No. 13-6827

In the Supreme Court of the United States

GREGORY HOUSTON HOLT, AKA ABDUL MAALIK MUHAMMAD,
Petitioner
v.
RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS, ET AL.
Respondents

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

BRIEF OF ALABAMA, ALASKA, ARIZONA, GEORGIA, HAWAII, INDIANA, KANSAS, MISSISSIPPI, MONTANA, NEBRASKA, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, WEST VIRGINIA AND WYOMING AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The *amici* States operate prison systems that provide varying degrees and kinds of accommodation for inmates' sincere religious beliefs. They value religious liberty and religious practice. But they also bear the ultimate responsibility for "maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody." *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974). Prison officials in the *amici* States already face "Herculean obstacles" in the "effective discharge of these duties." *Id.* Complying with the Religious Land Use and Institutionalized Persons Act (RLUIPA) should not require similar, heroic efforts.

In *Cutter v. Wilkinson*, the Court held that RLUIPA gives prison administrators the discretion they need to meet often irreconcilable objectives. The Court recognized that in evaluating RLUIPA claims, judges must defer to the experience and expertise of prison administrators "in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." 544 U.S. 709, 723 (2005). This deferential standard reflects both the Court's and Congress's longstanding judgment that courts are not best suited to weigh the unique challenges prison administrators face. The upshot of *Cutter* is that courts should credit officials' testimony that their policies achieve legitimate penological goals, instead of "second-guess[ing] the reasoned

judgments of prison officials." *Knight v. Thompson*, 723 F.3d 1275, 1282-83 (11th Cir. 2013).

It is the considered opinion of the *amici* States that *Cutter*'s deferential test appropriately balances the religious liberty of inmates with the unique institutional concerns of prison life. Prison life is not civilian life, and federal judges are not equipped to weigh the unique security concerns and resource constraints faced by prison administrators. Staffing and funding levels vary, as do the physical layouts and disciplinary problems of each prison. Prison administrators are in the best position to craft the restrictions necessary to maintain health and safety in the unique context of each prison's environment. The Court should continue to ascribe "due deference to the experience and expertise of prison and jail administrators." *Cutter*, 544 U.S. at 723.

In the light of these principles, Arkansas should win this case. Most prison systems have grooming policies for their prisoners, and some have no-beards grooming policies for their prison *guards* as well. The reason is that uniform grooming policies serve compelling interests in security, order, hygiene, and discipline. *Knight v. Thompson*, 723 F.3d 1275. A deferential standard does not require a prison to show that its policies are in line with a national trend. Nor does it require a prison to provide an individually-tailored policy for each inmate with a RLUIPA claim. Under *Cutter*'s deferential standard, the court of appeals should be affirmed.

SUMMARY OF ARGUMENT

I. The Court should continue to apply the *Cutter* standard and defer to Arkansas prison officials' judgment of how to meet their objectives.

A. There is no "special justification" for overruling *Cutter*. Precedents must be inconsistent with more recent decisions, unworkable, or poorly reasoned to be overturned. But the petitioner has presented no such justification. He has argued that RLUIPA should be applied exactly like RFRA—and it already is. RFRA and RLUIPA both apply strict scrutiny, and under both statutes, the court has considered prison regulations through a deferential lens. The petitioner implausibly claims that a deferential standard may limit religious liberty in the other contexts in which RFRA and RLUIPA operate. But deference is grounded in prisons' unique security concerns, which are not present in other contexts. Finally, *Cutter* works in practice. It has produced consistent results without protracted and costly litigation.

B. *Cutter* is not just stare decisis; it was rightly decided. Courts are not best suited to make the inevitable tradeoffs between liberty and security in the prison environment. Prison administrators best understand and respond to this inherently violent situation and thus deserve deference. For these reasons, Congress recognized that courts' traditional deference was necessary and expected this to continue under RLUIPA. Deference also keeps

RLUIPA consistent with the Establishment Clause by making sure religious liberty is not elevated above security concerns. Furthermore, it ensures that RLUIPA does not exceed Congress's Spending Clause authority by micromanaging how states run their prisons systems. *Cutter* correctly recognized the myriad of reasons deference is necessary for each State to run an effective, safe prison system.

C. The petitioner's arguments would undermine deference in practice. Deference in a federalist system means that states need not accept risks just because their neighbors have. They need not follow a national trend but can experiment with different ways to balance security and liberty. Deference also means that prisons need not show a compelling interest on an individualized basis. They must be able to apply uniform policies without reviewing each prisoner's past behavior and guessing at the future security risks he poses. Lastly, deference means that prison administrators can make their own judgments without hiring Rule 702 experts. Their very role is to safely administer prisons, and they must have the freedom to do so. Where security is at stake, states and their prison administrators must have the freedom to craft policies that balance liberty and security and enforce them uniformly.

II. Prison grooming policies do serve compelling state interests.

A. Sometimes policies must be uniform to be effective. Uniform dress and grooming policies serve

state interests in order, discipline and uniform treatment. Uniformity in grooming subordinates personal distinctions, advancing order and discipline in many contexts. Uniform dress and grooming policies also free guards and chaplains from the difficult task of administering case-by-case exemptions or making individualized grooming determinations. A uniform policy also means that religious persons are ensured equal treatment. There is no threat that the prison will accommodate practitioners of mainstream religions and overlook those who practice minority religions.

B. Further, prisons should not need to cite specific instances of their policies failing to prove a compelling interest. Arkansas need not give examples of prisoners hiding contraband in beards or changing their appearance in escape attempts. Arkansas has no examples because it has never allowed beards, and it should not have to change its policy and wait for it to fail. Prisoners are not presumptively trustworthy, and those requesting exemptions are no different. Prisons should be able to adopt prophylactic rules to proactively limit risk.

C. Lastly, Arkansas's concerns about escape, contraband, and medical conditions are plausible. In other prison systems, prisoners have so changed their appearance by shaving their beards that they were unrecognizable. These prisoners have used this to escape, walking right past guards who could no longer identify them. The threat of contraband is also real. In other prisons, inmates have hidden shanks, wire, rocks, tobacco, marijuana, razor

blades, and handcuff keys in their hair and beards. Moreover, long hair and beards have concealed medical conditions in other prisons. Grooming policies serve very real interests, protecting prisoners from contraband and medical conditions and making it more difficult for prisoners to escape.

ARGUMENT

I. The Court should defer to Arkansas prison officials about how to meet their institutional objectives.

The petitioner invites the Court to expressly or implicitly overrule *Cutter* and "apply the same strict-scrutiny standard that applies under the Religious Freedom Restoration Act (RFRA)" without meaningful "deference to defendant prison officials." Pet. Br. 12. The Court should decline the invitation.

To those more accustomed to civilian life, much of what goes on in prison may seem "almost preposterous," as the magistrate judge in this case put it. Inmates have been known to hide heroin in body cavities,[1] throw their own feces,[2] make alcohol with rotten bread,[3] and spray "foul-smelling mixture[s] of raw eggs and sour milk" out of plastic

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[1] *People v. Cornejo*, No. E058617, 2014 WL 1665628, at *2 (Cal. Ct. App. 4 Dist. April 28, 2014).

[2] *Cottrell v. Virginia*, No. 0795-13-2, 2014 WL 1707093, at *1 (Va. Ct. App. April 29, 2014).

[3] *People v. Saavedra*, No. G038747, 2008 WL 3979259, at *1 n.2 (Cal. Ct. App. 4 Dist. 2008).

shampoo bottles.[4] Prison administrators, not federal judges, are in the best position to make necessary tradeoffs between security and religious liberty in this environment.

A. There is no "special justification" for overruling *Cutter's* deferential standard.

Cutter's core rule creates a workable standard that allows prison administrators and prisoners to resolve disputes without the need for protracted litigation over each and every request for an exemption to a uniform prison policy.

1. The Court requires a "'special justification'" to overturn a long-standing precedent. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000)). The Court has wavered from precedents only when they are inconsistent with more recent decisions, *Halliburton,* 134 S. Ct. at 2411-12; "unworkable or badly reasoned," *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); their "theoretical underpinnings . . . are called into serious question," *State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997); or they are a "positive detriment to coherence and consistency in the law," *Patterson v. McLean Credit Union*, 491 U.S. at 173. The petitioner has not even attempted to meet these standards for undermining *Cutter*.

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[4] *State v. Blackmon*, 719 N.E.2d 970 (Ohio 1998).

2. The petitioner and his amici make two weak arguments for undermining *Cutter*, neither of which amounts to a "special justification."

First, the petitioner argues that RLUIPA should be applied to state prisons exactly as RFRA is applied to federal prisons because the text of RLUIPA mirrors the text of RFRA. *See* Pet. Br. 16. But *Cutter* does not ignore the text of RLUIPA; it merely recognizes that the task of evaluating compelling interests depends on the context of the challenged governmental action. Although RLUIPA imposes the same strict scrutiny standard as RFRA, the Court has always considered context when applying any strict scrutiny review—whether statutory or constitutional. *See Grutter v. Bollinger*, 539 U.S. 306, 327 (2003). Under RLUIPA, as elsewhere, "[c]ontext matters." *Cutter*, 544 U.S. at 722-23 (citations omitted).

Moreover, before this Court held that RFRA could not constitutionally apply to the States, *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), courts applying RFRA in the prison context adopted the same deferential standard under RFRA that this Court later approved for RLUIPA claims in *Cutter*. *See, e.g.*, *Diaz v. Collins*, 114 F.3d 69, 73 (5th Cir. 1997) ("It is our understanding that in enacting the RFRA, Congress intended to continue to extend substantial deference to prison officials in legitimate security matters."); *Hamilton v. Schriro*, 74 F.3d 1545, 1553 (8th Cir. 1996) (same); *George v. Sullivan*, 896 F. Supp. 895, 898 (W.D. Wis. 1995) (same). The legislative history establishes that Congress was aware of this body of case law when it enacted RLUIPA. 146 Cong. Rec. S7774-01 (Statements of

Senators Reid, Hatch, and Kennedy). Accordingly, there has never been a disparity between these two statutes as applied to claims arising from prisons. In fact, the lower courts have consistently relied on former RFRA prison cases in applying *Cutter*'s deferential standard. *E.g.*, *Hoevenaar v. Lazaroff*, 422 F.3d 366, 370 (6th Cir. 2005) ("RFRA cases according deference to prison decisions [are] applicable to cases brought pursuant to the RLUIPA.").

Second, the petitioner and his *amici* erroneously argue that deference in this context will limit religious liberty in other contexts. *E.g.*, Br. of Alliance Defending Freedom 13-14. But that argument is inconsistent with the Court's reasoning in *Cutter*. *Cutter* reflects the Court's understanding that there are special security concerns in prisons that do not extend to civilian life. *Cutter*, 544 U.S. at 722. In other words, the very point of the deferential standard is that prisons are *different* from other contexts. *Cutter*'s deference, grounded in prison security concerns, cannot be extended to religious liberty claims arising outside of prison, whether those claims are governed by other parts of RLUIPA, RFRA, or the First Amendment.

3. *Cutter*'s deferential standard works in practice by producing consistent results. Courts have generally applied *Cutter* to reach similar results on similar facts, regardless of a prisoner's particular religion. For example, the circuits have almost universally rejected prisoners' requests for complete religious exemptions from grooming policies, even though these prisoners' religions varied from Native

American,[5] to Rastafarian,[6] to Assemblies of Yahweh.[7]

Moreover, *Cutter*'s standard minimizes the need for protracted and costly litigation to address requests for a religious exemption from a generally applicable policy. Without deference, a prison system will always have to hire an independent consultant, conduct vast out-of-state discovery, or commission a costly study to win a RLUIPA case. For example, it will not be good enough for a prison administrator to testify that prisoners are constantly seeking new ways to introduce contraband into the prison. Instead, the prison will need some way of pointing to problems that have arisen from less restrictive policies in other prison systems—evidence they may not have without discovery on those other prison systems. And the impact of changing a security-based policy will not always be empirically verifiable in any event; prisons do not run computer databases to keep track of whether contraband is discovered in a prisoner's hair or in his pocket. Because prisoners love to litigate and because every aspect of prison life is covered by a policy of one kind or another, the Court can expect a lot of this complex, protracted litigation if it undermines *Cutter*'s deferential standard. *See Jones v. Bock*, 549 U.S. 199, 203 (2007)

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[5] *Longoria v. Dretke*, 507 F.3d 898, 904 (5th Cir. 2007); *Hoevenaar v. Lazaroff*, 422 F.3d 366 (6th Cir. 2005); *Knight v. Thompson*, 723 F.3d 1275 (11th Cir. 2013).

[6] *Maxwell v. Clarke*, 7:12CV00477, 2013 WL 2902833, at *1 (W.D. Va. June 13, 2013) *aff'd*, 540 F. App'x 196 (4th Cir. 2013).

[7] *Fegans v. Norris*, 537 F.3d 897, 900, 906 (8th Cir. 2008).

("Prisoner litigation continues to account for an outsized share of filings in federal district courts.").

B. *Cutter* was rightly decided.

Cutter is not only stare decisis, it was rightly decided. Four considerations persuaded the Court to adopt a deferential standard in *Cutter*, and they are still persuasive today.

1. Courts are not suited to make tradeoffs between liberty and security in the unique context of prisons. "The 'normal activity' to which a prison is committed" is a very unusual activity from the perspective of the rest of society: "the involuntary confinement and isolation of large numbers of people, some of whom have demonstrated a capacity for violence." *Pell v. Procunier*, 417 U.S. 817, 826-27 (1974). A prison administrator will necessarily have "a better grasp of his domain than the reviewing judge." *Bell v. Wolfish*, 441 U.S. 520, 548 (1979). Unlike courts, for example, prison administrators have the "ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Turner v. Safley*, 482 U.S. 78, 89 (1987). And, unlike judges, prison administrators will be familiar with the great lengths to which prisoners go to hide contraband and harm one another.

2. Deference is consistent with Congressional intent. Congress enacted RLUIPA against the backdrop of court decisions that deferred to prison officials under RFRA and the Constitution about how

best to meet security concerns. 146 Cong. Rec. S7774-01 (Statement of Senators Hatch and Kennedy). *E.g.*, *Bell v. Wolfish,* 441 U.S. at 547; *Pell v. Procunier*, 417 U.S. at 827. And Congress expressly recognized the need for courts to continue to defer under RLUIPA, expecting that "the courts will continue the 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 consideration of costs and limited resources." S. REP. 103-111, 10, 1993 U.S.C.C.A.N. 1892, 1899-900. To that end, RLUIPA expressly references the Prison Litigation Reform Act of 1995, *See* 42 U.S.C. § 2000cc-2(e), which itself imposes a deferential standard. 18 U.S.C. § 3626 (requiring courts to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief").

3. Deference minimizes RLUIPA's potential conflict with the Establishment Clause. As this Court recognized in *Cutter*, there is a non-frivolous argument that elevating religious interests "over all other interests" could violate the Establishment Clause. *Cutter*, 544 U.S. at 723 (citing *Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985)). The Court appropriately responded to that concern by refusing to "read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety" or to "significantly compromis[e] prison security or the levels of service provided to other inmates." *Cutter*, 544 U.S. at 725. The doctrine of constitutional avoidance counsels in

favor of deferring to the considered judgments of prison administrators about whether and how to craft a religious exemption from a generally applicable prison policy. *See* Br. of Americans United for Separation of Church and State 15-18 (arguing that exemptions must be weighed "with care to ensure that the Establishment Clause's boundaries are respected").

4. *Deference keeps RLUIPA consistent with the Spending Clause.* RLUIPA applies by its terms to all state government "activit[ies] that receive[] Federal financial assistance." 42 U.S.C. § 2000cc-1(b)(1). Congress has the power to set conditions on the receipt of federal funds to further its policy objectives, but Congress cannot use those conditions to "require the states to govern according to Congress's instructions." *Nat'l Federation of Independent Business v. Sebelius,* 132 S. Ct. 2566, 2602 (2012) (quoting *New York v. United States*, 544 U.S. 144, 162 (1992)); *see also South Dakota v. Dole*, 483 U.S. 203, 206 (1987). If the Court were to apply RLUIPA without meaningful deference to state prison officials, there would be very real questions about RLUIPA's constitutionality under the Spending Clause. *See Cutter*, 544 U.S. at 732 (Thomas, J., concurring) (explaining that "RLUIPA may well exceed the spending power"); *Charles v. Verhagen*, 348 F.3d 601, 608 (7th Cir. 2003) (holding RLUIPA constitutional because it gives each State "the freedom to tailor compliance according to its particular penological interests and circumstances").

C. Accepting the petitioner's arguments would overrule *Cutter* sub silentio.

Many of the petitioner's arguments implicitly reject the notion that prison officials should receive any meaningful deference. If these arguments are accepted, the Court would undermine, in practice, *Cutter*'s deferential standard.

1. *Deference means that, in a federalist system, States need not follow a national trend.* The petitioner makes too much of the fact that most of Arkansas's sister States would allow a prisoner to grow a beard. State experimentation is not a problem to be remedied; it is a "happy incident" to be encouraged. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *Accord Chandler v. Miller*, 520 U.S. 305, 324 (1997) (Rehnquist, C.J., dissenting) ("mere novelty should not be a strike against" a state policy). As one Congressman put it, RLUIPA "mandates a uniform test, not a uniform result." 139 Cong. Rec. S14461-01. RLUIPA rightly preserves the autonomy of prison administrators to respond to their unique circumstances rather than engaging other prison systems in "a race to the top of the risk-tolerance or cost-absorption ladder." *Knight*, 723 F.3d at 1286.

Prison systems balance security and prisoner liberty in different ways. Two medium security prisons in Illinois prove the point. *Grayson v. Schuler*, 666 F.3d 450 (7th Cir. 2012); *Lewis v. Sternes*, 712 F.3d 1083 (7th Cir. 2013). Problems

with contraband increase as prisoners have more visitation, outdoor, and communal time. Dixon Correctional Facility solves the contraband problem with a strict grooming policy, but allows its inmates to go outside their cells for most of the day with additional visiting hours. *Lewis,* 712 F.3d at 1086. Big Muddy Correctional Facility, in contrast, has a more restrictive visitation policy and a less restrictive grooming policy. *Id*. Although these prisons have different policies, they are simply different ways to strike a balance between prisoner visitation, on the one hand, and the problems of smuggling contraband, on the other.

A similar dynamic likely explains the difference between the jurisdictions that prohibit beards and those jurisdictions with less rigorous grooming policies.[8] *See* Pet. Br. 25. In Alabama and Arkansas, for example, prisoners are typically confined in open barracks with 50 or more other prisoners. Resp. Br. 15. This mode of confinement allows prisoners more access to each other for socialization, entertainment, and education. But "open-barrack housing [also] allows for greater opportunities to exchange contraband and use weapons on other inmates," Resp. Br. 16, which is why this kind of housing is limited to low security prisoners in the federal

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[8] Petitioner says that Alabama, Arkansas, Florida, Georgia, South Carolina, Texas, Virginia, and Louisiana are the only state prison systems that prohibit beards. But he recognizes that many other prisons have grooming standards instead of strict rules, and it is impossible to know how prison administrators in those systems would apply those standards to petitioner. Pet. Br. 25.

system.[9] State prisons that house violent inmates in one-or two-person cells make a different trade-off that allows less restrictive grooming policies at the expense of prisoners' freedom of movement.

A deferential standard allows courts to take these issues into account without requiring a prison administrator to study, and distinguish, his prison's policies and inmate population from those of every prison that happens to have a less restrictive policy. Although evidence of other systems' policies may be "relevant," it cannot be "controlling." *Knight*, 723 F.3d at 1286; *accord Braunfeld v. Brown*, 366 U.S. 599, 608 (1961) (plurality opinion) (religious exception not required even though 21 of 34 jurisdictions provided one); *Chance v. Tex. Dep't. of Criminal Justice*, 730 F.3d 404, 411 (5th Cir. 2013); *Spratt v. R.I. Dep't of Corr.,* 482 F.3d 33, 42 (1st Cir. 2007); *Fowler v. Crawford*, 534 F.3d 931, 943 (8th Cir. 2008). The petitioner's argument that Arkansas must follow the policies of a majority of jurisdictions is inconsistent with meaningful deference to prison officials and fails to appreciate the many structural, population, and resource differences between prisons.

2. Deference means that States are not required to show a compelling interest on an individualized inmate-by-inmate basis. Prisons need the discretion to apply their policies in a uniform manner, without

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[9] *See* Federal Bureau of Prisons, About Our Facilities, http://www.bop.gov/about/facilities/ federal_prisons.jsp.

reevaluating them for each individual inmate. In similar situations, this Court has recognized that "[t]he laborious administration of prisons [] become[s] less effective, and likely less fair and evenhanded" when a prison official has to make an individualized determination of whether to apply a uniform policy to a particular inmate. *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. 1510, 1521 (2012). It is an especially "difficult if not impossible task" to identify "inmates who have propensities for violence, escape, or drug smuggling" that are greater than or less than any other inmate. *Block v. Rutherford*, 468 U.S. 576, 587 (1984).

The petitioner's argument that the prison must show a compelling interest and least restrictive means "with respect to the particular person whose religious exercise is burdened" would undermine these interests. Pet. Br. 17. Prison officials should not have to litigate a policy on an inmate-by-inmate basis. And courts should not have to wade through a flood of RLUIPA claims from litigious prisoners without the benefit of precedent from other inmates' cases. The Court should avoid a "complicated [RLUIPA] scheme requiring" prisons to treat prisoners differently "based on their behavior, suspected offense, criminal history, and other factors." *Florence*, 132 S. Ct. at 1522.

3. Deference means that prison administrators can draw on their own experience and intuition without hiring an expert witness under Rule 702. The petitioner erroneously argues that the prison witnesses in this case were not experts under Rule 702. Pet. Br. 49-50. This line of argument misses the

point of *Cutter*'s deferential standard. Courts defer to the judgment of prison officials, not merely because they "have a better grasp of [their] domain than the reviewing judge," but also because of their role in comprehensively administering a prison system. *Bell*, 441 U.S. at 548. "[T]he 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 546-48 (internal citations omitted). Indeed, this Court has recognized that "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) (citation omitted).

Even though "prison administrators may be 'experts' only by Act of Congress or of a state legislature," they are still due deference. *Bell*, 441 U.S. at 548 (quoting *Procunier*, 417 U.S. at 827). They are the ones who have to weigh competing claims on a limited pool of resources. They are the ones who have the "Herculean" task of "maintaining internal order and discipline" and "securing their institutions against unauthorized access or escape." *Procunier,* 417 U.S. at 404-05. Prison officials are due deference because of who they are, not just because of what they know.

* * *

To be sure, deference to prison administrators is not unlimited. But, where order and security are legitimately at issue, prison administrators must

have the discretion to evaluate and choose the best way to balance religious practice with those interests.

II. Prison grooming policies serve compelling state interests.

When he is not arguing that the Court should reconsider *Cutter*, the petitioner spends much of his brief downplaying the compelling interests served by prison grooming policies in general and Arkansas's in particular. Pet. Br. 28, 46. He makes three rhetorical moves to support this overarching argument. First, he erroneously argues that uniformity is not, in itself, an interest that supports Arkansas's policy. *Id.* at 17, 37, 43. Second, he wrongly faults Arkansas prison officials for failing to cite "specific example[s]" where a prisoner with a beard became a safety or security problem. *Id.* at 32, 38. Third, he mischaracterizes the officials' testimony about the interests that grooming policies serve as "conclusory" and "implausible." *Id.* at 32. The Court should reject these propositions.

A. Uniformity in dress and grooming serves the state interest in order, discipline, and uniform treatment of prisoners.

As an initial matter, Arkansas has an interest in a uniform grooming policy simply because it is *uniform*. The Court has never "doubt[ed] that there may be instances in which a need for uniformity precludes the recognition of exceptions" for religious

exercise. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006). Sometimes "granting the requested religious accommodations would seriously compromise [the government's] ability to administer the program," *id.* at 435, or otherwise "undermine the State's goal." *Braunfeld*, 366 U.S. at 608 (plurality opinion). This is such a case for at least three reasons.

First, one of the functions of a uniform dress and grooming policy is to establish order and discipline. This is why, for example, firefighters, police departments, and the military have such policies. Uniformity in appearance "encourages the subordination of personal preferences and identities" and develops "a sense of hierarchical unity by tending to eliminate outward individual distinctions." *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986). In the military or police force, the only relevant distinctions are based on rank. In prison, the only distinction is between inmates and guards.

Exemptions to such policies can breed resentment. *See*, *e.g.*, *Baranowski v. Hart*, 486 F.3d 112, 125 (5th Cir. 2007) (plaintiff's preferred alternative "would breed resentment among other inmates"); *Hoevenaar*, 422 F.3d at 371-72 (crediting warden's testimony that requested exemption would "cause resentment among the other inmates"). In fact, Arkansas is not requiring anything more of its *prisoners* than what many prisons require of their *guards*. Almost all prisons have a grooming policy for their guards, as well as for their prisoners. In several systems, the grooming policy for guards prohibits beards to the same extent that Arkansas's inmate grooming policy does for inmates: no beards

are allowed unless medically necessary.[10] These uniform dress and grooming policies — for guards and prisoners alike — reinforce order and discipline in a setting where order and discipline are incredibly important.

Second, prison officials have an "essential interest in readily administrable rules" for interacting with those *convicted* of violating the law, no less than "with those *suspected* of violating the law." *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. at 1522 (emphasis added). It is a simple matter to enforce a policy of no beards. It becomes much more complicated to enforce a policy allowing beards of certain shapes and lengths for certain prisoners, and denying them to others. At the very least, chaplains and guards must monitor beard

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[10] States with publicly-available no-beard policies for guards include **Alabama**, Alabama Department of Corrections, *Dress Code*, http://www.doc.state.al.us/docs/AdminRegs/ AR217.pdf; **California,** California Department of Corrections and Rehabilitation, *Operations Manual* at 221, http://www.cdcr.ca.gov/regulations/Adult_Operations/docs/DOM/DOM%202012/2012%20DOM-Combined.pdf; **New Mexico**, New Mexico Corrections Department, *Grooming and Physical Appearance for Correctional Employees* at 1, http://corrections.state.nm.us/policies/docs/CD-030400.pdf, **Oklahoma**, Oklahoma Department of Corrections, *Standards for Employee Personal Appearance* at 17, http://www.ok.gov/doc/documents/op110245.pdf, **South Carolina**, South Carolina Department of Corrections, *Uniformed Personnel Grooming and Attire Standards*, Rule 2.13, http://www.doc.sc.gov/pubweb/Employment/Policy/ADM-11-09.htm, and **Texas**, Texas Department of Criminal Justice, *Dress and Grooming Standards* at 4, http://www.tdcj.state.tx.us/divisions/hr/hr-policy/pd-28.pdf

lengths and keep track of exemptions at the expense of their other duties. *DeMoss v. Crain*, 636 F.3d 145, 154 (5th Cir. 2011).

Lastly, the government has an "interest in uniform treatment for the members of all religious faiths." *Goldman v. Weinberger*, 475 U.S. 503, 512 (1986) (Stevens, J., concurring). The exception requested by the petitioner may seem to be a reasonable accommodation because half-inch beards are mainstream. But that kind of reasoning creates the danger that a similar claim on behalf of another religious person will be dismissed as too extreme or unusual. As Justice Stevens once warned, "[i]f exceptions from dress code regulations are to be granted on the basis of a multifactored test," the degree to which the exemption is acceptable to the majority "inevitably" will "play a critical part in the decision." *Id.* at 512-13. The difference between a half-inch beard, a kouplock,[11] and a dreadlock "is not merely a difference in 'appearance'—it is also the difference between" a Muslim inmate like petitioner on the one hand and a Native American inmate or a Rastafarian on the other. *Id.* A prison system should be able to prioritize the benefit of not drawing those kinds of inter-religious distinctions in its grooming policy.

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[11] A kouplock is "a two-inch wide strip of hair beginning at the base of the skull and stretching down the back" that is associated with some Native American religions. *Knight*, 723 F.3d at 1277.

B. A prison should not need "specific examples" of policy failure to establish that its regulations serve a compelling interest.

Grooming policies like Arkansas's serve the government's compelling interests in security, order, and hygiene. *See*, *e.g.*, *Knight*, 723 F.3d 1275 (11th Cir. 2013); *Fegans v. Norris*, 537 F.3d 897, 908 (8th Cir. 2008). The petitioner erroneously argues that Arkansas cannot rely on these interests because its prison officials did not cite "specific examples" where beards have been used for bad ends. The petitioner is wrong to impose a "specific example" requirement on prison administrators.

As a practical matter, *of course* these Arkansas prison officials could not cite "any specific example[] from Arkansas" where "a prisoner who escaped could change his appearance by shaving his beard" or used his beard to conceal contraband. Pet. Br. 8. The reason is simple: *Arkansas does not allow prisoners to grow beards.* The very point of the grooming policy is to make sure these problems do not arise. The only way for Arkansas to develop "specific examples" would be by discovery of other states' prison systems, by hiring an expert witness from another system, or by experimenting with a less restrictive policy.

The Court should not impose a "try-and-fail" requirement on prison administrators. Obviously, a prison's case for denying an exception is the strongest when it has previously allowed the exception and bad things have come of it. But nothing in RLUIPA's text, history, or logic limits a prison system's ability to deny a religious exemption

to those circumstances. As the Court has recognized, "[r]esponsible prison officials must be permitted . . . to act before the time when they can compile a dossier on the eve of a riot." *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132-33 (1977). Congress did not adopt the pollyannaish presumption that prisoners are trustworthy until proven otherwise. And experience teaches that the inmates who sue for religious exemptions are no better or worse than others in this regard. *E.g., Hoevenaar v. Lazaroff*, 422 F.3d 366, 371 (6th Cir. 2005) (prisoner challenging grooming policy "ha[d] a long history of possessing and hiding contraband" and "twice attempted to escape from prison").

A more realistic presumption is that prisoners will find a way to exploit an exemption if they can. Prisons are populated exclusively by people who have been convicted of crimes. Some attempt to escape, and the first such attempt will come without a prior history of escaping. Others start fights or riots, often without a prior history of doing so. Excluding contraband and maintaining control are constant struggles. The courts cannot "overestimate[]" the "murderous ingenuity of murderous inmates," and prisoner administrators should not be compelled to underestimate it. *Scarver v. Litscher*, 434 F.3d 972, 976-77 (7th Cir. 2006) (Posner, J.). "Prison officials need not endure assaults, drug indulgence, or sexual improprieties before implementing policies designed to prevent such activities in an uneasy atmosphere." *Fowler v. Crawford*, 534 F.3d 931, 939 (8th Cir. 2008). Prison administrators must have the ability to craft system-

wide, generally applicable policies without waiting for "specific examples" of policy failure.

C. Arkansas's concerns about escape, concealed contraband, and exacerbated medical conditions are plausible.

Although Arkansas's witnesses were understandably unable to talk in detail about other prison systems, the experience of other states establishes that uniform grooming policies serve compelling state interests. In other prison systems, beards and long hair have been instrumental in escape attempts. They have been used to hide contraband. And they have been used to conceal prisoners' medical conditions.

1. *Grooming policies prevent prisoners from altering their appearance to assist in an escape.* Grooming policies limit escape attempts and allow prisons to recover escapees more quickly. This is so because inmates with long hair or beards "can more easily change their appearance, should they escape, by cutting their hair." *Grayson v. Schuler*, 666 F.3d 450, 452 (7th Cir. 2012). States obviously have a compelling interest in "the ability to identify prisoners" and in "prevent[ing] [prisoners] from disguising themselves." *Harris v. Chapman*, 97 F.3d 499, 503-04 (11th Cir. 1996).

The notion of prisoners shaving their hair to help them escape is no speculative concern. There are documented instances where inmates have cut their hair or shaved their beards for this purpose. The former Director of the Virginia Department of

Corrections has testified in other litigation over grooming policies about one incident where an inmate cut his long hair and shaved his beard to escape. *See* Angelone Dep. 58-60, *Limbaugh v. Thompson*, 2:93-cv1404- WHA (M.D. Ala. Jul. 11, 2008). When the inmate was ultimately apprehended, it was "nearly impossible to identify him." *Id.* at 60. Another prisoner was able to walk out of the prison visiting area after cutting his hair and beard. *See* Johnson Aff. 8 (Doc. 17), *Allen v. Johnson*, No. 2:05cv311, (E.D. Va. 2005). Yet another inmate almost escaped when he cut his hair and beard to pose as a chapel volunteer. *Id.*

2. *Grooming policies prevent prisoners from hiding contraband in their hair or beards.* "Correctional officials have a legitimate interest, indeed a responsibility, to ensure that jails are not made less secure by reason of what new detainees may carry in on their bodies." *Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S.Ct. 1510, 1513 (2012). For this reason, this Court has consistently upheld uniform "[p]olicies designed to keep contraband out of jails and prisons." *Id.*

Again, this is no speculative concern. Although it might seem far-fetched to those in civilian life, there are real-world instances where prisoners have endangered the lives of other inmates and guards by concealing contraband in their hair and beards. In Virginia, for example, prison staff found a 6 ¾ inch shank that an inmate had concealed in his long hair. Johnson Aff. 8 (Doc. 17), *Allen v. Johnson*, No. 2:05cv311, (E.D. Va. 2005). Another inmate hid a razor blade in his hair, which injured the guard who

searched it. Angelone Dep. 48, *Limbaugh v. Thompson*, 2:93-cv1404- WHA (M.D. Ala. July 11, 2011).

Prison grooming policies also deter contraband that may not be a weapon, but can undermine the control of prison administrators. A prisoner once hid small amounts of marijuana in his hair that he apparently procured during visitation. Johnson Aff. 7. Prisoners have also concealed wire, rope, rocks and tobacco in their hair. *See McRae v. Johnson*, 261 F. App'x 554, 559 (4th Cir. 2008). In one South Carolina prison, a number of keys to handcuffs and doors went missing. Officers found the keys only after requiring the whole unit to cut their hair and shave their beards. Affidavit of Robert E. Ward (Doc. 30), *Green v. Ozmint*, CV 2:04-22074-22AJ (D.S.C. Jun. 23, 2005), *available at* 2007 WL 295593.

3. Grooming policies protect the health of inmates. They allow guards to easily uncover medical conditions and limit tick, lice and other pest problems. *See Knight*, 723 F.3d at 1284; *Grayson v. Schuler*, 666 F.3d 450, 452 (7th Cir. 2012). Medical staff have discovered black widow spiders in an inmate's hair. Angelone Aff. 5, *Limbaugh v. Thompson*, 2:93-cv1404- WHA (M.D. Ala. Jul. 11, 2008). Prisoners have also been treated for cysts, rashes, skin disease, lice, fungal infections, boils, parasites, mold growing on the scalp, lesions in scalp, psoriasis, bleeding scalp and dandruff due to long hair or beards. *Id.*

* * *

A grooming policy cannot remedy all the discipline, contraband, escape, and health problems in Arkansas's prisons. The petitioner is right, for example, that "prisoners can hide contraband in many other places" apart from their hair and beards Pet. Br. 33. But RLUIPA cannot reasonably be understood to mean that a prison is forbidden from adopting a policy that eliminates one way of undermining safety and security simply because it cannot eliminate them all. The court of appeals appropriately deferred to the judgment of Arkansas prison officials that their uniform policy was the best way to serve their interests in order and security, and it should be affirmed.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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