating the identification of inmates who wish to engage in violence or escape.

1. Contraband. This Court has long recognized that prison officials "must be ever alert to attempts to introduce drugs and other contraband into the premises which . . . is one of the most perplexing problems of prisons today; they must prevent, so far as possible, the flow of illicit weapons into the prison; they must be vigilant to detect escape plots, in which drugs or weapons may be involved, before the schemes materialize." *Hudson*, 468 U.S. at 527. Guns, knives, razor blades, glass shards, and illegal drugs are obvious threats to prison security. But even "[e]veryday items can undermine security if introduced into a detention facility. . . ." *Florence*, 132 S. Ct. at 1519. The *Florence* Court explained that matches can be used to commit arson; cell phones can be used to orchestrate violence and criminality both inside the prison and outside prison walls; pills enhance suicide risks; chewing gum can block locking devices; hairpins can open handcuffs; ink pens can be made into weapons; and otherwise scarce items can be used as the currency that lubricates illicit transactions. *Id*.

As Lay and Harris testified, beards are places where prisoners can hide contraband. They offered specific examples of contraband (such as needles, homemade darts, pieces of broken razors, drugs, and SIM cards) that could be concealed in a beard, especially when it hides the skin. J.A. 80, 84, 115-17, 124. Other items, such as pieces of fence wire, staples, and paperclips can be concealed in a trim beard. And gum or window caulk can be used as an adhesive to help keep the items hidden in the beard for as long as necessary to make it through a security checkpoint.

Petitioner candidly acknowledges that the State has "a legitimate governmental interest in maintaining security for inmates and staff alike and in the staunching of the flow of contraband," J.A. 18, and he readily admits that allowing beards would undermine those security concerns. J.A. 57. He is right. The effects of contraband can obviously be deadly. Contraband can even be dangerous to the prisoner who possesses it. At a hearing in another grooming case, for example, current ADC Director Ray Hobbs testified about an incident that occurred during the summer of 2013 in which an inmate with a beard arrived from a county jail. The new inmate had concealed a razor blade in his beard, and then used it to commit suicide later that evening. *See* Testimony of Director Ray Hobbs, *Jones v. Meinzer*, No. 5:12CV00117, DE 91, at 78-79 (E.D. Ark. Oct. 17, 2013).

2. Identification. Inmate identification is vitally important both inside and outside the prison. A prison's no-beard policy "assists in the accomplishment of institutional security by minimizing an inmate's ability to alter his appearance rapidly and significantly." *Hill v. Blackwell*, 774 F.2d 338, 344 (8th Cir. 1985); *see also* J.A. 80. A beard has a significant impact on a person's appearance, and it can be shaved in seconds.

Inmates have shaved their beards to disguise themselves in prison, allowing them to escape or inflict harm.[13] Beards can also make inmates "resemble

[13] *See, e.g.*, Tony Bustos, *15 Days of Anguish*, The Arizona Republic, 2004 WLNR 22983497 (March 21, 2004) (describing an incident in which an inmate subdued a correctional officer in the prison's kitchen, stole the officer's uniform, shaved his own beard, and used the disguise to fool another guard in the watchtower; the prisoner took control over the watchtower and the guns kept there, leading to a 15-day standoff); Jack Petrick, *Mix-up Frees Mob Informant*, New Jersey Record, 2008 WLNR 19146026 (Oct. 7, 2008) (reporting an instance in which a man convicted of armed robbery escaped from a New Jersey prison by shaving his beard, donning dress clothes, and walking past security guards); Vernon Scott, *A Prison Escape, Hollywood Style*, United Press International (Jan. 10, 1998) (reporting about an Illinois prisoner's escape plan, which included a shaved beard that, according to correctional officers, made them unable to identify the prisoner); Joseph Szydlowski, *Jail Escapee Eludes Capture*, Cincinnati Post, 2007 WLNR 12130584 (June 26, 2007) ("Definitely changed is Artrip's appearance. Shortly before his escape, he shaved a full beard he sported in his jail photo."); Jeff Richgels, *Inmate Found Outside of Cell*, Capital Times, 1993 WLNR 1978554 (Sept. 28, 1993) (reporting on an inmate's

(Continued on following page)

other inmates" who also have beards, giving rise to impersonations and the possibility that an inmate will use another inmate's identification card "to get into areas of the prison where they do not belong." *Gooden v. Crain*, 353 Fed. Appx. 885, 889 (5th Cir. 2009). Beards also make it "difficult to quickly identify and recapture inmates if they escape." *Id.* at 889.[14] A no-beard policy can facilitate the prompt recapture of escapees, and such policies have been effective in the past. *Shabazz v. Barnauskas*, 600 F. Supp. 712, 716 (M.D. Fla. 1985).

There are, to be sure, other ways an inmate may alter his appearance after an escape, such as wearing

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ability to breach security after sneaking past prison guards, shaving his beard, and donning the uniform of a trustee).

[14] *See also* Karen Aho, *Escaped Peeping Tom Caught*, Anchorage Daily News, 1999 WLNR 7355183 (Oct. 9, 1999) (reporting the capture of an Alaska prisoner who shaved his beard after escaping and evading detection for a year); *California Prisons Enforce New Grooming Standards*, Charleston Gazette & Daily Mail, 1997 WLNR 630834 (Dec. 31, 1997) (discussing two instances in which inmates shaved their beards as part of their escapes from California prisons); Carolyn Starks and Mark S. Warnick, *City Bus Station End of Line for Prisoner*, Chicago Tribune, 1997 WLNR 5783169 (Dec. 7, 1997) (reporting on a Minnesota inmate's post-escape decision to shave his beard so as to avoid detection); *Escaped Prisoner Captured in Department Store*, Associated Press (Dec. 12, 1985) (reporting on an instance in which an Oklahoma inmate went from bearded to clean-shaven after an escape); John Allard, *Officers Try to Trap Escaped Murderer*, Columbia State Record, 1994 WLNR 1293344 (Sept. 11, 1994) (reporting the inability of 60 investigators, a helicopter, and a bloodhound team to find an escaped South Carolina murderer who shaved his beard after an escape).

a wig, applying cosmetics, donning sun glasses, and so forth. But ADC has a legitimate interest in regulating a particularly profound way to change one's appearance that is within ADC's control and which can affect the search in the initial precious minutes following an escape attempt. *Hill*, 774 F.2d at 347 (noting that beards "cover a number of identifying facial features" and can "significantly alter an individual's appearance"). In addition, an inmate's ability to alter his appearance *after* an escape by wearing a wig or sunglasses says nothing about an inmate's ability to alter his appearance to effectuate the initial escape or gain unauthorized access to an area while still inside prison walls.

C. The medical exception does not prove that ADC's no-beard policy fails to serve a compelling interest.

ADC's narrow exception for prisoners who require quarter-inch beards for diagnosed medical conditions does not show that the grooming policy fails to further a compelling governmental interest. A grooming policy need not be an all-or-nothing proposition. As explained above, statutes and rules rarely pursue a single purpose at any cost, without reference to competing interests. *See* part I.C.2, *supra*. Respondents have identified both qualitative and quantitative differences between the particular religious exemption requested by Petitioner and the existing medical exception. *Yellowbear v. Lampert*, 741 F.3d 48, 61 (10th Cir. 2014) (noting that a government can

rebut an argument from underinclusion by identifying quantitative or qualitative differences).

The medical exemption allows inmates with skin conditions to shave with electric clippers instead of using razors. To qualify for such an exemption, the inmate must be seen by medical personnel, have a diagnosed dermatological condition, and receive a medical prescription that would allow for the use of electric clippers. Inmates with prescriptions trim their facial hair as close to the skin as possible without aggravating the sensitive areas. J.A. 109; Affidavit of Warden Randy Watson, *Jones v. Meinzer*, No. 5:12CV00117, DE 61-6, ¶ 7 (E.D. Ark. June 21, 2013); *id*. at DE 91, p. 22 (testimony of Assistant Director Grant Harris). The facial hair cannot exceed one-fourth of an inch, and the facial skin is still visible after the shave. J.A. 124.

As a quantitative matter, the medical exception has a far smaller impact than the proposed religious exception. Medical prescriptions for clipper shaves are oftentimes temporary in nature. *See* Testimony of Director Ray Hobbs, *Jones v. Meinzer*, No. 5:12CV00117, DE 91, at 78. If an inmate is suffering from a dermatological condition, it is incumbent upon the medical staff to treat the condition and try to resolve it, which could negate the inmate's need to utilize the exemption. Moreover, "[t]he number of inmates warranting a medical exemption to the grooming policy is quite small, but the number of inmates likely to seek qualification for a religious exception would be much greater." *Green v. Polunsky*, 229 F.3d 486, 491 (5th

Cir. 2000); *see also* J.A. 109 (testifying that "not a very high percentage" of inmates have facial hair under the medical exception); Affidavit of Warden Randy Watson, *Jones v. Meinzer*, No. 5:12CV00117, DE 61-6, ¶ 5 (E.D. Ark. June 21, 2013); *id.* at DE 91, pp. 22-27 (Assistant Director Harris testifying that ADC's allowance of facial hair for medical conditions is a rare exception that typically applies to inmates with burns or scars; forcing inmates to use razors directly on burned or scarred skin would implicate Eighth Amendment concerns; and the witness had not been apprised of any current inmate who had any sort of "beard" under the medical exception); *see also* part III.B, *infra* (discussing ADC's substantial Muslim inmate population, other religions that require beards, and opportunistic conversion).

As a qualitative matter, the short length of facial hair remaining after a guardless clipper shave makes the quarter-inch beard a far less likely place to conceal contraband. Also, prison administrators can visually inspect a face that has received a guardless clipper shave without having to put their hands on the inmate's face. J.A. 124. Further, any remaining facial hair is less likely to hide the contours of the face, making it much more difficult for inmates attempting to hide contraband in their mouths to succeed.

In short, ADC's more relaxed restrictions for inmates with diagnosed dermatological conditions do not render unreasonable its belief that longer beards pose security concerns. *Hill*, 774 F.2d at 346-47. To

the contrary, the regulation evidences an appropriate balancing of competing interests and "sensitivity on the part of prison officials to the medical needs of inmates." *Id.*

III. ADC's grooming policy is the least restrictive means of furthering its governmental interests.

ADC's no-beard policy is the least restrictive means of accomplishing the compelling governmental interests just described. A proposed alternative rule constitutes a less restrictive alternative only if it would be equally as effective in achieving the compelling governmental interest. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 846 (1997) (holding that a policy is not the least restrictive means if feasible alternatives "would be at least as effective in achieving [the policy's] legitimate purposes"); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (noting that a less restrictive alternative must be "at least as effective" in achieving the legitimate purpose that the statute was enacted to serve); *Hobby Lobby*, 573 U.S. ___ (2014), slip op. at 44 (concluding that the government's existing accommodation for nonprofit religious institutions served the government's interest "equally well" and, therefore, was a less restrictive means); *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 665 (2004) (noting the government's burden to refute the effectiveness of means proposed by the plaintiff). A no-beard policy is more effective than a policy that would

allow all inmates to wear a half-inch beard or that would allow the hundreds or thousands of religious objectors to wear a half-inch beard.

A. A policy of allowing all prisoners to grow a half-inch beard is not a less restrictive alternative.

A policy of allowing all inmates to wear a half-inch beard upon request would not be as effective as ADC's current no-beard policy and, therefore, is not a less restrictive means. Half-inch beards would still give rise to the contraband problems that the current policy seeks to avoid. And half-inch beards would still pose identification problems. These problems would not be cured by Petitioner's proposed work-arounds.

1. Allowing half-inch beards would give rise to contraband problems, which would not be cured by Petitioner's proposed responses.

One's body is often the most efficient place to hide small objects quickly while drawing the least amount of attention to oneself. A half-inch beard can easily accomplish the inmate's goal while thwarting efforts to prevent small, dangerous objects from entering the prison. At the preliminary injunction hearing, Lay and Harris testified about specific items of contraband that could be hidden in a half-inch beard. Darts, needles, pieces of wire, pieces of broken glass, razor blades, tobacco, marijuana, and other powdered drugs can all be hidden in a half-inch

beard. J.A. 80, 84, 116, 117; *see also Jones*, 2013 WL 5676886, at *5. Integral components of cellular phones, such as SIM cards, can also be secreted in a half-inch beard. J.A. 117. A trim beard can also obscure the contours of the face and help disguise items concealed by inmates inside of their mouths. *Jones*, 2013 WL 5676886, at *6.

Lay and Harris's testimony was based upon their combined 70 years of experience in corrections. Both men have worked at various levels within the organizational hierarchy. They have worked around inmates for most of their careers, and they have first-hand knowledge of inmates' habits and routines. They know that inmates who are housed in maximum-security facilities, such as Petitioner, spend much of their time figuring out ways to undermine prison security.

Petitioner questioned Lay and Harris about two proposed ways to address those contraband concerns: (1) indefinite housing in administrative segregation and (2) hands-on inspection by staff. ADC presented testimony persuasively explaining why the proffered alternatives were unworkable, and Petitioner presented no evidence to rebut ADC's evidence that the options were not feasible.

Petitioner first suggested that he, and presumably any other inmate who desired to grow a half-inch beard, could be housed in administrative segregation for as long as he wished. J.A. 74. Respondents rejected this option based upon an Eighth Circuit case holding that indefinite administrative segregation

may violate due process. *Williams v. Hobbs*, 662 F.3d 994 (8th Cir. 2011); *see also Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983) (holding that "administrative segregation may not be used as a pretext for indefinite confinement of an inmate" and that, accordingly, "[p]rison officials must engage in some sort of periodic review of the confinement of such inmates").

Petitioner also recommended that correctional officers physically inspect inmates' half-inch beards on a frequent basis. J.A. 107; *see also* Pet. Br. 37-38. But such inspections of inmates' beards would pose legitimate safety concerns. A correctional officer who is required to run his hands through an inmate's beard could get cut or pricked with dirty needles or broken razorblades. J.A. 130. Thus, "guards conducting searches for [drugs and weapons in beards] would be exposed to unnecessary risks of harm." *Green*, 229 F.3d at 490; *Limbaugh v. Thompson*, No. 2:93CV1404, 2011 WL 7477105, *7 (M.D. Ala. July 11, 2011) ("Requiring correctional officers to search long hair for contraband or weapons constitutes a safety and health hazard to the correctional officers."). Beard searches would also substantially increase the opportunities for confrontation between inmates and correctional officers. *Fromer*, 874 F.2d at 76. Indeed, searching a beard is risky because putting hands around a person's mouth is particularly invasive and enhances the risk of an altercation. An angry inmate could even bite a correctional officer. *Jones*, 2013 WL 5676886, at *5.

Petitioner argues for the first time in this Court (Pet. Br. 37) that inmates should be allowed to run

their own fingers through their facial hair. But that is not a realistic solution, either. "[A]n inmate secreting contraband [in a beard] can manipulate the search and avoid detection of the contraband." *Limbaugh*, 2011 WL 7477105, at *7. If an inmate were to hide contraband in his beard, he would predictably manipulate the self-search in ways that avoid detection.

2. Allowing half-inch beards would give rise to identification problems, which would not be cured by multiple photographs.

The identification-related problems with beards would not be solved by limiting their lengths to one-half of an inch. The security problem is created by the *change* in a prisoner's appearance; and the principal change in appearance comes from the initial growth from no beard to a half-inch beard, not the incremental increases thereafter.

Petitioner says that ADC need only take an initial clean-shaven photograph during the intake process and another photograph after the beard has reached its maximum length. But common sense tells us that "dual pictures would provide limited help in helping guards locate an inmate that wanted to quickly and momentarily alter his appearance *in* prison" because "[t]he guards would be forced to turn to photographic records of some sort rather than quickly relying on their own recognition of an inmate's appearance." *Hart v. CSP-Solano*, No. CIV-02-0577, 2005 WL 1683581, at *5 n.9 (E.D. Cal. July

8, 2005). What is more, obtaining a clean-shaven photograph of an inmate is not always possible. An inmate could refuse to shave his beard upon entry into ADC, just as Petitioner did.

In addition, "serial rephotography" imposes "disciplinary and administrative problems." *Fromer,* 874 F.2d at 76. Keeping up with further significant changes to inmates' appearances would prove to be administratively burdensome on an already strained staff, whose primary goal is to provide safety to the inmates and staff members of each institution. Saying in a written policy that a prison will keep up with significant changes in inmates' appearances is one thing; having an overworked staff fully implement such a policy is something else altogether. Potential administrative problems abound. Inmates may not cooperate with the taking of additional photographs, requiring disciplinary action. Inmates can shave before their photographs are taken and "easily thwart" a policy of maintaining updated photographs. *Id*.

Finally, there is no evidence to suggest that a serial-photograph regime would work. A court is in no position to say that "preparation, storage, maintenance, and dissemination to the world of law enforcement agencies (and other sources) two photographs to be used to recapture an escapee is a feasible means of furthering the state's interest." *Shabazz v. Barnauskas*, 790 F.2d 1536, 1540 (11th Cir. 1986). Courts are rightfully suspicious of the notion that "it works as well to present a potential source of identification with two pictures." *Id.*

3. Allowing half-inch beards would create administrative problems.

A policy allowing half-inch beards would also create administrative difficulties beyond the taking of multiple photographs. ADC administrators expressed concern with how they would monitor beard lengths if Petitioner, as well as other ADC inmates, were allowed to maintain beards. J.A. 83. Respondents testified that people have different hair types, and their facial hair grows at different thicknesses and rates. J.A. 84. Unlike quarter-inch facial hair, a half-inch beard generally covers the skin as well as the contours of the face. J.A. 124. Therefore, it is not easy to determine visually whether a beard has grown longer than half an inch and no longer complies with the policy.

Respondents testified that they did not see a workable method of gauging beard lengths without touching the inmates and using a measuring tape to precisely measure the length of potentially hundreds of beards on a frequent basis. J.A. 107. The logistics associated with measuring every beard would be taxing on an already over-taxed staff. J.A. 86. Further, disagreements as to the length of the beard could create arguments between inmates and staff, whose relations are oftentimes tenuous at best.

Finally, courts have recognized that "[c]onducting such operations under dangerous conditions would greatly increase the time and expense of running the prison system." *Green*, 229 F.3d at 490; *Limbaugh*,

2011 WL 7477105, at *7 (holding that long hair "exacerbates the difficulty of and length of time necessary to search for contraband"). So, too, would a policy allowing inmates to have half-inch beards.

4. Other prison systems' experiences, while relevant, are not dispositive.

Petitioner argues at length (Pet. Br. 21-32) that ADC's grooming policy fails because 44 other state and federal prison systems would allow a half-inch beard.[15] But Petitioner does not offer any evidence regarding the "experiences" of other prison systems. He merely notes that a law professor, with the help of student researchers, determined that the vast majority of prisons currently allow facial hair of some length. *See* Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923 (2012). Nothing in that article explains *why* prisons moved in this direction. It is perfectly possible that prison systems made hard choices as a means of dealing with voluminous grievances and relentless litigation, not because the efficacy of the more restrictive grooming policies had been cast in doubt. Nothing in Professor Sidhu's article or the record in this case sheds light on any state prison's actual "experience" with a more permissive policy.

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[15] The January 2012 hearing focused on only two jurisdictions: California and New York. Petitioner examined Lay and Harris about their knowledge of the policies in those states, to which they responded they did not have any specific knowledge.

In any event, while the practices of other institutions are relevant to the RLUIPA analysis, they are not controlling. As explained in part I.C.3, *supra*, RLUIPA "does not pit institutions against one another in a race to the top of the risk-tolerance or cost-absorption ladder." *Knight*, 723 F.3d at 1286; *see also Daker v. Wetherington*, 469 F. Supp. 2d 1231, 1239 (N.D. Ga. 2007) (interpreting RLUIPA to leave "room for a particular prison to decline to join the 'lowest common denominator' when, in the discretion of its officials, the removal of a challenged restriction poses an appreciable risk to security"). ADC has shown that Petitioner's requested exemption poses actual security and safety risks. The fact that other jurisdictions have chosen to allow male inmates to maintain beards "shows only that they have elected to absorb those risks," *Knight*, 723 F.3d at 1286, whereas Arkansas's prison system has not. RLUIPA does not "force institutions to follow the practices of their less risk-averse neighbors. . . ." *Id.* ADC has shown that its departure from the practices of other jurisdictions stems not from a stubborn refusal to accept a workable alternative, but rather from a "calculated decision not to absorb the added risks that its fellow institutions have chosen to tolerate." *Id.*

B. A policy of allowing half-inch beards for all prisoners who claim a religious need to have a beard is not a less restrictive alternative.

"[T]he Government can demonstrate a compelling interest in uniform application of a particular program" – and therefore not allow any exceptions, even for religious reasons – "by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program." *Gonzales v. O Centro Espirita Beneficent Uniao do Vegetal,* 546 U.S. 418, 435 (2006). A grooming policy that makes religious-based exceptions for half-inch beards, just like a policy that allows half-inch beards for everyone, would produce the same contraband and identification concerns discussed above.

The number of inmates who will likely seek a religious-based exemption is large. ADC currently has 1,737 Muslim inmates, which amounts to nearly 12% of its prison population. Of course, not all Muslim inmates will want beards. On the other hand, Islam is not the only religion in which some adherents feel compelled to wear beards. *See, e.g.*, *Fegans*, 537 F.3d at 900 (deciding a beard case in which an ADC prisoner followed the teachings of the Assemblies of Yahweh); Testimony of Chaplain Don Yancy, *Jones v. Meinzer*, No. 5:12CV00117, DE 91, at 62-63 (testifying

about religious sects that require beards). Opportunistic conversions are also likely.[16]

The question, then, is not whether ADC can handle one prisoner with a half-inch beard; it is whether having hundreds or thousands of prisoners with beards would jeopardize ADC's efforts to provide a secure and safe prison. For the reasons discussed above, it would. ADC has a "compelling interest in uniform enforcement of the policy," and questions such as whether a particular inmate "personally has ever or would ever actually hide contraband in his [beard], seek to change his identity, or fail to keep himself and his hair clean are beside the point." *Ragland*, 420 F. Supp. 2d at 518. A beard "presents these risks," and Respondents "have a compelling interest in alleviating such risks in like manner as when any inmate fails to comply with the policy. . . ." *Id.*

To the extent Petitioner says that we should ignore all other potential religious objectors and should focus only on him, he is on even weaker

[16] The possibility of opportunistic conversions is hardly speculation. *See, e.g.*, Testimony of Assistant Director Grant Harris, *Jones v. Meinzer*, No. 5:12CV00117, DE 91, at 44 (testifying how ADC experienced a significant increase in the number of inmates who claimed to require a Common Fare meal for religious reasons, including 1,500 to 1,600 requests for such meals during one period; constructed a separate kitchen to accommodate the voluminous requests; and now has one inmate in the entire prison system who wants a Common Fare meal).

ground. It is true that Petitioner has not yet introduced contraband from the outside world into the prison (to Respondents' knowledge) or tried to escape. But those facts say nothing about the probability of such things in the future. All inmates, including Petitioner, may have an incentive to obtain or conceal contraband. *Florence*, 132 S. Ct. at 1520. Moreover, Petitioner's pre- and post-incarceration history of violence and disputes does not lend comfort to an appropriately cautious prison administrator.[17] *See, e.g.*, J.A. 71, 81, 83. ADC has a compelling interest in applying its grooming policy to Petitioner, just like other inmates.

[17] Petitioner says he based his request on a half-inch beard after reading a Ninth Circuit case. J.A. 66. But he fails to acknowledge that factors relevant to an individualized inquiry in the Ninth Circuit would weigh against allowing Petitioner to have a trim beard, given his violent past. *See Warsoldier v. Woodford*, 418 F.3d 989, 998-99 (9th Cir. 2005) (distinguishing cases that upheld long-hair prohibitions in maximum security prisons; inmates at minimum-security facility, such as one where the plaintiff was incarcerated, "pose fewer security risks" and are "less likely to attempt to escape" because they "have less serious criminal histories" and are often permitted "to leave the premises to work and may sleep in unlocked dorm rooms").

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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