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 PETITIONER

ERIC C. RASSBACH
LUKE W. GOODRICH
MARK L. RIENZI
HANNAH C. SMITH
JOSHUA D. HAWLEY
ASMA T. UDDIN
The Becket Fund for Religious Liberty
3000 K St., NW, Ste. 220
Washington, DC 20007
(202) 955-0095

DOUGLAS LAYCOCK
Counsel of Record
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903
dlaycock@virginia.edu
(434) 243-8546

Counsel for Petitioner

QUESTION PRESENTED

Whether the Arkansas Department of Correction's grooming policy violates the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq*. (2006), to the extent that it prohibits petitioner from growing a one-half-inch beard in accordance with his religious beliefs.

PARTIES TO THE PROCEEDINGS

Petitioner is Gregory Houston Holt, a/k/a Abdul Maalik Muhammad. Respondents are six employees of the Arkansas Department of Correction:

Director Ray Hobbs
Chief Deputy Director Larry May
Warden Gaylon Lay
Major Vernon Robertson
Captain Donald Tate
Sergeant Michael Richardson

All respondents are sued in their official capacities only.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

INTRODUCTION 3

STATEMENT 5

SUMMARY OF ARGUMENT 12

ARGUMENT 15

I. RLUIPA Enacts a Statutory Standard of Compelling Interest and Least Restrictive Means 15

II. Respondents Have Substantially Burdened Petitioner's Exercise of Religion 18

III. Respondents Have Not Proved Either Compelling Interest or Least Restrictive Means 21

A. Respondents Have No Compelling Interest in Prohibiting What At Least Forty-Four American Prison Systems Permit 21

B. Respondents' Implausible and Conclusory Testimony Proved Neither Compelling Interest Nor Least Restrictive Means 32

1. Hiding contraband 32

2. Changing appearance 38

3. Measuring half an inch 40

4. No exceptions ever 42

5. Failure to consider less restrictive means 43

C. Due Deference To Prison Administrators Cannot Create a Compelling Interest 46

D. The Courts Below Applied the Deferential *Turner* Standard, Not the RLUIPA Standard 52

CONCLUSION 55

APPENDIX 1a

Religious Land Use and Institutionalized Persons Act 1a

Civil Rights of Institutionalized Persons Act 7a

Civil Rights Act of 1964, as amended 8a

Administrative Directive 98-04 ..... 10a

Administrative Regulations, State of Arkansas Board of Corrections, Section DOC 840 ..... 13a

Administrative Directive 05-26 ..... 15a

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Abbott v. *United States*,
131 S. Ct. 18 (2010) 17

Auer v. *Robbins*,
519 U.S. 452 (1997) 51

Bolger v. *Young Drug Prods. Corp.*,
463 U.S. 60 (1983) 33

Brown v. *Entm't Merchs. Ass'n*,
131 S. Ct. 2729 (2011) 33

Chamber of Commerce v. *Whiting*,
131 S. Ct. 1968 (2011) 46

Chevron (USA) v. *Natural Res. Def. Council, Inc.*,
467 U.S. 837 (1984) 51

Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*,
508 U.S. 520 (1993) 35-36

City of Boerne v. *Flores*,
521 U.S. 507 (1997) 16

Couch v. *Jabe*,
679 F.3d 197 (4th Cir. 2012) 25-26, 36, 44, 52

Cutter v. *Wilkinson*,
544 U.S. 709 (2005) 2, 16, 18, 47, 49

Daubert v. *Merrell Dow Pharm., Inc.*
509 U.S. 579 (1993) 15, 49-50

Exxon Mobil Corp. v. *Allapatah Servs., Inc.*,
545 U.S. 546 (2005) 46

Fegans v. *Norris*,
537 F.3d 897 (8th Cir. 2008) 10-11, 31, 52-55

Fisher v. *Univ. of Tex.*,
133 S. Ct. 2411 (2013) 44

Fraternal Order of Police Newark Lodge No. 12 v. *City of Newark*,
170 F.3d 359 (3d Cir. 1999)..... 40

Garner v. *Kennedy*,
713 F.3d 237 (5th Cir. 2013) 22, 25

Gen. Elec. Co. v. *Joiner*,
522 U.S. 136 (1997) 50

Gonzales v. *O Centro Espirita Beneficiente Uniao do Vegetal*, 4, 12, 16, 17
546 U.S. 418 (2006) 23, 32, 36, 43, 55

Grutter v. *Bollinger*,
539 U.S. 306 (2003) 44

Ho Ah Kow v. *Nunan*,
12 F. Cas. 252 (Field, Circuit Justice, C.C.D. Cal. 1879) 3-5

Johnson v. *Bi-State Justice Center/Ark. Dep't of Corr.*,
12 F.3d 133 (8th Cir. 1993) 11

Johnson v. *California*,
543 U.S. 499 (2005) 21

Kumho Tire Co. v. *Carmichael*,
526 U.S. 137 (1999) 49-50

Lovelace v. *Lee*,
472 F.3d 201 (4th Cir. 2006) 52

Mayweathers v. *Terhune*,
328 F. Supp. 2d 1086 (E.D. Cal. 2004)..... 7, 29

Mockaitis v. *Harcleroad*,
104 F.3d 1522 (9th Cir. 1997) 47

Native Am. Council of Tribes v. *Weber*,
No. 13-1401, 2014 WL 1644130
(8th Cir. Apr. 25, 2014) 23, 53

O'Lone v. *Estate of Shabazz*,
482 U.S. 342 (1987) 16, 20, 53-54

Pell v. *Procunier*,
417 U.S. 817 (1974) 54

Procunier v. *Martinez*,
416 U.S. 396 (1974) 21

Shakur v. *Schriro*,
514 F.3d 878 (9th Cir. 2008) 22-23, 44

Skidmore v. *Swift & Co.*,
323 U.S. 134 (1944) 15, 50-51

Smith v. *Ark. Dep't of Corr.*,
103 F.3d 637 (8th Cir. 1996) 29

Spratt v. *R.I. Dep't of Corr.*,
482 F.3d 33 (1st Cir. 2007)..... 22, 36, 44

Turner v. *Safley*,
482 U.S. 78 (1987) 15-16, 20, 22, 43, 52-54

United States v. *Mead Corp.*,
533 U.S. 218 (2001) 50-51

Univ. of Tex. Sw. Med. Ctr. v. *Nassar*,
133 S. Ct. 2517 (2013) 51

Warsoldier v. *Woodford*,
418 F.3d 989 (9th Cir. 2005) 22, 44

Washington v. *Klem*,
497 F.3d 272 (3d Cir. 2007)..... 22, 36, 44

Wisconsin v. *Yoder*,
406 U.S. 205 (1972) 19

Yellowbear v. *Lampert*,
741 F.3d 48 (10th Cir. 2014) 19, 36, 44, 52

CONSTITUTIONS AND STATUTES

U.S. Const.,

amend. I, Free Exercise Clause 16

amend. XIV, Equal Protection Clause..... 3

Civil Rights of Institutionalized Persons Act,
42 U.S.C. § 1997 1-2

Religious Freedom Restoration Act,

Generally 12, 16-18, 20, 32, 43, 55

42 U.S.C. § 2000bb-1 16-17

42 U.S.C. § 2000bb-2(3)..... 17, 32

42 U.S.C. § 2000bb-2(4)..... 16

Religious Land Use and Institutionalized
Persons Act,

Generally .....*passim*

42 U.S.C. § 2000cc-1(a)..... 1-2, 16-17, 32, 53, 55

42 U.S.C. § 2000cc-1(b)..... 2

42 U.S.C. § 2000cc-3(g)..... 18, 52

42 U.S.C. § 2000cc-5(2)..... 2, 17, 32

42 U.S.C. § 2000cc-5(7)..... 19

Section 7, 114 Stat. 803 (2000) 16

Title 28, Judiciary

28 U.S.C. § 1254(1)..... 1

28 U.S.C. § 1915(e) 10
28 U.S.C. § 1915(g) 11
28 U.S.C. § 1915A..... 10

RULES AND REGULATIONS

Arkansas Department of Correction
Admin. Directive 98-04 ..... 2-3, 6, 27, 34
Ark. Admin. Code 004.00.1-I(C)..... 7, 9, 37, 39
Ark. Admin. Code 004.00.1-III(B)..... 37
Ark. Admin. Code 004.00.1-III(C)..... 19, 37
Cal. Code Regs. Tit. 15, § 3019..... 39
Federal Rule of Evidence 702..... 49-50
Ill. Admin. Code tit. 20, § 502.110(b) 39
Indiana Department of Correction, Policy and Administrative Procedures, § 02-01-104.X, http://www.in.gov/idoc/files/02-01-104_AP_Offender_Grooming____11-1-2013.pdf 24, 39
Rules of the City of New York, ch. 1, tit. 40 § 1-103(e)(1) (2008), http://www.nyc.gov/html/boc/downloads/pdf/minimum_standards.pdf 26
N.Y. Comp. Codes R. & Reg. tit. 7, § 270.2(B)(11)(v) (Rule 100.31)..... 39
Ohio Admin. Code 5120-9-25..... 24, 38-39
Supreme Court Rule 32.1 3

Virginia Department of Corrections, Operating Procedure: Offender Grooming and Hygiene, No. 864.1, http://vadoc.virginia.gov/about/procedures/documents/800/864-1.pdf 25, 39-40

LEGISLATIVE HISTORY

H.R. Rep. 106-119 (1999)..... 47

Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. 16698 (2000) 18, 46-48

S. Rep. 103-111, 1993 U.S.C.C.A.N. 1892 ..... 18, 20, 46, 48

OFFICIAL PUBLICATIONS

Arkansas Department of Correction, *Annual Report*, http://adc.arkansas.gov/resources/Documents/ 2012_Annual_Report_final.pdf..... 2, 26

California Department of Corrections and Rehabilitation, *Corrections: Year at a Glance* (2011), http://www.cdcr.ca.gov/News/docs/2011_Annual_Report_FINAL.pdf..... 30, 31

Federal Bureau of Prisons, *About Our Facilities*, http://www.bop.gov/about/facilities/federal_prisons.jsp 30

Mississippi Department of Corrections, *Division of Institutions State Prisons*, http://www.mdoc.state.ms.us/division_of_institutions%20State%20Prisons.htm..... 30

City of New York Department of Correction, *Department of Correction*, http://www.nyc.gov/html/ops/downloads/pdf/pmmr2014/doc.pdf 26

New York Department of Corrections and Community Supervision, *Occupancy, Staffing, and Safety*, http://www.doccs.ny.gov/FactSheets/Occupancystaffingandsafety09.html 30

North Carolina Department of Public Safety, *Dan River Prison Work Farm*, https://www.ncdps.gov/index2.cfm?a=000003,002240,002371,002384,002289 31

Ohio Department of Rehabilitation and Correction, *Agricultural and Farm Services*, http://www.drc.ohio.gov/web/ag_farm.htm 30

Oklahoma Department of Corrections, *2012 Yearbook*, http://www.ok.gov/doc/documents/2012%20yearbook.pdf 30

OTHER SECONDARY SOURCES

American Correctional Association, *Standards for Adult Correctional Institutions* (4th ed. 2003) 26, 27

American Correctional Association, *Standards for Adult Correctional Institutions* (3d ed. 1990) 27

American Correctional Association, *Standards for Adult Correctional Institutions* (2d ed. 1981) 27

Cyril Glassé, *The New Encyclopedia of Islam* (3d ed. 2008) 5

S.A. Nigosian, *The Zoroastrian Faith: Tradition and Modern Research* (1993)..... 6

The Oxford Dictionary of Islam (John L. Esposito, ed. 2003) 6

James Peguese & Robert Koppel, *Managing High-Risk Offenders in Prison Dormitory Settings* (2003), http://www.aca.org/publications/ctarchives-pdf/july03/peguese.pdf..... 30

J. Robson, *Hadith*, in 3 *The Encyclopedia of Islam* (Bernard Lewis, et al., eds., new ed. 1986)..... 6

Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923 (2012) 7, 24-26, 38, 42

Sahih Muslim (Abdul Hamid Siddiqi trans., Sh. Muhammad Ashraf 1971) 6

The Translation of the Meanings of Sahih Al-Bukhari (Muhammad Muhsin Khan trans., Darussalam Pubs. 1997) 5-6

OPINIONS BELOW

The magistrate's recommendations are reported at 2012 WL 994481 (E.D. Ark. Jan. 27, 2012), J.A. 160.

The District Court's order adopting those recommendations is reported at 2012 WL 993403 (E.D. Ark. Mar. 23, 2012), J.A. 179.

The Eighth Circuit's opinion is reported at 509 F. App'x 561 (8th Cir. 2013), J.A. 184, *rehearing and rehearing en banc denied*, J.A. 190.

The District Court's preliminary injunction, J.A. 34, the order continuing that injunction pending appeal, J.A. 183, and the Eighth Circuit's order refusing to stay its mandate, J.A. 191, are all unreported. This Court's injunction pending disposition of the petition for certiorari is reported at 134 S. Ct. 635 (2013), J.A 192.

JURISDICTION

The Eighth Circuit entered judgment on June 12, 2013. J.A. 188. It denied a timely petition for rehearing on July 17, 2013. J.A. 190. The petition for certiorari was filed on September 27, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Religious Land Use and Institutionalized Persons Act (RLUIPA) provides:

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

> of the burden on that person —
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a) (2006).

> The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

42 U.S.C. § 2000cc-5(2). These provisions are also reprinted in an appendix to this brief, along with all related provisions relevant to RLUIPA's application to prisons. App., *infra*, 1a-9a.

The definition of "institution" in § 1997 includes state prisons. The Act applies to those prisons that receive federal financial assistance. 42 U.S.C. § 2000cc-1(b). It is undisputed that the Arkansas prisons receive federal financial assistance.[1]

Petitioner challenges Administrative Directive 98-04.D of the Arkansas Department of Correction, which provides:

> No inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip. Medical staff may prescribe that

---

[1] See Arkansas Department of Correction, *Annual Report 2012,* at 3, http://adc.arkansas.gov/resources/Documents/2012_Annual_Report_final.pdf (describing $ 574,461 in federal grants for FY2012); see also *Cutter* v. *Wilkinson*, 544 U.S. 709, 716 n.4 (2005) (noting that every state prison system receives such assistance).

> 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.

J.A. 164. MSF 207 is a form for prisoners covered by the medical exception. J.A. 109, 118. The full text of Administrative Directive 98-04 and related regulations is reprinted in the appendix to this brief. App., *infra*, 10a-16a.[2]

INTRODUCTION

In 1879, Justice Field confronted a San Francisco ordinance requiring that the hair of inmates in the county jail be cut to a "uniform length of one inch from the scalp." *Ho Ah Kow* v. *Nunan*, 12 F. Cas. 252, 253 (Field, Circuit Justice, C.C.D. Cal. 1879). The ordinance burdened the "religious faith of the Chinese" because it required the queue — a long braid of hair — to be cut off. *Ibid.* Justice Field, writing for the court, held that the ordinance violated the Equal Protection Clause, because it "act[ed] with special severity upon Chinese prisoners, inflicting upon them suffering altogether disproportionate to what would be endured by other prisoners." *Id.* at 255. Indeed, it was as if the city had mandated that "all prisoners confined in the county jail should be fed on pork," even if they were

---

[2] Respondents introduced all of Directive 98-04 and related policies, and a photocopy of a cell-phone SIM card next to a ruler, as exhibits at an evidentiary hearing before the magistrate. J.A. 119-120, 128-129. These exhibits were returned to counsel for respondents after the hearing, Letter from Clerk returning exhibits, ECF No. 79, and apparently were not restored to the record on appeal. Counsel for respondent has supplied copies of both exhibits to counsel for petitioner, and these copies have been placed in the custody of the Clerk pursuant to Rule 32.1.

Jewish. *Id.* at 255. It made no difference that the ordinance was written in "general terms" or that the prison officials had raised unjustified concerns of health and discipline. *Ibid.* Requiring an inmate to contradict his deeply held religious beliefs was "unworthy" of the United States. *Id.* at 256.

This case comes 135 years later, but the claims and defenses are substantially the same. The difference is that this case is easier: Petitioner seeks relief under a federal civil rights statute specifically designed to protect the religious exercise of prisoners, 42 U.S.C. § 2000cc *et seq.* (2006) (RLUIPA), and under a precedent that requires robust and individualized application of strict scrutiny, *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

The state-imposed burden on petitioner's religious practice of keeping a beard is incontrovertible. Respondents say they can allow no exceptions to the no-beard rule because of security concerns. But that defense is not tenable when forty-four other state and federal prison systems with the same security interests allow the beards that Arkansas forbids. The defense is also untenable because the evidence offered to support it is too weak to satisfy RLUIPA's compelling interest test or to merit any deference. Like the health and discipline interests raised by the defendants in *Ho Ah Kow*, these are post-hoc rationalizations for bureaucratic stubbornness, or worse.

In *Ho Ah Kow*, Justice Field believed that the ordinance was motivated by open hostility to the Chinese. Respondents' refusal to extend a religious exception to petitioner is almost as troubling because it indicates hostile indifference to the faiths of religious minorities.

Just as San Francisco should not have knowingly inflicted on Ho Ah Kow "suffering altogether disproportionate to what would be endured by other prisoners" by cutting off his queue, *Ho Ah Kow*, 12 F. Cas. at 255, Arkansas should not knowingly inflict similarly disproportionate suffering on petitioner by prohibiting his religiously mandated beard.

STATEMENT

1. Petitioner Gregory Holt, also known as Abdul Maalik Muhammad, is an inmate of the Arkansas Department of Correction. Petitioner is a devout Muslim who seeks to grow a half-inch beard in accordance with the obligations of his faith. J.A. 18, 54.

Respondents have never questioned the sincerity of petitioner's belief that he must grow his beard. That belief is based on *hadith*, which are accounts of the acts or statements of the Prophet Muhammad. J.A. 54, 58-59. *Hadith* are generally viewed as the most important source of Islamic law after the Koran.[3]

Petitioner believes that faithful Muslims should obey the sayings of the Prophet collected in *hadith*. J.A. 58-59 (citing the Koran, Surah 4:80). With respect to his beard, petitioner cited the *hadith* stating: "Allah's Messenger said, 'Cut the moustaches short and leave the beard (as it is).'" *The Translation of the Meanings of Sahih Al-Bukhari* ¶ 5893 (Muhammad Muhsin Khan trans., Darussalam Pubs. 1997); J.A. 18, 54. Other *hadith* elaborate this teaching. "The Prophet

[3] This brief account of *hadith*, except where cited to some other source, is based on J. Robson, *Hadith*, in 3 *The Encyclopedia of Islam* 23, 23-25 (Bernard Lewis, *et al.* eds., new ed. 1986); Cyril Glassé, *The New Encyclopedia of Islam* 177-79 (3d ed. 2008); and *The Oxford Dictionary of Islam* 101-02 (John L. Esposito ed., 2003).

said, 'Do the opposite of what *Al-Mushrikun* do. Grow abundantly the beards and cut the moustaches short.'" *Sahih al Bukhari* ¶ 5892. Similarly, "Abu Huraira reported: The Messenger of Allah (may peace be upon him) said: Trim closely the moustache, and grow beard, and thus act against the fire-worshippers." *Sahih Muslim* ¶ 501 (Abdul Hamid Siddiqi trans., Sh. Muhammad Ashraf 1971).

The *Al-Mushrikun* were pagans and polytheists. *Sahih Al-Bukhari* ¶ 5892 n.1. "Fire-worshippers" was a pejorative term for Zoroastrians. S.A. Nigosian, *The Zoroastrian Faith: Tradition and Modern Research* 113 (1993). The obligation to grow the beard visibly distinguished faithful Muslims from adherents of these other faiths. *Sahih Muslim* ¶ 500 n.471.

Petitioner testified that the teaching to grow the beard is a "sound Hadith." J.A. 54, 63. The soundness of *hadith*, a subject of much study in Islam, refers to the reliability with which a teaching is attributed to the Prophet. Petitioner cited the *Sahih Al-Bukhari*, which is widely accepted as the soundest, or most authoritative, collection of *hadith*. Multiple reports of the same teaching are further evidence of soundness.

2. Respondent Ray Hobbs is Director of the Arkansas Department of Correction. J.A. 17. Respondent Larry May is the Chief Deputy Director. J.A. 33. Other respondents are officers at the Cummins Unit, where petitioner was housed during the proceedings below. J.A. 29, 53-54. All respondents are sued only in their official capacities. J.A. 17, 32-33.

The Department's Directive 98-04 prohibits beards, but exempts quarter-inch beards grown for medical reasons. J.A. 164; pp. 2-3, *supra*. If an inmate grows a beard in violation of the grooming policy, he is subject

to progressively escalating disciplinary action. J.A. 18, 29, 55, 164.

All Arkansas inmates are photographed upon admission to prison. Ark. Admin. Code 004.00.1-I, (C)(6). If a change in hair, mustache, sideburns, or beard significantly changes an inmate's appearance, a new photograph is taken. *Ibid.*

3. Petitioner sought permission to grow a beard through the prison grievance process and exhausted that potential remedy. Plaintiff's Exhibits, ECF No. 13. Throughout the grievance process and ensuing litigation, petitioner took a conservative approach to relief. Although he understands *hadith* to require him to leave his beard entirely uncut, J.A. 65, he sought permission to grow only a half-inch beard, J.A. 18-19, 57, 65-66, 142-43. A half-inch beard is an extremely short beard — about 70% of the diameter of a dime.

Petitioner based the half-inch limitation on a reported case ordering California officials to allow Muslim prisoners to grow a half-inch beard. *Mayweathers* v. *Terhune*, 328 F. Supp. 2d 1086 (E.D. Cal. 2004); J.A. 19, 55-56. California has since repealed its beard restrictions entirely. Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 964 (2012).

Petitioner viewed a half-inch beard as a "compromise." J.A. 143, 164. Respondents rejected petitioner's offer. J.A. 164. The warden stated: "[Y]ou will abide by ADC policies and if you choose to disobey, you can suffer the consequences." Plaintiff's Exhibits at 6, ECF No. 13.

4. Having exhausted his administrative remedies, petitioner filed a complaint, J.A. 16, and a motion for a preliminary injunction and temporary restraining

order, ECF No. 3. The magistrate recommended that the motion be denied. J.A. 30-31. But the District Court granted a preliminary injunction without a hearing, J.A. 34, and remanded to the magistrate for "a temporary injunction hearing." J.A. 35.

At the hearing, petitioner testified that it is impossible to hide anything in his beard, J.A. 56-57, 70, 75, and that there are many other places in which a prisoner might hide contraband more effectively, J.A. 56, 64-65, 69, 139-42.

Respondents offered two witnesses. The first was respondent Gaylon Lay, one of the wardens at the Cummins Unit. J.A. 79. The second was Grant Harris, an Assistant Director of the Department of Correction. J.A. 112-13.

They testified to their personal belief that inmates could hide contraband even in a half-inch beard. J.A. 80, 84-85, 116-17, 123, 126. Neither witness offered any specific example, from Arkansas or elsewhere. Both witnesses acknowledged that inmates could hide contraband in many other places, J.A. 98, 103-04, 106, 115-17, 121, 126-27, 132, and Mr. Harris testified that staff smuggle contraband for inmates, J.A. 122, 132. Mr. Lay acknowledged that the amount of contraband had actually increased since a court had upheld the no-beard policy in 2006. J.A. 86.

Mr. Lay testified that a prisoner who escaped could change his appearance by shaving his beard. J.A. 80, 96. Here again, he offered no examples of this ever happening. When asked on cross-examination why the Department could not photograph petitioner both with and without a beard — as other prison systems do, J.A. 69, 176 — both witnesses elaborated their earlier testimony and avoided answering the question. J.A. 104,

123. In fact, as already noted, Arkansas requires that a new photograph be taken any time an inmate changes his appearance. Ark. Admin. Code 004.00.1-I(C)(6).

Mr. Lay also worried that the Department would be unable to measure a half-inch beard on a consistent basis. J.A. 80-83, 107. However, he acknowledged that the prison has monitored the length of the quarter-inch beards permitted for medical reasons, without suggesting that there had been any problems. J.A. 109.

Finally, both witnesses testified that they simply could not make an exception for any inmate on any issue, because any exception would either cause resentment, endangering the inmate who got the exception, J.A. 86-87, 118, or make that inmate a leader within the inmate population, J.A. 118-19. Once again, neither witness offered any examples. At the time of the hearing, petitioner had been wearing a beard for about three months due to the preliminary injunction. J.A. 34, 65. Mr. Harris testified that he knew of no hostility directed at petitioner because of his beard nor of any inmates making him a leader because of his beard. J.A. 121.

5. As further detailed at pp. 24-26, *infra*, at least forty-four American state and federal prison systems have regulations that would permit an inmate with petitioner's religious beliefs to maintain a half-inch beard. See Sidhu, 66 U. Miami L. Rev. at 964-72 (collecting prison grooming standards from fifty states plus the United States and District of Columbia). Forty-two of those jurisdictions would impose no length limitation. *Ibid.* Petitioner, respondents' counsel, and the magistrate all asked respondents' witnesses about the policies in New York, California, and

other states where beards are permitted. Neither witness knew anything about these policies or the experiences of other states. J.A. 101-02, 105-06, 110-11, 119, 127.

6. Because of the District Court's preliminary injunction, J.A. 34, petitioner had a beard at the hearing, J.A. 58, and the magistrate was able to observe it. At the conclusion of the hearing, the magistrate said to petitioner: "I look at your particular circumstance and I say, you know, it's almost preposterous to think that you could hide contraband in your beard." J.A. 155.

Nevertheless, the magistrate said he was required to defer to respondents' testimony. J.A. 155-56. He relied on *Fegans* v. *Norris*, 537 F.3d 897 (8th Cir. 2008), which had rejected an earlier RLUIPA challenge to respondents' grooming policy. Petitioner emphasized that while *Fegans* rejected a claim to both hair and beard of unlimited length, he sought only a half-inch beard. J.A. 69, 139, 151. The magistrate acknowledged this factual distinction, but read *Fegans* to command "deference to the prison officials if they're able to state legitimate penological needs." J.A. 154.

In his written recommendations, the magistrate characterized as "compelling" petitioner's argument that "an inmate could easily hide contraband in many places other than a one-half-inch-beard." J.A. 168. But he again emphasized that "the prison officials are entitled to deference," *ibid.*, and concluded that under *Fegans*, petitioner had little chance of success on the merits, J.A. 169. He recommended that the preliminary injunction be vacated.

He also screened the complaint under 28 U.S.C. §§ 1915A(b) and 1915(e)(2)(B), which permit dismissal of any prisoner claim that is frivolous or malicious,

fails to state a claim on which relief can be granted, or seeks monetary relief from an immune defendant. J.A. 169-70. In the Eighth Circuit, these statutory grounds have been expanded to include cases in which the evidence is so one-sided that no further proceedings are necessary. J.A. 170; *Johnson* v. *Bi-State Justice Center/Ark. Dep't of Corr.*, 12 F.3d 133, 136 (8th Cir. 1993).

On the basis of this screening, the magistrate concluded that respondents had demonstrated compelling interest and least restrictive means. J.A. 176. He also concluded that petitioner's religious exercise had not been substantially burdened, because he was allowed to practice other elements of Islam unrelated to beards. J.A. 176-77. He then recommended, without further explanation, that petitioner's complaint be dismissed for failure to state a claim on which relief could be granted. J.A. 177.

The District Court adopted the magistrate's written recommendations "in their entirety in all respects," J.A. 179, and "dismissed with prejudice for failure to state a claim on which relief can be granted," J.A. 180. But the court later stayed that order, thus reinstating the preliminary injunction pending appeal. J.A. 183.

7. The Eighth Circuit affirmed in a brief and unpublished per curiam opinion. J.A. 184. It emphasized deference to respondents' testimony and paraphrased its previous decision in *Fegans*. J.A. 186-87.

The court also modified the judgment to provide that "the dismissal does not count as a 'strike' for purposes of 28 U.S.C. § 1915(g)." J.A. 187. That section bars further complaints by prisoners who have had three cases dismissed as frivolous or malicious or for failure to state a claim. The holding that this case does

not fall within this section implies, appropriately, that the dismissal was not for failure to state a claim; rather, the court believed that respondents had proved their affirmative defense of compelling interest and least restrictive means.

The Eighth Circuit refused to stay its mandate. J.A. 191. This Court then granted an injunction permitting petitioner to keep his half-inch beard pending disposition of his petition for certiorari. J.A. 192.

SUMMARY OF ARGUMENT

This case presents a basic question of statutory interpretation: Does the Religious Land Use and Institutionalized Persons Act mean what it says, or should the legislative history be interpreted to trump the statutory text and require extreme deference to defendant prison officials?

I. RLUIPA's text says that a substantial burden on a prisoner's exercise of religion can be justified only if imposition of that burden on the prisoner is the least restrictive means of furthering a compelling government interest. This is the same strict-scrutiny standard that applies under the Religious Freedom Restoration Act (RFRA), which this Court enforced according to its terms in *O Centro*, 546 U.S. 418. The two statutes are *in pari materia* and substantially identical in their key provisions. RLUIPA also places the burden of proving compelling interest and least restrictive means on the government, but the Eighth Circuit explicitly shifted that burden to petitioner.

II. Respondents bear the burden of proving their affirmative defense under strict scrutiny because they have plainly imposed a substantial burden on petitioner's exercise of religion. They prohibit him from complying with a compulsory obligation of his faith

and back that prohibition with serious and cumulative penalties.

III.A. Respondents have not come close to demonstrating either compelling interest or least restrictive means. At least forty-four other state and federal prison systems would allow petitioner's half-inch beard. Respondents cannot demonstrate a compelling interest without explaining why the rule that works in these prison systems would not also work in Arkansas. Far from doing so, respondents freely admitted that they knew nothing of these other prison systems and had made no attempt to learn.

B. Instead, respondents offered four reasons why they could not accommodate petitioner's half-inch beard. None of these reasons has merit. First, respondents claimed that petitioner could hide contraband in a half-inch beard. But they gave no examples of this ever happening in any prison system, and the magistrate who saw the beard found the idea "almost preposterous." J.A. 155. Respondents also agreed that prisoners can hide contraband in many other places, and they gave no reason why they need to prohibit beards when they do not regulate these other hiding places to the same extent.

Respondents also ignored readily available less restrictive means. They can search beards just like they search any other hiding place. They can order prisoners to run their hands through their own beards to dislodge anything hidden there. And they can require inmates to shave if they are ever caught hiding contraband in their beard. All of these less restrictive alternatives have worked in other prison systems, and respondents failed to address them.

Second, respondents testified that if petitioner escaped, he could shave his beard to change his appearance. Again they gave no examples, and they had no answer to an obvious question: Why not take one photograph clean shaven, and a second photograph with the beard? Respondents already require inmates to take a new photograph whenever they change their appearance, and other prison systems do the same.

Third, respondents testified that it would be difficult to monitor compliance with a half-inch limitation for 15,000 prisoners. But 15,000 prisoners will not want to grow beards for religious reasons, and half an inch is no more difficult to measure than a quarter inch — which respondents already permit for beards grown for medical reasons.

Finally, respondents testified that they can never make any exception for any prisoner on any issue, because other prisoners might resent it. This simply shows their refusal to take RLUIPA seriously; the statute works by requiring religious exemptions.

C. The lower courts accepted this testimony not because it demonstrated a compelling interest and least restrictive means, but because they thought they had to defer to prison officials. To be sure, the legislative history mentions "due deference to the experience and expertise of prison and jail administrators;" but the legislative history cannot shore up defective testimony, much less override the statutory text. If any deference is due, it is due to the cumulative experience of the forty-four prison systems that would allow petitioner's beard — not to the conclusory and implausible testimony in this case.

To the extent that the statutory text permits deference, two bodies of law offer suggestive analogies. Had

the testimony of respondents' witnesses been screened under the standard of *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), much of it would have been inadmissible. The testimony has few indicia of reliability and consists largely of *ipse dixit*. Such testimony certainly is not entitled to deference. And for the same reasons, no deference is due if the testimony is evaluated under the standards of *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944).

D. The courts below accorded respondents' testimony an abject deference that cannot be squared with the statutory text. Instead of applying RLUIPA, they applied the rational-basis standard applicable to certain categories of prisoners' constitutional claims under *Turner* v. *Safley*, 482 U.S. 78 (1987), and wrongly shifted the burden of proof from respondents to petitioner. But RLUIPA was enacted to provide a statutory alternative to the *Turner* standard, and it explicitly places the burden of proving compelling interest and least restrictive means on respondents.

ARGUMENT

I. RLUIPA Enacts a Statutory Standard of Compelling Interest and Least Restrictive Means.

A. The courts below required near-total deference to prison officials under RLUIPA — so much deference that in order to prevail, an official need simply name a penological interest in some way affected by the prisoner's religious claim. That is not what RLUIPA says.

The Religious Land Use and Institutionalized Persons Act provides: "No government shall impose a substantial burden on the religious exercise of a [prisoner]" unless "the government demonstrates that imposition of the burden on that person — (1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a).

This statutory standard was enacted to supplement the much weaker standard for prisoner claims under the Free Exercise Clause, which requires only that the burden be "reasonably related to legitimate penological interests." *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 349 (1987) (quoting *Turner* v. *Safley*, 482 U.S. 78, 89 (1987)). It is that weaker constitutional standard that the lower court's analysis parallels. But RLUIPA's statutory rule is different.

RLUIPA creates a distinct statutory standard providing "heightened protection" for religious exercise. *Cutter* v. *Wilkinson*, 544 U.S. 709, 714 (2005). RLUIPA allows "prisoners to seek religious accommodations under the same standard as set forth in RFRA [the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*]." *Gonzales* v. *O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 436 (2006). That standard is "the strict scrutiny test." *Id.* at 430.

The core provisions of RLUIPA were copied nearly verbatim from RFRA; these provisions are *in pari materia* and substantively identical. Compare 42 U.S.C. § 2000cc-1(a) (RLUIPA) with 42 U.S.C. § 2000bb-1 (RFRA). But Congress's careful coordination of the two statutes did not stop there. Section 7 of RLUIPA amended RFRA to eliminate all references to state law (thus conforming RFRA to the Court's decision in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997)), and to incorporate into RFRA the definition of "religious exercise" enacted in RLUIPA. See 114 Stat. 803, 806 (2000) (RLUIPA); 42 U.S.C. § 2000bb-2(4) (RFRA). When one

statute amends an earlier, related statute, this is further reason to construe the two statutes together. See, *e.g.*, *Abbott* v. *United States*, 131 S. Ct. 18, 28-29 (2010).

Both statutes provide that government may substantially burden the exercise of religion only if it "demonstrates" that it has used the least restrictive means to further a compelling interest. 42 U.S.C. § 2000cc-1(a) (RLUIPA); 42 U.S.C. § 2000bb-1(b) (RFRA). Both statutes define "demonstrates" as "meets the burdens of going forward with the evidence and of persuasion." 42 U.S.C. § 2000cc-5(2) (RLUIPA); 42 U.S.C. § 2000bb-2(3) (RFRA); *O Centro*, 546 U.S. at 428 (interpreting this provision of RFRA).

Both statutes require the government to make this demonstration with respect to the particular person whose religious exercise is burdened. It is "imposition of the burden on that person," 42 U.S.C. § 2000cc-1(a) (RLUIPA), or "application of the burden to the person," 42 U.S.C. § 2000bb-1(b) (RFRA), that must serve a compelling interest by the least restrictive means. "[T]hat person," or "the person," refers to "the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430-31.

It is therefore insufficient to permit prison officials to defeat a RLUIPA claim merely by asserting a general interest in prison security. Of course prison officials have an interest in security, but that is not the question. "[I]nvocation of such general interests, standing alone, is not enough." *Id.* at 438. The question is whether respondents' refusal to allow a religious exception for a half-inch beard is the least restrictive means of furthering a compelling interest. The Court

must look "beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431.

RLUIPA is also broader than RFRA in one respect. RLUIPA provides that "[t]his chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

B. The legislative history of RLUIPA indicates that the statutory standard of compelling interest and least restrictive means is to be administered "with due deference to the experience and expertise of prison and jail administrators." Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. 16698, 16699 (2000) (quoting S. Rep. 103-111 at 10 (1993)).[4] The Court took note of this legislative history in *Cutter*, 544 U.S. at 723, and we address it fully below. See Part III.C, *infra*. But at the outset, it is important to note that legislative history cannot override statutory text. When a prison system's witnesses are uninformed and lacking in expertise, little or no deference is due. And as we shall explain, neither the statutory text nor the legislative history permits the abject deference accorded by the courts below.

II. Respondents Have Substantially Burdened Petitioner's Exercise of Religion.

Respondents have not seriously disputed that they substantially burden petitioner's religious exercise.

---

[4] This report was the Senate Judiciary Committee's report on RFRA. It is reprinted in 1993 U.S.C.C.A.N. 1892.

RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Here, petitioner's obligation to grow his beard *is* compelled by his understanding of the Prophet Muhammad's teachings. See pp. 5-6, *supra*. And respondents have never contested petitioner's sincerity.

Respondents have explicitly burdened this religious exercise: If petitioner violates the rule against beards, he must "suffer the consequences." ECF No. 13 at 6. These consequences include progressively escalating disciplinary action, J.A. 18, 29, 55, 145, 164, including loss of privileges, punitive segregation, punitive work assignments, and loss of good-time credits. Ark. Admin. Code 004.00.1-III(C). An outright prohibition of a mandatory religious practice, backed by physical punishment, is a substantial burden under any plausible standard. See, *e.g.*, *Yellowbear* v. *Lampert*, 741 F.3d 48, 56 (10th Cir. 2014) ("flatly prohibiting Mr. Yellowbear from participating in an activity motivated by a sincerely held religious belief" imposes substantial burden); *cf. Wisconsin* v. *Yoder*, 406 U.S. 205, 218 (1972) (Amish were burdened where the "law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs").

Respondents did not argue in the Eighth Circuit, and that court did not hold, that petitioner's religious exercise is not substantially burdened. But a two-sentence passage in the magistrate's recommendations found no substantial burden on petitioner's religious exercise — because he was allowed to practice *other* elements of his religion. J.A. 176-77. That is, because petitioner could obtain a pork-free diet and order religious materials, respondents could force him to violate

his religious obligation to grow a beard. Presumably this would work in reverse; if they let him grow his beard, maybe they could feed him pork every day.

The magistrate cited no authority for this remarkable understanding of substantial burden. It appears to be derived from a passage in *O'Lone*, 482 U.S. at 351-52, which said that prisoners' ability "to participate in other religious observances of their faith supports the conclusion that the restrictions at issue here were reasonable." *Id.* at 352. But *O'Lone* did not apply RLUIPA's statutory strict-scrutiny standard; it applied *Turner*'s rational-basis standard, which ultimately asked only whether the prison regulations were "reasonable." 482 U.S. at 351-52. And even then, it did not hold that the right to practice some elements of a religion meant that prohibiting other elements of the religion was not a burden. Rather, permission to exercise some elements of the religion was simply "a factor in the reasonableness analysis." *Id.* at 349 n.2. This was not a burden holding, and it was not a RLUIPA holding or a strict-scrutiny holding. It was an all-things-considered reasonableness holding.

Nor is *O'Lone* a relevant authority under RLUIPA. Quite the contrary: *O'Lone* is one of the principal reasons Congress applied RFRA's heightened standard to prisoners in the first place. S. Rep. 103-111 at 9-11. Respondents prohibit petitioner from complying with what he understands to be a compulsory religious obligation, and they threaten severe and accumulating penalties if he disobeys their prohibition. This prohibition substantially burdens petitioner's exercise of religion.

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

Because respondents have imposed a substantial burden on petitioner's religious exercise, the burden shifts to them to demonstrate that imposing that burden is the least restrictive means of furthering a compelling governmental interest. Respondents have not carried that burden. They have not proved a compelling interest in refusing a religious exception for half-inch beards. They certainly have not proved that refusing such an exception is the least restrictive means of furthering any compelling interest. And they have no plausible reason for prohibiting what at least forty-four American prison systems permit.

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

1. The experience of other prisons is directly relevant to respondents' claim of compelling interest. In deciding to apply strict scrutiny to a constitutional claim involving racial segregation in prisons, this Court relied on the fact that "[v]irtually all other States and the Federal Government manage their prison systems without reliance on racial segregation." *Johnson* v. *California*, 543 U.S. 499, 508 (2005).

The Court has relied on the experience of other prisons even at lower levels of scrutiny. In a case applying intermediate scrutiny, the Court said that "the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction." *Procunier* v. *Martinez*, 416 U.S. 396, 414 n.14 (1974). And even under the highly deferential form of rational basis review applied to prisoners' constitutional claims, this Court has looked

to the practice of federal prisons to establish "obvious, easy alternatives" to a challenged state regulation. *Turner*, 482 U.S. at 98.

The experience of other prisons is relevant *a fortiori* under RLUIPA's standard of compelling interest and least restrictive means. Most courts of appeals applying RLUIPA require prison officials to explain why solutions that work in other jurisdictions would not work in theirs. Thus, in *Garner* v. *Kennedy*, 713 F.3d 237, 247 (5th Cir. 2013), the court found it "persuasive that prison systems that are comparable in size to Texas's — California and the Federal Bureau of Prisons — allow their inmates to grow beards, and there is no evidence of any specific incidents affecting prison safety in those systems due to beards." Similarly, in *Warsoldier* v. *Woodford*, 418 F.3d 989, 999 (9th Cir. 2005), where a Native American prisoner sought a religious exemption from restrictions on long hair, the court found no compelling interest, in part because "[p]risons run by the federal government, Oregon, Colorado, and Nevada all meet the same penological goals without such a policy."

This reasoning has not been limited to grooming cases. In a case of a prisoner prohibited from preaching during worship services, prison officials failed strict scrutiny "in the absence of any explanation * * * of significant differences between [defendant's prison] and a federal prison that would render the federal policy unworkable." *Spratt* v. *R.I. Dep't of Corr.*, 482 F.3d 33, 42 (1st Cir. 2007). And in a challenge to a rule limiting the number of religious books a prisoner could keep in his cell, defendants failed strict scrutiny in part because their "other institutions" did not enforce a similar rule. *Washington* v. *Klem*, 497 F.3d 272, 285 (3d Cir. 2007); *accord Shakur* v. *Schriro*, 514 F.3d 878, 890

(9th Cir. 2008) (reinstating a claim against Arizona officials where the plaintiff "point[ed] to a prison in Washington State that apparently serves a Halal meat diet to Muslim inmates 'that is minimally more expensive than the standard diet'") (citation omitted).

Even in the Eighth Circuit, a recent decision relied on the practice of prisons in other jurisdictions: "widespread allowance of tobacco in prison lends substantial credence to [the inmates'] position that less restrictive alternatives to a complete ban on the use of tobacco in Lakota religious ceremonies [are] possible." *Native Am. Council of Tribes* v. *Weber*, No. 13-1401, 2014 WL 1644130, at *8 (8th Cir. Apr. 25, 2014) (quoting district court; alterations by Eighth Circuit). But as further explained in Section III.D, *infra*, the Eighth Circuit took the opposite view in this case. J.A. 186-87.

This Court made a similar point in *O Centro*. There, the plaintiffs sought a religious exception from federal drugs laws for the use of hoasca, a sacramental tea containing a hallucinogenic drug. 546 U.S. at 425-26. As in this case, the government claimed a compelling interest in refusing a religious exception. But the Court unanimously rejected the government's defense as unproven. The Court relied in part on the fact that federal drug laws contained an exception for religious use of peyote, *id.* at 433-34, and on the fact that the Attorney General had authority to create additional exceptions, *id.* at 432-33. These exceptions undermined the government's claim of compelling interest for much the same reason that exceptions in other prison systems do here: They show from actual experience that uniform, no-exceptions enforcement of the challenged rule is not necessary to further a compelling government interest.

2. In this case, at least forty-four American prison systems would permit petitioner's half-inch beard, either for all prisoners or for prisoners with religious reasons to grow a beard. Sidhu, 66 U. Miami L. Rev. at 964-72. Forty-one jurisdictions — thirty-nine states, the United States, and the District of Columbia — permit beards with no fixed length limitations; three permit beards with length limitations of a half inch or more. *Ibid.*

Of the forty-one jurisdictions without length limitations, thirty-four permit beards for *all* prisoners; seven (Arizona, New Mexico, New York, North Dakota, Ohio, Pennsylvania, and West Virginia) restrict beards but allow religious exemptions. Two of these seven permit *all* prisoners to grow beards longer than what petitioner seeks — an inch in New York and three inches in Pennsylvania; the religious exemption is for prisoners who require even longer beards. *Id.* at 968-69. And since Professor Sidhu's article was published, Ohio amended its rules and now permits beards for all prisoners, with no length limits. Ohio Admin. Code 5120-9-25(F).

Three jurisdictions have length limitations: Idaho (half an inch), Mississippi (half an inch), and Indiana (1-1/2 inches). Sidhu, 66 U. Miami L. Rev. at 971-72. But since Professor Sidhu's article was published, Indiana has repealed its length limitation and now allows beards of any length. Indiana Department of Correction, Policy and Administrative Procedures, 02-01-104(X), http://www.in.gov/idoc/files/02-01-104_AP_Offender_Grooming____11-1-2013.pdf. These three states bring to forty-four the number of prison systems that would permit petitioner's half-inch beard. And

forty-two of those jurisdictions (all but Idaho and Mississippi) permit beards *longer* than the half inch that petitioner seeks.

These jurisdictions typically require the beard to be kept "neat and clean." Sidhu, 66 U. Miami L. Rev. at 964-70. Some impose qualitative limits for hygiene, sanitation, identification, or security, which enable them to deal with any actual problems on a case-by-case basis. *Id.* at 965-70 (Illinois, Kansas, Maryland, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Pennsylvania, Tennessee, Washington, Wisconsin, and Wyoming). But they do not have rules that simply prohibit beards, and few limit beards to some arbitrary length.

Only seven or eight jurisdictions would prohibit petitioner's half-inch beard: Alabama, Arkansas, Florida, Georgia, South Carolina, Texas, Virginia, and possibly Louisiana. Even in most of these states, beards are not completely prohibited. Four (Alabama, Arkansas, Florida, and Georgia) allow beards for medical reasons. *Id.* at 970-71; J.A. 164; pp. 2-3, *supra*.

A fifth state (Texas) has been enjoined under RLUIPA to allow a Muslim inmate to grow a quarter-inch beard. *Garner* v. *Kennedy*, 713 F.3d 237 (5th Cir. 2013). A sixth (Virginia) lost a similar appeal, *Couch* v. *Jabe*, 679 F.3d 197 (4th Cir. 2012), and now allows all inmates to grow quarter-inch beards.[5] In both cases, the plaintiff prisoners received all the relief they requested. See *Garner*, Appellee's Brief 2; *Couch*, 679

[5] Virginia Department of Corrections, Operating Procedure: Offender Grooming and Hygiene, No. 864.1 § IV.F.1 (2013), at http://vadoc.virginia.gov/about/procedures/documents/800/864-1.pdf.

F.3d at 199. It was the plaintiffs' caution and defendants' resistance to more than minimal change, and not any holding of the courts, that limited the beards in these cases to a quarter inch.

A seventh state (Louisiana) has a grooming policy that appears not to mention beards at all. Sidhu, 66 U. Miami L. Rev. at 972. Because the policy on hair is quite restrictive in tone, we assume that *perhaps* it is interpreted to also apply to facial hair. Only one state (South Carolina) clearly prohibits all beards. *Ibid.*

Large municipal corrections systems also allow beards. For example, New York City, which has a jail population nearly as large as Arkansas's prisons,[6] allows prisoners to "adopt hair styles, including facial hair styles, of any length." Rules of the City of New York, ch. 1, tit. 40 § 1-103(e)(1), at 5 (2008), http://www.nyc.gov/html/boc/downloads/pdf/minimum_standards.pdf.

3. The American Correctional Association (ACA) also recommends that prisoners be allowed to grow beards. The ACA, in cooperation with the Commission on Accreditation for Corrections, promulgates widely followed *Standards for Adult Correctional Institutions* (4th ed. 2003). One of respondents' witnesses recognized the ACA as a source of training, J.A. 101, and respondents' policies cite ACA standards as relevant.

---

[6] See City of New York Department of Correction, *Department of Correction,* at 2, http://www.nyc.gov/html/ops/downloads/pdf/pmmr2014/doc.pdf (FY2012 average daily inmate population was 12,287); Arkansas Department of Correction, *Annual Report 2012,* at 1, http://adc.arkansas.gov/resources/Documents/2012_Annual_Report_final.pdf (inmate population at the end of FY2012 was 14,805); *cf.* J.A. 102 (respondents' witness estimating 15,000 to 17,000).

See Administrative Directive 98-04, Department of Correction Regulation 840, App., *infra*, 12a, 14a.

Standard 4-4283, entitled "Freedom in Personal Grooming," provides that: "Written policy, procedure, and practice allow freedom in personal grooming except when a valid interest justifies otherwise." *Standards* at 77. The official comment states: "Inmates should be permitted freedom in personal grooming as long as their appearance does not conflict with the institution's requirements for safety, security, identification, and hygiene. All regulations concerning personal grooming should be the least restrictive necessary." *Ibid.*

The lack of detail in the stated exception leaves some exploitable ambiguity, but the plain tenor of this standard is against restrictive grooming rules. Understandably, respondents' grooming policy does not cite this standard.[7] This standard supports the many state prison rules that permit beards with no fixed length limit but with a power to deal with any issues of security or hygiene if they ever arise. This standard has been in effect, in nearly identical language, for more than thirty years; it originated as Standard 2-4335 in 1981. *Standards for Adult Correctional Institutions* 87-88 (2d ed. 1981). And this is for all prisoners, not just for those with religious needs.

---

[7] Defendant's Administrative Directive 98-04 cites only the ACA's standard on personal hygiene supplies, which was Standard 3-4324 in the third edition and Standard 4-4342 in the fourth edition. App., *infra*, 12a, 14a. It conspicuously avoids citing the ACA's standard on "Freedom in Personal Grooming," which was Standard 3-4270 in the third edition and Standard 4-4283 in the fourth edition.

4. It is almost impossible to imagine a compelling interest in refusing religious exceptions to a rule that is in tension with accreditation standards and that forty-four jurisdictions reject. Certainly respondents cannot "demonstrate[]" a compelling interest without considering the experience in these jurisdictions and producing actual evidence of problems caused by half-inch beards.

But respondents' witnesses knew nothing of that experience and had shown no interest in learning. Petitioner asked why Arkansas could not do what other states did. J.A. 101-02, 105-06. Respondents' counsel asked one of them what he knew about the practice in other states. J.A. 119. The magistrate asked. J.A. 110-11, 127. They knew nothing:

> Q [by Ms. Cryer, counsel for respondents] Are you aware of what other states are doing, how they run their facilities, or what types of rules that they have?
>
> A [Mr. Harris] No, ma'am, not specifically. I'm really not.

J.A. 119.

> THE COURT: * * * Last question, the Ninth Circuit case, it appears that they have a grooming policy and then the Ninth Circuit allowed this beard, half inch beard, have you had any sort of correspondence, any training, or anything based on that, that the California officials have mentioned or come and spoken at any conference or anything, have they talked about what the impact has been in their prison system?

> THE WITNESS [Mr. Lay]: No, sir, I haven't had an opportunity to visit with anyone about that. As a matter of fact, I wasn't aware of that case until this came up.

J.A. 110-11. Accord J.A. 101 ("I can't tell you for what reason they've elected or chosen to go that route."); J.A. 105 ("I don't know what goes on nationally across the country"). The case the magistrate asked about, *Mayweathers*, 328 F. Supp. 2d 1086, was then 7-1/2 years old.

Mr. Harris responded to the same question: "I haven't heard anything, any consequences or — or feedback on since what happened in California, and I'm trying to recall anything negative or positive about their grooming change * * * ." J.A. 127.

5. Mr. Lay testified that the Cummins Unit, where petitioner was then housed, was different from prisons in California and New York because it has a farm and open barracks instead of cells. J.A. 101-02. See *Smith* v. *Ark. Dep't of Corr.*, 103 F.3d 637, 640 (8th Cir. 1996) (describing an open dormitory in the Cummins Unit that housed 86 inmates with no guard). In *Smith*, and apparently in the usage of prison administrators, these open sleeping rooms are often called "dormitories." See *id.* at 640, 642.

Mr. Lay did not explain the relevance of these allegedly unusual features of the Cummins Unit. Presumably he meant that open barracks and farm labor create more opportunities for one prisoner to pass contraband to another. But when large numbers of inmates are left unguarded, they do not need beards to enable them to pass contraband. And respondents' ban on beards is not limited to the Cummins Unit; it applies to every unit, whether or not it has a farm and

open barracks. In fact, after the record closed, respondents moved petitioner to the Varner Unit, where he is housed in a one-man cell and is still subject to the rule against beards.

More fundamentally, prison farms and open barracks are hardly unique to the Cummins Unit. Open barracks or dormitories are ubiquitous,[8] and farms are common.[9] Thus, this testimony only underscores that

---

[8] See, *e.g.*, Federal Bureau of Prisons, *About Our Facilities*, http://www.bop.gov/about/facilities/federal_prisons.jsp (minimum security federal prison camps "have dormitory housing"; low security institutions have "mostly dormitory or cubicle housing"); California Department of Corrections and Rehabilitation, *Corrections: Year at a Glance* 13, 39 (2011), http://www.cdcr.ca.gov/News/docs/2011_Annual_Report_FINAL.pdf (29.8% of California inmates—or roughly two times Arkansas's entire prison population—are in housing custody level 1 or 2, which involve "[o]pen dormitories"); New York Department of Corrections and Community Supervision, *Occupancy, Staffing and Safety*, http://www.doccs.ny.gov/FactSheets/Occupancystaffingandsafety09.html (New York prisons have "numerous open dormitories and housing units at more than 50 correctional facilities. In prototype dorms, 60 inmates sleep in one large room."); James Peguese & Robert Koppel, *Managing High-Risk Offenders in Prison Dormitory Settings* (2003), http://www.aca.org/publications/ctarchivespdf/july03/peguese.pdf ("dormitory housing has grown nationwide").

[9] See, *e.g.*, Mississippi Department of Corrections, *Division of Institutions State Prisons*, http://www.mdoc.state.ms.us/division_of_institutions%20State%20Prisons.htm (reporting that prisoners worked 75,000 man-days on prison farm in 2012); Ohio Department of Rehabilitation and Correction, *Agricultural and Farm Services*, http://www.drc.ohio.gov/web/ag_farm.htm (describing operations on 19,000 acres of prison farm land); Oklahoma Department of Corrections, *2012 Yearbook* 69-70, http://www.ok.gov/doc/documents/2012%20yearbook.pdf (reporting that Oklahoma prisoners produced more than 1.1 million pounds of vegetables, 2.9 million pounds of meat, and large quantities of dairy products in 2012); see also California, *Corrections*

respondents' witnesses knew little or nothing about other prison systems. The allegedly unusual conditions at the Cummins Unit are not at all unusual, and they do not explain why rules that work in forty-four other jurisdictions would not work in Arkansas.

6. The Eighth Circuit treated the experience of other jurisdictions as nearly irrelevant: "although prison policies from other jurisdictions provide some evidence as to feasibility of implementing less restrictive means of achieving prison safety and security, it does not outweigh deference owed to expert judgment of prison officials who are more familiar with their own institutions." J.A. 186-87 (citing *Fegans*, 537 F.3d at 905).

The Eighth Circuit also said that courts must defer to prison officials "absent substantial evidence in record indicating that response of prison officials to security concerns is exaggerated." J.A. 186 (citing *Fegans* 537 F.3d at 903). In other words, the Eighth Circuit did not require respondents to prove a compelling interest in enforcing a rule that forty-four other jurisdictions do not enforce. Rather, it required *petitioner* to disprove respondents' claim of compelling interest with "substantial evidence," and it held that the evidence of many other jurisdictions was not sufficiently substantial. This rule impermissibly reverses

---

Year at a Glance, *supra* note 8, at 19 (describing work of 4,200 inmates in "Conservation Camps," where inmates provide fire suppression, flood and earthquake response, and other emergency services); North Carolina Department of Public Safety, *Dan River Prison Work Farm*, https://www.ncdps.gov/index2.cfm?a=000003,002240,002371,002384,002289 (describing how prisoners operate a farm, pick up litter, and restore forests, parks, and lakes "all across North Carolina"). All of these states would allow petitioner's half-inch beard.

RLUIPA's explicit allocation of the burdens of going forward with the evidence and of persuasion. 42 U.S.C. §§ 2000cc-1(a); 2000cc-5(2); see also *O Centro*, 546 U.S. at 428 (applying the identical provision of RFRA, 42 U.S.C. § 2000bb-2(3)).

B. Respondents' Implausible and Conclusory Testimony Proved Neither Compelling Interest Nor Least Restrictive Means.

Respondents' witnesses offered four reasons why they could not permit a half-inch beard, even for religious reasons. None of these reasons withstands analysis. Considered separately or in combination, they do not come close to showing that respondents' ban on beards is the least restrictive means of furthering a compelling interest.

1. Hiding contraband.

a. Respondents' witnesses testified that prisoners can hide contraband in a half-inch beard. J.A. 80, 84-85, 116-17, 123, 126. This is the testimony that the magistrate found "almost preposterous." J.A. 155. They gave no examples of anyone ever having actually hidden contraband in any beard of any length, let alone a half-inch beard.

Mr. Harris particularly emphasized cell-phone SIM cards, and he brought one with him. The magistrate measured the SIM card at 9/32 by 13/32 of an inch. J.A. 129. That is less than a tenth of an inch shorter than petitioner's beard. J.A. 129. Mr. Harris did not explain how petitioner could have put this object into his beard, made it stay in place, and ensured that it would not be visible at any point.

b. The question is not whether it is conceivably possible to hide some extremely small thing in a half-inch

beard. It cannot be that any incremental change in risk, however slight, furthers a compelling interest — much less that it does so by the least restrictive means. That approach would justify almost any imaginable restriction on prisoners and render RLUIPA a dead letter. "[T]he government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown* v. *Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 n.9 (2011); see also *Bolger* v. *Young Drug Prods. Corp.*, 463 U.S. 60, 73 (1983) (a rule that "provides only the most limited incremental support" for the government's interest is not justified even under the more relaxed standards for laws regulating commercial speech).

The question is whether a half-inch beard significantly expands an inmate's ability to conceal contraband, or put another way, whether the government has carried its burden of demonstrating that allowing half-inch beards for religiously motivated inmates would increase the flow of contraband in the prison — and not just trivially or incidentally. Respondents' evidence gives no reason to believe that the flow of contraband would increase in the slightest.

c. Respondents' witnesses agreed that prisoners hide contraband in many places, including clothes, socks, shoes, boots, coats, and body cavities. J.A. 98, 115. The SIM card "can be concealed just about anywhere." J.A. 116. Pieces of phones "have been walked down the hall in flip flops." *Ibid.* Officers smuggle contraband for prisoners. J.A. 122, 132. "[T]here's many different ways" for contraband to enter the prison. J.A. 132. "They do hide it in a lot of different places." J.A. 106. "There's many ways" to carry or pass contraband, and the half-inch beard is not the only one, "not by a long shot." J.A. 126.

Although respondents' grooming policy prohibits hair that reaches below the middle of the nape of the neck, it does not limit the length or quantity of hair on top of the head. See Administrative Directive 98-04.B, App., *infra*, 11a. Responding to petitioner during cross-examination, Mr. Lay said that "you could hide something in hair the length of yours or mine, but that's not excessive according to the policy." J.A. 106. That is, not even respondents believe that it is necessary or appropriate to eliminate every hiding place that could conceivably be eliminated. They do not require all prisoners to shave their heads, go naked, or dress only in Speedos. The difference between permitting substantial hair on top of the head and prohibiting all hair on the front of the face would seem to rest on little more than a vague sense of social convention.

d. Respondents were reduced to arguing that a half-inch beard provided one more place in which to hide things. J.A. 106, 126. If the magistrate is right that nothing could be hidden in a half-inch beard, then it does not even provide one more place. But if it does, that additional hiding place has no appreciable effect on the risk of concealed contraband, because there are ample other places to hide anything so small that it could conceivably be hidden in a half-inch beard.

The magistrate's assessment, and the other possibilities to which respondents' witnesses testified, show this extra hiding place to be an especially ineffectual one. It would be far easier and safer for a prisoner to drop a SIM card, or any other small item, in a shoe or a pocket or the hem or lining of his clothes. The item would be much better hidden, and gravity would work to pull the item to the bottom of its hiding place. If the same item were hidden in a half-inch beard, gravity

would work to pull it out of the beard and into plain view.

The magistrate fully recognized the significance of all these other hiding places. In his written recommendations, adopted by the District Judge, he said: "Although Plaintiff makes compelling arguments that an inmate could easily hide contraband in many places other than a one-half inch beard, the prison officials are entitled to deference." J.A. 168. Deference cannot trump evidence in this way, and cannot eliminate the government's obligation to "demonstrate[]" that its solution is necessary. No deference is due when testimony is implausible, there are "compelling arguments" to refute it, and the basis of those compelling arguments — the availability of many other hiding places — is undisputed. Courts are not required to believe the sky is falling just because prison officials say so.

Given the many other hiding places available to prisoners, and the clear superiority of most of those hiding places, permitting a religiously motivated half-inch beard would not increase the risk of contraband even incrementally. And as already noted, that cannot be the standard. Certainly respondents did not prove that prohibiting half-inch beards is the least restrictive means of furthering a compelling interest.

e. The availability of many other hiding places also renders respondents' policy substantially underinclusive, which further prevents them from demonstrating a compelling interest and least restrictive means. In *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546-47 (1993), this Court held that a ban on animal sacrifice failed strict scrutiny because the city "fail[ed] to enact feasible measures to restrict

other conduct producing substantial harm or alleged harm of the same sort" — such as killing animals for other reasons and improper disposal of garbage by restaurants, *id.* at 543-45. As the Court explained, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* at 547 (internal quotation and citation omitted).

The Court applied the same principle in *O Centro*, where it held that the government's interest in restricting hoasca was not compelling, because it already made an exception for peyote. 546 U.S. at 433 (quoting *Lukumi*). And courts of appeals have applied the same principle under RLUIPA, concluding that a prison's interest is not compelling when it permits substantial conduct that undermines that interest. See, *e.g.*, *Yellowbear*, 741 F.3d at 60 (prison lacked a compelling interest in refusing lock downs for religious needs when it used lock downs for medical needs); *Couch*, 679 F.3d at 204 (prison officials failed "to explain how the prison is able to deal with the beards of medically exempt inmates but could not similarly accommodate religious exemptions"); *Washington*, 497 F.3d at 283-84, 285 (prison had no compelling interest in a ten-book limit when it allowed larger amounts of newspapers, magazines, and other personal property); *Spratt*, 482 F.3d at 42 (prison lacked a compelling interest in stopping inmates from preaching when they were "free to become leaders under other circumstances").

Here, where the prison does not eliminate numerous hiding places that are clearly superior to a half-inch beard — including clothes, socks, shoes, boots, and coats — and does not eliminate other potential hiding places that are at least no worse than a half-

inch beard — such as hair on top of the head — its interest in eliminating a half-inch beard is not compelling.

f. Nor is a complete ban on half-inch beards the least restrictive means. If respondents believe it is possible to hide things in a half-inch beard, its officers can search the beard — just like they search any other potential hiding place. And if officers are reluctant to run their hands through a prisoner's beard, J.A. 98-99, they can direct prisoners to vigorously run their own hands through their beards to dislodge anything hidden there. Respondents have ample means to enforce such an order: "Failure to obey verbal and/or written orders of staff" is a serious offense for prisoners, subject to the highest class of penalties. Ark. Admin. Code 004.00.1-III(B)(12-1) (stating the rule and its penalty class); *id.* at (C)(1)(a) (specifying the penalties for that class).

Respondents can also require inmates to shave their beard if contraband is ever found there. They already do this for contraband hidden in the hair: "If at any time concealment of contraband is detected in the hair, the warden/center supervisor may prescribe an individual grooming policy." Ark. Admin. Code 004.00.1-I(C)(6). In other words, respondents do not fight contraband in the hair by requiring all prisoners to shave their heads. Rather, they deter such conduct by threatening to take away a prisoner's right to choose his own hair style, and they end his ability to hide contraband there if he abuses the choice.

There is no reason why this less restrictive rule could not apply to beards. For prisoners with sincerely held religious obligations to wear a beard, the deterrent effect of threatening to shave the beard would be

substantial — indeed it would likely be greater than the deterrent effect on other inmates of threatening to shave their head. And for any inmate, shaving the beard would eliminate the possibility of a repeat violation.

Other states apply just such rules to beards. Missouri's rules, for example, permit all prisoners to "have whatever hair and beard length they prefer;" require prisoners to comply with instructions pertaining to searching their beards; and provide for shaving the beard if contraband is concealed there. Sidhu, 66 U. Miami L. Rev. at 966; see also Ohio Admin. Code 5120-9-25(J) ("The rules infraction board may indefinitely restrict the style or length of hair of any inmate who is convicted of concealing contraband in his hair or facial hair * * * ."). Other prison systems similarly permit beards but explicitly leave room to address hygiene or security issues case-by-case if they ever arise. See p. 25, *supra*.

2. Changing appearance.

Mr. Lay testified that escaped prisoners can alter their appearance by shaving their beards. J.A. 80, 96. He provided no examples of this ever having happened in any jurisdiction. He described only one incident thirty or forty years ago in which a clean-shaven prisoner escaped and then grew a beard. J.A. 104-05. "Of course, that went the other way around." J.A. 104.

Petitioner asked each witness why they could not require a clean-shaven photograph of each prisoner on admission, and a second photograph if he grew a beard. Mr. Lay gave a nonresponsive answer, simply listing ways in which inmates might change their appearance, and describing the problem that would exist if the prison were not permitted to require the initial

clean-shaven photo. J.A. 104. Mr. Harris said only that Warden Lay had already answered that question, and immediately returned to talking about contraband. J.A. 123. Neither offered any reason why it would be insufficient to take a clean-shaven photograph and a photograph with a beard.

In fact, respondents already require a photograph when the prisoner enters an institution and a new photograph whenever "the growth or elimination of hair, mustaches, sideburns and/or beard significantly changes your [an inmate's] appearance." Ark. Admin. Code. 004.00.1-I(C)(6). Other prison systems do the same;[10] Virginia adds a second rule, which specifically

---

[10] See, *e.g.*, Cal. Code Regs. tit. 15, § 3019 ("An inmate may also be charged for replacement of [an identity] card if a physical change in the inmate's appearance is a matter of his or her own choice and the change occurs within six months of the issue of a new or replacement card."); Ill. Admin. Code tit. 20, § 502.110(b) ("If the growth, elimination, or color change of hair, mustache, sideburns, or beard significantly changes the individual's appearance, a new identification photograph shall be taken."); Indiana Policy, § 02-01-104.X, http://www.in.gov/idoc/files/02-01-104_AP_Offender_Grooming____11-1-2013.pdf ("When a significant change occurs in an offender's appearance, a new identification picture shall be made."); N.Y. Comp. Codes R. & Regs. tit. 7, § 270.2(B)(11)(v) (Rule 100.31) ("An inmate shall pay the cost of a replacement ID card whenever the inmate's appearance is changed as a result of a beard, mustache, or change in hair length or color."); Ohio Admin. Code 5120-9-25(G) ("A new photo shall be taken whenever in the judgment of the managing officer or designee any significant change in physical appearance has taken place. Rephotographing shall be at the inmate's expense if the change in appearance is occasioned by grooming changes."); Va. Operating Procedure 864.1, *supra* note 5, § IV.B.6.a (2013) ("To insure a current likeness, identification photographs for inclusion in permanent records and on offender identification cards will be updated whenever an offender's appearance changes.").

requires a clean-shaven photograph of any prisoner who grows a beard.[11]

Moreover, respondents do not explain how their interest in identifying prisoners can be compelling when it comes to beards worn for religious reasons, but is not compelling when it comes to quarter-inch beards worn for medical reasons. In *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359 (3d Cir. 1999) (Alito, J.), the Third Circuit confronted a similar situation and held that a police department had no compelling interest in prohibiting officers from wearing beards grown for religious reasons when it already allowed beards grown for medical reasons. As the court explained: "The Department does not contend that these medical exemptions pose a serious threat to the safety of the members of the force or to the general public, and there is no apparent reason why permitting officers to wear beards for religious reasons should create any greater difficulties in this regard." *Id.* at 366. Here, there is no reason why permitting petitioner to wear a quarter-inch beard for medical reasons would not create the same supposed identification difficulties as a half-inch beard for religious reasons.

3. Measuring half an inch.

Mr. Lay testified that it would be difficult to determine the length of beards and to manage half-inch

[11] Va. Operating Procedure 864.1, *supra* note 5, § IV.B.6.d ("Each offender who desires to have a beard shall notify the Unit manager (major institutions) or Lieutenant (field units and work centers) so that separate identification photos can be maintained in VACORIS showing the offender without facial hair and with facial hair.").

beards for 15,000 prisoners. J.A. 80, 107. But respondents already allow quarter-inch beards for medical reasons. J.A. 80, 164. They do not explain how they can administer a quarter-inch limit but not a half-inch limit, and no explanation is possible. As Mr. Lay volunteered, "you could start, I guess, with a particular clipper guard that's a particular length." J.A. 84. Or the warden's office could keep a ruler, or a popsicle stick or tongue depressor with a half-inch mark, in case of any dispute.

It is also absurd to predict that all 15,000 prisoners will want to grow beards. Most men do not want beards, and only those with religious motivations are protected by RLUIPA. The magistrate dismissed Mr. Lay's fear of "having to manage 15,000 people with beards" as not at issue. J.A. 103. Yet Mr. Harris still refused to concede that "not every inmate in the Department of Correction is going to grow a beard." J.A. 122-23. This kind of testimony does not demonstrate a compelling interest. Rather, it demonstrates that respondents refused to take RLUIPA or petitioner's claim seriously, and were willing to give wholly implausible testimony in support of imaginary problems.

Mr. Lay also testified about a dispute between petitioner and an inmate barber who cut his beard too short. J.A. 81-83. Petitioner testified that the barber "tried to shave it nearly all the way off," even after petitioner twice told the barber that he had a court order permitting a half-inch beard. J.A. 70-71. Mr. Lay testified that the barber claimed that petitioner had told him nothing. J.A. 82. The barber did not testify, and the magistrate made no findings concerning the incident.

What is clear from the testimony of both witnesses is that this was not a dispute about the meaning of half an inch. Rather, this was a misunderstanding (the barber's alleged view) or disregard (petitioner's view) of petitioner's right to have a half-inch beard at all. The incident does not show any difficulty in trimming a half-inch beard, let alone that no prisoner should ever be permitted a beard, any more than a dispute over a bad haircut shows that all inmates should shave their heads.

If half-inch clippers, measuring sticks, and general familiarity with half an inch are not enough, respondents could also provide guards, prisoners, and barbers with a sketch or photograph of a compliant half-inch beard. At least one state already does this for rule-compliant haircuts. Sidhu, 66 U. Miami L. Rev. at 963 (reprinting Alabama's sketch).

Or respondents could do what most prison systems do: abandon any limit stated in inches and impose a qualitative limit on beards so long or so tangled that they actually create a significant potential hiding place. See p. 25, *supra*. By asking for only half an inch, petitioner has asked for an extremely conservative compromise. But if there is another solution that gives him as much or more relief and is easier for respondents to administer, they remain free to adopt the less restrictive alternative.

4. No exceptions ever.

Respondents' witnesses testified that allowing petitioner an exemption that was not available to other inmates might generate a reaction that could endanger him, or alternatively, make him a leader of inmates. J.A. 86-87, 118-19. Asked about "any inmate that is allowed to do something that other inmates are

not allowed to do," Mr. Harris answered, "That's the last thing you would want to happen in an institution." J.A. 118. Respondents again failed to offer any examples, and Mr. Harris acknowledged that petitioner had neither been targeted nor become a leader because of his beard. J.A. 121. Nor have respondents explained how they could allow beards for medical reasons even though possessing a medically-motivated beard is also "something that other inmates are not allowed to do." J.A. 118.

Nothing better illustrates respondents' refusal to take RLUIPA seriously than their claim that they can never make exceptions for anything. RLUIPA "plainly contemplates that courts would recognize exceptions — that is how the law works." *O Centro*, 546 U.S. at 434 (describing identical language of RFRA) (emphasis omitted). A law that requires religious exceptions necessarily rejects respondents' claim of a compelling interest in never granting any exception to anyone for anything.

5. Failure to consider less restrictive means.

We have organized this discussion in terms of the facts, without separately assigning each factual detail to the compelling-interest issue or the least-restrictive means issue. In light of those facts, respondents failed to demonstrate that refusing religious exceptions to their ban on half-inch beards is necessary to further any compelling government interest.

But they also failed to seriously consider and address "obvious, easy alternatives" to their policy. *Turner*, 482 U.S. at 98. Prison officials are required to explain why such alternatives would not work even under the deferential *Turner* standard of bare rational

basis review. *Ibid.* *A fortiori*, consideration of alternatives is required under RLUIPA's strict-scrutiny standard. *Cf. Fisher* v. *Univ. of Tex.*, 133 S. Ct. 2411, 2420 (2013) (requiring university to consider efficacy of race-neutral means to achieve compelling interest in diversity before considering race in admissions). Indeed, "the phrase 'least restrictive means' is, by definition, a relative term. It necessarily implies a comparison with other means." *Washington*, 497 F.3d at 284.

Thus, several circuits have held that a prison "cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Shakur*, 514 F.3d at 890 (quoting *Warsoldier*, 418 F.3d at 999); *Spratt*, 482 F.3d at 41 (same); *Couch*, 679 F.3d at 203 (government must "acknowledge and give some consideration to less restrictive alternatives"); *Washington*, 497 F.3d at 284 ("Government must consider and reject other means before it can conclude that the policy chosen is the least restrictive means."). This consideration must be "serious" and in "good faith." *Fisher*, 133 S. Ct. at 2420 (quoting *Grutter* v. *Bollinger*, 539 U.S. 306, 339 (2003)). "[T]he government's burden here isn't to *mull* the claimant's proposed alternatives, it is to *demonstrate* the claimant's alternatives are ineffective to achieve the government's stated goals." *Yellowbear*, 741 F.3d at 63 (emphasis in original).

Here there are many less restrictive alternatives to banning petitioner's half-inch beard, and respondents failed even to "mull" them, much less demonstrate that they are ineffective. The less restrictive means discussed above include:

With respect to contraband, respondents could:

1. Search beards as they search everything else about prisoners.
2. Order inmates to vigorously run their own hands through their beards.
3. Impose qualitative limits on long or tangled beards.
4. Require any inmate caught hiding contraband in his beard to shave.

With respect to identifying prisoners, respondents could:

1. Require a new photograph whenever an inmate changes his appearance.
2. Require an initial clean-shaven photograph of any inmate who grows a beard.

With respect to administering a rule permitting half-inch beards, respondents could:

1. Provide inmate barbers with half-inch clipper guards, and if necessary, train those barbers in their use.
2. Give guards and barbers a sketch or photograph of faces with compliant half-inch beards.
3. Keep a ruler or other measuring stick in the warden's office.
4. Use the same methods they already use to administer the quarter-inch limit on medical beards.

Respondents' witnesses reflexively rejected, without serious thought, every argument for half-inch beards. They claimed expertise but knew nothing of experience elsewhere or of the views of the American

Correctional Association. Their testimony was variously implausible, illogical, evasive, and "almost preposterous." J.A. 155. They simply refused to take seriously the possibility that RLUIPA may sometimes require exceptions to prison rules. Such testimony does not come close to proving a compelling government interest or least restrictive means.

C. Due Deference To Prison Administrators Cannot Create a Compelling Interest.

1. The courts below gave essentially unlimited deference to anything respondents said. They deferred to testimony that was "almost preposterous," J.A. 155; they deferred despite "compelling arguments" to the contrary, J.A. 168; they deferred despite the contrary practice of many other jurisdictions, J.A. 186-87.

Such unlimited deference is the wrong legal standard, and it effectively negates the statute. RLUIPA's legislative history contemplates "due deference to the experience and expertise of prison and jail administrators." Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. at 16699 (quoting S. Rep. 103-111 at 10 (1993)). But it does not say how much deference is due. And "due deference" cannot overcome respondents' failure to demonstrate a compelling interest or least restrictive means.

2. "Congress's 'authoritative statement is the statutory text, not the legislative history.'" *Chamber of Commerce* v. *Whiting*, 131 S. Ct. 1968, 1980 (2011) (quoting *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)). The statutory text of RLUIPA says nothing about deference. Respondents' claim to deference is based solely on legislative history,

and however much or little weight is given to legislative history, that history must be understood in a way that is consistent with the statutory text.

3. Even considered apart from the statutory text, RLUIPA's legislative history does not support giving any deference to these respondents, much less the great deference accorded them in the courts below. The legislative process that culminated in RLUIPA is summarized in the Joint Statement, which was the manager's statement on the bill, 146 Cong. Rec. at 16698. Congress enacted RLUIPA after conducting nine hearings over three years. *Ibid.*

The Joint Statement reported that "prison officials sometimes impose frivolous or arbitrary rules" and "restrict religious liberty in egregious and unnecessary ways." *Id.* at 16699. Among its illustrations were a case of jail officials who secretly recorded a sacramental confession, *Mockaitis* v. *Harcleroad*, 104 F.3d 1522, 1525 (9th Cir. 1997), and an unreported case in which a prisoner was allowed to attend Episcopal worship services but forbidden to take communion. 146 Cong. Rec. at 16699. The House report noted cases of institutions feeding pork to all prisoners, refusing to buy matzo at Passover, and even refusing offers of *free* matzo at Passover. H.R. Rep. 106-119 at 9-10. See also *Cutter*, 544 U.S. at 716 n.5 (noting examples gathered from testimony at just two of these hearings, including refusal to honor religious dietary rules, refusal to allow communion wine, and seizure or destruction of scriptures and other religious items). Plainly Congress contemplated no deference to rules or practices such as these.

But the reach of the Act is not limited to such egregious violations. The same committee report that first

mentioned due deference also repeatedly paraphrased the compelling-interest test for application to prison cases. "[O]nly regulations based upon penological concerns of the 'highest order' could outweigh an inmate's claims." S. Rep. 103-111 at 10. And the specific quotation that invoked due deference immediately continued: "At the same time, however, inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements." 146 Cong. Rec. at 16699 (quoting S. Rep. 103-111 at 10).

Courts must exercise independent judgment to distinguish genuine expertise from speculation, exaggeration, and rationalization. They must decide when expertise is genuine and how much deference is "due."

4. The legislative history says that courts will give "due deference to the experience and expertise of prison and jail administrators." Joint Statement of Senators Hatch and Kennedy, 146 Cong. Rec. 16699 (quoting S. Rep. 103-111 at 10 (1993)). It does not say deference "to the defendants in each case." It does not even say deference "to prison administrators." It says deference "to the *experience and expertise*" of prison administrators (emphasis added).

The leaders of the American Correctional Association, and of prisons in the forty-four jurisdictions that would permit petitioner's beard, are also prison administrators. It is equally consistent with the legislative history, and far more justified, to defer to the experience and expertise of all these prison administrators than to respondents' two witnesses. The cumula-

tive experience in forty-four jurisdictions is vast. If allowing beards had led to significant problems, forty-four American prison systems would not allow them.

Here, where prison officials could not support their opinions with any examples, and where they knew nothing about experience in many other prisons — experience that is contrary to their uninformed opinions — they have shown no expertise to which a court can defer. For these witnesses, no deference was due.

5. *Cutter* v. *Wilkinson* quoted the legislative history's mention of "due deference," 544 U.S. at 723, but it did not consider how deference should be operationalized. The case was before the Court on a motion to dismiss and a "thin record." *Id.* at 717. The Court considered a constitutional challenge, but no issue of statutory interpretation. The nature and extent of any deference to prison administrators remains to be determined.

No existing model of judicial deference is squarely applicable or controlling here. But two bodies of law offer suggestive analogies, and neither suggests any level of deference to these respondents.

The first useful analogy is the Court's familiar standards for pre-screening the reliability of expert-witness testimony. Fed. R. Evid. 702; *Daubert* v. *Merrell Dow Pharm.*, *Inc.*, 509 U.S. 579 (1993). These standards apply to testimony based on any form of "specialized knowledge," including knowledge based on "experience." *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 147-49 (1999); Fed. R. Evid. 702.

Both courts below deferred to the "expert judgment" of respondents' witnesses. J.A. 176, 186, 187 (quotation omitted). The magistrate emphasized the witnesses' long "experience," and their "knowledge,

which is pretty particular," *i.e.*, specialized knowledge. J.A. 155. Mr. Lay explicitly testified to his "opinion" at J.A. 85; more commonly, the witnesses described their opinions as their "concerns." J.A. 79-81, 83-84, 86, 96-97, 102, 106, 113-14, 116-19, 129-30, 134. This testimony was allegedly expert testimony within scope of Rule 702. Had the standards of *Daubert* and *Kumho Tire* been applied, most of this testimony would not have been admissible — let alone entitled to deference.

It is impossible to review the record in this case and conclude that the testimony of respondents' witnesses "'rests on a reliable foundation.'" *Kumho Tire*, 526 U.S. at 141 (quoting *Daubert*, 509 U.S. at 597). Respondents' witnesses relied on their own experience, but that experience offered no examples of the dangers they feared, and they offered no other basis for their opinions. They had no knowledge of experience in other prison systems. With at least forty-four prison systems rejecting their position, that position had little more than "minimal support" in the corrections community. *Daubert*, 509 U.S. at 594. Expert testimony requires some independent indicia of reliability, not just "the *ipse dixit* of the expert." *Kumho Tire*, 526 U.S. at 157 (quoting *Gen. Elec. Co.* v. *Joiner*, 522 U.S. 136, 146 (1997)). But *ipse dixits* — their own unsupported opinions — are all these witnesses offered.

6. Respondents would fare no better under *Skidmore* deference. *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). *Skidmore* is roughly analogous here because it defines the deference due to administrative agencies or executive branch officials that lack delegated authority "generally to make rules carrying the force of law." *United States* v. *Mead Corp.*, 533 U.S. 218, 226-

27 (2001).[12] However, even *Skidmore*'s level of deference has never been applied to judicial review of action subject to a strict-scrutiny standard.

Under *Skidmore*, courts defer only to the extent that expertise is actually demonstrated. "The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *Mead Corp.*, 533 U.S. at 228 (citations omitted). Courts may look to "all those factors which give [an agency's position] power to persuade." *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 133 S. Ct. 2517, 2533 (2013) (quoting *Skidmore*, 323 U.S. at 140).

Respondents could not possibly prevail if the Court applied *Skidmore* deference. Respondents' witnesses did not support their opinions with standards, studies, data, or even examples, and they knew nothing of experience elsewhere. They lack expertise and deserve little or no deference.

7. Whatever sort of deference might be applied, it must be administered consistently with the statutory standard of compelling interest and least restrictive means. In close cases, where defendants have offered strong evidence but the court is uncertain whether

---

[12] Congress plainly did not delegate to the state prison officials subject to RLUIPA any authority to issue legally binding rules interpreting RLUIPA. *Chevron* deference to respondents' interpretation of RLUIPA, and *Auer* deference to their interpretation of their own rules about RLUIPA, are therefore wholly inapplicable here. See *Mead Corp.*, 533 U.S. at 229-34; *Chevron (USA)* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

they have demonstrated compelling interest and least restrictive means, deference might "nudge a questionable case across the line." *Yellowbear*, 741 F.3d at 59. But deference does not mean "that prison officials may declare a compelling governmental interest by fiat." *Ibid.* As the Fourth Circuit said in another beard case, "a court should not rubber stamp or mechanically accept the judgments of prison administrators." *Couch*, 679 F.3d at 201 (quoting *Lovelace* v. *Lee*, 472 F.3d 174, 190 (4th Cir. 2006)). Otherwise, the mention of due deference in legislative history would override the statutory text.

Total deference to prison officials, with only lip service to compelling interest and least restrictive means, is not the statutory standard. The standard is compelling interest and least restrictive means, with the burdens of going forward with the evidence and of persuasion on respondents. This statutory standard must be "construed in favor of a broad protection of religious exercise." 42 U.S.C. § 2000cc-3(g). Any deference based on the legislative history must be consistent with that standard, so construed.

D. The Courts Below Applied the Deferential *Turner* Standard, Not the RLUIPA Standard.

The courts below did not apply the standard set forth in RLUIPA's text. They applied the deferential *Turner* standard, which applies only to constitutional claims. The very point of RLUIPA was to provide a statutory alternative to this standard.

1. The magistrate understood the Eighth Circuit's legal standard to be embodied in *Fegans*, 537 F.3d 897. And he understood *Fegans* to require him to rule for

respondents so long as they could "state" or "articulate" "legitimate penological needs." J.A. 154-55. But reasonable relationship to "legitimate penological interests" or "objectives" is the *Turner* standard. *Turner*, 482 U.S. at 87, 89; *O'Lone*, 482 U.S. at 349, 352 (applying *Turner* to prisoners' free-exercise claims). RLUIPA requires respondents to "demonstrate[]" their interests, not "state" or "articulate" them, and to demonstrate "compelling governmental interest" and "least restrictive means," not just any "legitimate" interest. 42 U.S.C. § 2000cc-1(a).

In his written recommendations, the magistrate eventually recited the statutory standard, J.A. 173, and recited that respondents had satisfied it, J.A. 176. But he mentioned the statutory standard only *after* he concluded that petitioner had little chance of success and *after* recommending that petitioner's motion for a preliminary injunction be denied. J.A. 169. He said that even under the statutory standard, "the court still affords a significant amount of deference to the expertise of prison officials." J.A. 174. At no point in his treatment of the evidence did he acknowledge or imply any functional difference between the statutory and constitutional standards.

2. The Eighth Circuit RLUIPA cases are mixed. Its most recent decision enforced the statute according to its terms. *Native Am. Council*, 2014 WL 1644130. But in this case, it disregarded RLUIPA's text and applied a standard drawn from prisoners' constitutional cases.

The Eighth Circuit required petitioner to disprove respondents' claims of compelling interest, and to do so with substantial evidence. J.A. 186. That rule is flatly inconsistent with the statute's explicit allocation of the burden of proof. See pp. 17, 31-32, *supra*. It is

taken, substantially verbatim, from *Pell* v. *Procunier*, 417 U.S. 817, 827 (1974). See J.A. 186 (citing *Fegans*, 537 F.3d at 903, which cited *Pell*). *Pell* was a constitutional case, and the first opinion in this Court to invoke "legitimate penological objectives," 417 U.S. at 822, which eventually became the core of the *Turner* standard.

In fact, the courts below applied a standard that was *more* deferential than *Turner*. This Court's constitutional cases engaged in substantial analysis of the challenged prison rules. *Turner*, 482 U.S. at 91-99; *O'Lone*, 482 U.S. at 350-53. In *Turner*, the Court unanimously struck down Missouri's ban on most prisoner marriages, despite testimony that the ban served security and rehabilitation interests. The Court found that testimony exaggerated, illogical, and unable to explain why the federal prison system's more individualized rule would not suffice. 482 U.S. at 97-99.

In contrast, the magistrate here reasonably understood the Eighth Circuit to require that he defer even to testimony that was "almost preposterous." J.A. 155. The Eighth Circuit summarized respondents' testimony in a single sentence, and its entire legal analysis of that testimony was contained in a second sentence. J.A. 185-87.

3. The illusory nature of RLUIPA review in the courts below is further illustrated by the courts' indifference to facts. As the magistrate explicitly recognized, this case was factually quite different from earlier Eighth Circuit cases. J.A. 154. Petitioner wanted only a half-inch beard; *Fegans* involved "shoulder-length hair" and a beard that was "uncut altogether." 537 F.3d at 904, 906. But facts didn't matter. After ac-

curately stating the factual distinctions, the magistrate immediately returned to his theme of deference. J.A. 154.

The Eighth Circuit affirmed on the authority of *Fegans*, J.A. 186-87, without even mentioning the factual differences between the cases. Petitioner's very limited request for relief required no independent analysis, because in this case, the Eighth Circuit applied a rule of effectively unlimited deference to prison officials.

* * * * *

RLUIPA, like RFRA, requires "case-by-case consideration of religious exemptions to generally applicable rules." *O Centro*, 546 U.S. at 436. It requires respondents to "demonstrate[]" that "imposition of the burden on [petitioner]" is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000cc-1(a).

When forty-four American prison systems permit religious beards, when respondents were neither aware of these policies nor able to explain how their needs were different, and when the testimony in support of their policy was implausible, conclusory, and devoid of examples, respondents did not come close to carrying their burdens of production and persuasion.

CONCLUSION

The judgment should be reversed and the case remanded for further proceedings consistent with an opinion clearly stating that RLUIPA is to be enforced according to its terms and that respondents have wholly failed to prove either compelling interest or least restrictive means.

Respectfully submitted.

ERIC C. RASSBACH
LUKE W. GOODRICH
MARK L. RIENZI
HANNAH C. SMITH
JOSHUA D. HAWLEY
ASMA T. UDDIN
The Becket Fund for Religious Liberty
3000 K St., NW, Ste. 220
Washington, DC 20007
(202) 955-0095

DOUGLAS LAYCOCK
Counsel of Record
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903
dlaycock@virginia.edu
(434) 243-8546

MAY 22, 2014

APPENDIX

Statutory and Regulatory Provisions Involved

Religious Land Use and Institutionalized Persons Act

42 U.S.C. § 2000cc. Protection of land use as religious exercise.

[omitted]

42 U.S.C. § 2000cc-1. Protection of religious exercise of institutionalized persons

(a) General rule

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

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

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

(b) Scope of application

This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of

that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. § 2000cc-2. Judicial relief

(a) Cause of action

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

(b) Burden of persuasion

[omitted; applies only to land-use and constitutional cases]

(c) Full faith and credit

[omitted; applies only to land-use cases]

(d) Omitted [by Congress]

(e) Prisoners

Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) Authority of United States to enforce this chapter

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States,

acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) Limitation

[omitted; applies only to cases where scope of statute's application is based on Commerce Clause]

42 U.S.C. § 2000cc-3. Rules of construction

(a) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated

Nothing in this chapter shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) Claims to funding unaffected

Nothing in this chapter shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) Other authority to impose conditions on funding unaffected

Nothing in this chapter shall—

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a per-

son other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this chapter.

(e) Governmental discretion in alleviating burdens on religious exercise

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) Effect on other law

[omitted; applies only to cases where scope of statute's application is based on Commerce Clause]

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

(h) No preemption or repeal

Nothing in this chapter shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this chapter.

(i) Severability

If any provision of this chapter or of an amendment

made by this chapter, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this chapter, the amendments made by this chapter, and the application of the provision to any other person or circumstance shall not be affected.

42 U.S.C. § 2000cc-4. Establishment Clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. In this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

42 U.S.C. § 2000cc-5. Definitions

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause " means that portion of the First Amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term "government"—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

[omitted]

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

[omitted; applies only to land-use cases]

Provisions Referred to or Incorporated into the Religious Land Use and Institutionalized Persons Act

Civil Rights of Institutionalized Persons Act

42 U.S.C. § 1997 (2006). Definitions

As used in this subchapter—

(1) The term "institution" means any facility or institution—

(A) which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State; and

(B) which is—

(i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;

(ii) a jail, prison, or other correctional facility;

(iii) a pretrial detention facility;

(iv) for juveniles—

(I) held awaiting trial;

(II) residing in such facility or institution for purposes of receiving care or treatment; or

(III) residing for any State purpose in such facility or institution (other than a residential facility providing only elementary or secondary education that is not an institution in which reside juveniles who are adjudicated delinquent, in need of supervision, neglected, placed in State custody, mentally ill or disabled, mentally retarded, or chronically ill or handicapped); or

(v) providing skilled nursing, intermediate or long-term care, or custodial or residential care.

* * * *

Civil Rights Act of 1964, as amended

42 U.S.C. § 2000d-4a. "Program or activity" and "program" defined

For the purposes of this subchapter, the term "program or activity" and the term "program" mean all of the operations of—

(1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or

local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2) (A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of vocational education, or other school system;

(3) (A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

ADMINISTRATIVE DIRECTIVE 98-04

SUBJECT: Personal Cleanliness and Grooming for Inmates

NUMBER: 98-04

SUPERSEDES: 98-02

APPLICABILITY: All inmates under the care and custody of the Arkansas Department of Correction

REFERENCE: AR 840 – Personal Cleanliness and Grooming for Inmates

PAGE: 1 of 2

APPROVED: Original signed by Larry Norris

EFFECTIVE DATE: 4/20/98

I. POLICY:

To provide for the health and hygiene of incarcerated offenders, and to maintain a standard appearance throughout the period of incarceration, minimizing opportunities for disguise and for transport of contraband and weapons.

II. PROCEDURES:

A. All inmates, including current inmates, are expected to conform with the grooming policy. New inmates whose hair does

not meet standards will have their hair cut during the intake process prior to being photographed.

B. Inmates' hair must be worn loose, clean and neatly combed. No extreme styles are permitted, including but not limited to corn rows, braids, dread locks, mohawks, etc. The hair of male inmates must be cut so as to be above the ear, with sideburns no lower than the middle of the ear lobe and no longer in the back than the middle of the nape of the neck. Female inmates may wear their hair no longer than shoulder length.

C. No inmates are permitted to wear or possess hair pieces.

D. No inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip. 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.

E. Nails on hands and feet will be clipped so as not to extend beyond the tips of fingers or toes.

F. Inmates will maintain standards of hygiene so as not to create a health hazard or public nuisance. If personal hygiene falls below these standards, the Chief of Security may order that the necessary steps be taken to force compliance. For mental health services and medical housing, this authority is vested in the staff person supervising the treatment area.

G. Failure to abide by grooming standards is grounds for disciplinary action.

H. Hygiene, but not grooming, standards, are applicable to individuals housed in jails operated by ADC. Grooming standards may be deemed applicable for individuals with escape histories or who have been known to smuggle weapons or contraband in their hair.

III. STANDARDS:

American Correctional Association; Standards For Adult Correctional Institutions, Third Edition, 3-4324.

ADMINISTRATIVE REGULATIONS
STATE OF ARKANSAS
BOARD OF CORRECTIONS

Section Number: DOC 840
DCP 7.17

Page Number: 1 of 1

Board Approval Date: 2/19/98

Supersedes:	**Dated:**
DOC 840	**11/30/79**
DCP 7.17	**04/29/94**

Reference: [Blank]

Effective Date: 4/20/98

SUBJECT: Personal Cleanliness and Grooming for Offenders

I. AUTHORITY:

The Board of Correction and Community Punishment is vested with the authority to promulgate Administrative Regulations by Ark. Code Ann. §§ 12-27-105, 16-93-1203 and 16-93-1205 (Michie Supp. 1995).

II. APPLICABILITY:

All offenders under the care and custody of the Arkansas Department of Correction and Department of Community Punishment (Departments).

III. POLICY:

To provide for the health and hygiene of offenders confined or incarcerated in Department facilities, and to maintain a standard appearance throughout the period of incarceration or confinement, minimizing opportunities for disguise and for transport of contraband and weapons.

IV. GUIDELINES:

A. Offenders shall be provided necessary items and services to maintain personal hygiene and grooming.

B. Grooming regulations to maintain a standard appearance shall be stated in an Administrative Directive.

V. STANDARDS:

American Correctional Association; Standards For Adult Correctional Institutions, Third Edition, 3-4324, and Standards for Adult Community Residential Services 3-ACRS-4D-10.

ADMINISTRATIVE DIRECTIVE

SUBJECT: Bathing and Personal Hygiene and Hair Care Services

NUMBER: 05-26

SUPERSEDES: [BLANK]

APPLICABILITY: Institutional Staff

REFERENCE: AR 840 – Personal Cleanliness and Grooming For Inmates

PAGE 1 of 1

APPROVED: Original signed by Larry Norris

EFFECTIVE DATE: 9/7/05

I. POLICY:

It shall be the policy of the Arkansas Department of Correction that all inmates be provided with adequate bathroom and barber facilities to enable them to maintain acceptable standards of personal hygiene. These facilities will include sufficient bathing facilities to permit inmates to shower at least three (3) times per week, temperature controls for shower units, and hair care services which comply with applicable health requirements.

II. PROCEDURES:

Housing areas in all units will provide showers, toilets, and hand washing sinks for the inmate population. Controls on the showers will not allow the water temperature to be above safe limits.

Personal hygiene items provided to the inmates include toothbrush, toothpaste, safety razor (as needed), and a pocket comb. Other personal hygiene items are available for purchase from the inmate commissary.

Hair care services will be available to all inmates.