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 CORRECTIONS, *ET AL.*,
Respondents.

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

BRIEF FOR FORMER CORRECTIONS OFFICIALS JOHN CLARK, JUSTIN JONES, CHASE RIVELAND, PHIL STANLEY AND ELDON VAIL AS AMICI CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Former Corrections Officials John Clark, Justin Jones, Chase Riveland, Phil Stanley, and Eldon Vail

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief in letters lodged with the Clerk.

respectfully submit this brief as amici curiae in support of Petitioner Gregory Houston Holt a/k/a Abdul Maalik Muhammad.

John Clark served as Assistant Director of the Federal Bureau of Prisons from 1991 to 1997. From 1989 to 1991 he served as Warden of USP-Marion, the highest security federal prison in the United States. He has over 30 years of experience in the field of corrections.

Justin Jones served as Director of the Oklahoma Department of Corrections from 2005 to 2013. He has more than 35 years of experience in the field of corrections.

Chase Riveland served as Executive Director of the Colorado Department of Corrections from 1983 to 1986 and as Secretary of the Washington State Department of Corrections from 1986 to 1997. He has 39 years of professional, management, and administrative experience in the field of corrections.

Phil Stanley served as Commissioner of the New Hampshire Department of Corrections from 2000 to 2003. He has 35 years of experience in the field of corrections.

Eldon Vail served as Secretary of the Washington State Department of Corrections from 2007 to 2011. He has over 30 years of experience in the field of corrections.

As former corrections officials, *amici* have first-hand experience administering secure prisons while accommodating religious exercise, as now codified in section 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1,

and the analogous provisions of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1. It is *amici*'s view that allowing the requested religious exemption from restrictive grooming policies would serve to *enhance* prison security, not to diminish it, and that prison officials are unlikely to satisfy RLUIPA's strict scrutiny inquiry when rejecting what has proven to be a successful religious accommodation in other comparable institutions or for other comparable prisoners, both as a matter of law and sound penal policy. We respectfully submit this brief to set forth the basis for those views.[2]

SUMMARY OF ARGUMENT

The government may not impose a substantial burden on the religious exercise of a prisoner unless doing so is necessary to a compelling state interest that cannot be furthered by less restrictive means. 42 U.S.C. § 2000cc-1. There is no dispute in this case that the hair grooming policies enforced by Arkansas corrections officials impose a substantial burden on the religious rights of the prisoner plaintiffs. There is also no dispute that the hair grooming policies in the Arkansas prison system are more restrictive than those in place in the overwhelming majority of prison systems across the country. And there is no dispute that prison officials in Arkansas never reviewed other states' less restrictive policies, never considered whether they could be implemented in

[2] Counsel affiliated with the ACLU also serve as co-counsel for Petitioners in *Knight* v. *Thompson*, 723 F.3d 1275 (11th Cir. 2013), *petition for cert. filed,* 82 U.S.L.W. 3476 (U.S. Feb. 6, 2014) (No. 13-955), which raises issues similar to those presented in this case.

Arkansas without compromising prison security, and never demonstrated that they could not. The language, history, and purpose of RLUIPA require more before rejecting a requested religious accommodation.

Petitioners have made all these points, and *amici* will not repeat them at length. *Amici*'s focus in this brief is to explain that the prison security claims made by Respondents are inconsistent with sound penal policy, contradicted by experience, and not entitled to the deference they were given by the courts below.

First, accommodating individual religious practice can have a demonstrably *positive* effect on individual adjustment and rehabilitation and, as a result, on the prison security environment as a whole. Short-sighted and unsupported policies that impede individual religious practice in the name of prison security are more likely to have the opposite effect. In *amici's* experience, allowing latitude in prisoner religious exercise meaningfully contributes to the prison security environment.

Second¸ perceptions of fairness and legitimacy play a critical role in contributing to prison security, and are likewise undermined when prison authorities enforce rules that are perceived by prisoners to be arbitrary or unreasoned. Because every prison requires the cooperation of its incarcerated inhabitants to maintain a stable environment, fairness in the exercise of prison authority promotes legitimacy and encourages self-regulation. In the context of RLUIPA, fairness takes on an unmistakably substantive character, where the state's burden

of "demonstrating" a compelling interest that cannot be furthered by any less restrictive means requires that it not only consider the less restrictive policies of other prison jurisdictions, but establish with evidence that these other policies could not work in the state's own prison system as to the particular prisoner practitioner. The arbitrary determinations of the sort at issue here do not enhance security; they undermine it.

The Eighth Circuit's decision should be reversed.

ARGUMENT

I. THE RELIGIOUS ACCOMMODATION SOUGHT BY PETITIONER POSES NO MATERIAL SECURITY RISK.

Respondents have failed to demonstrate that the requested religious accommodation here would pose a material risk to prison security when the overwhelming majority of prison systems around the country have concluded otherwise, and where Respondents did not demonstrate that conditions in Arkansas call for a different result as to Petitioner. RLUIPA requires more than the *ipse dixit* invocation of prison security before prison officials can impose a substantial burden on the religious rights of prisoners in their care.

A. A Broad Federal And State Consensus Exists That Religious Grooming Exemptions Do Not Implicate Prison Security.

Amici collectively have over 169 years of experience as corrections professionals. That experience, and the experience of their colleagues across the country, has led to a broad consensus among federal and state

correction officials that restrictive grooming policies that fail to permit religious accommodation are not required for reasons of prison security. All told, Petitioner's beard would have been allowed in at least 43 of the 52 prison jurisdictions in this country (whether outright or as a religious exemption). *See* Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 964-72 (2012) (describing the prisoner grooming policies of all U.S. prison jurisdictions).[3]

Nor have Respondents demonstrated that the policies in place in the vast majority of states presented any meaningful security problems. In fact, for the most part Respondents appear not to have been *aware* of other states' policies. Petitioner cited cases from California, *Mayweathers* v. *Terhune*, 328 F. Supp. 2d 1086 (E.D. Cal. 2004); Arizona, *Luckette* v. *Lewis*, 883 F. Supp. 471 (D. Ariz. 1995), and New York, *Fromer* v. *Scully*, 874 F. 2d 69 (2d Cir. 1989), granting or upholding religious exemptions to prison beard restrictions under RLUIPA and the First Amendment, respectively. Petitioner also presented evidence that New York requires two identification

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[3] Thirty-eight states, the United States, and the District of Columbia permit beards with no restriction on length for all prisoners or for prisoners with religious motivation; Indiana, Idaho and Mississippi limit beards to 1½, ½ and ½ inches, respectively. *See* Pet. Br. 24-25. Moreover, as a result of appellate court decisions, two of the nine states that would not permit Petitioner's requested ½-inch beard recently changed their policies to provide requested religious exemptions of ¼-inch beards. *See Garner* v. *Kennedy*, 713 F.3d 237 (5th Cir. 2013) (Texas); *Couch* v. *Jabe*, 679 F.3d 197 (4th Cir. 2012) (Virginia).

photos of bearded prisoners (to protect against the concern that a bearded prisoner can quickly change his appearance by shaving). *See* J.A. 69.[4]

Respondents' answer to this evidence was telling: their witnesses testified that they had not *considered* the less restrictive policies in other states, were not aware of what policies other states were implementing, had not considered specific means to address any change-in-appearance risk allegedly presented by beards, and speculated that these other states must not share Arkansas's goals regarding "safety" and "security" and "prevent[ing]" contraband "from

[4] The trial record in *Knight* v. *Thompson*, *see supra* n.2, contains an extensive factual development of the less restrictive grooming policies in other jurisdictions, and the various means used by other prison systems to reconcile religious accommodations with asserted security concerns in individual cases in contrast to the blanket denial imposed by Alabama and Arkansas. *See generally* Plfs.' Trial Exs. 22-55, *Knight* v. *Thompson*, Civ. Nos. 2:93-cv1404-WHA, 2:96-cv554-WHA (hereinafter "*Knight* Trial Exs."). For example, the record in *Knight* reflects that some states consider whether the prisoner requesting a religious exemption or otherwise seeking to retain a beard or long hair has a history of grooming-related misconduct (e.g., escape attempts, attempts to conceal identity). *See, e.g.*, *id.* Ex. 22 at 3, 5 (New Mexico, Ohio). Other states require the prisoner to obtain a new identification photograph when the prisoner's appearance has changed as a result of grooming preferences. *See, e.g.*, *Knight id.* at 7 (Wyoming), 24 at 1 (Alaska), 32 at 1 (Illinois), 33 at 7 (Indiana). Others impose restrictive standards on an individualized basis "[a]t any time concealment of contraband is detected in the hair." *Id.* Ex. 34 at 4 (Iowa).

coming into our institutions." J.A. 132; *see* J.A. 101-102, 105-106, 110-111, 119. Respondents offered no empirical basis to meaningfully and reliably distinguish Arkansas's correctional facilities from the 43 jurisdictions that permit the exemptions at issue.[5] *Compare Garner* v. *Kennedy*, 713 F.3d 237, 247 (5th Cir. 2013) ("We also find 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 * * * *"). This Court need not and should not credit Arkansas's conclusory justification for its restrictive policies that other states must be less concerned with prison "safety and security." J.A. 132.

B. Respondents Have Not Demonstrated That The Denial of the Requested Exemption Is The Least Restrictive Means Of Furthering A Compelling Interest.

RLUIPA prohibits the government from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution," 42 U.S.C. § 2000cc-1(a), "unless the government demonstrates that imposition of the burden on that person is in furtherance of a compelling governmental

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[5] The testimony offered by respondents in *Knight* regarding less restrictive hair length policies in 40 of the 52 U.S. prison jurisdictions was almost identical. *See* Pet. for Cert., *Knight* v. *Thompson*, No. 13-955 (U.S. Feb. 6, 2014), at 5-6 (Alabama witnesses, including its retained expert, "never * * * reviewed," were "not aware," and "never 'examined or looked into' " other states' policies); *Knight* v. *Thompson*, 723 F.3d at 1278 & n.2 (40 of 52 prison jurisdictions would have permitted requested exemption).

interest" and "is the least restrictive means of furthering that compelling governmental interest." *Id.* The key is "demonstrates": The government is put to its proof under RLUIPA, and must "meet the burdens of going forward with the evidence and of persuasion." 42 U.S.C. 2000cc-5(2).

The Eighth Circuit concluded, however, that deference to Arkansas's prison officials was warranted *in the absence of* "substantial evidence in [the] record indicating that [their] response * * * to security concerns [was] exaggerated," and notwithstanding that the Petitioner had come forward with evidence of "prison policies from other jurisdictions" applying "less restrictive means of achieving prison safety and security." J.A. 186-87.[6]

But RLUIPA requires more than just blind deference in the "absence" of evidence supporting a restriction. As this Court has recognized, Congress adopted strict scrutiny in RLUIPA specifically to redress the "'arbitrary' barriers [that] impeded institutionalized persons' religious exercise" and that had prevailed under the prior, more deferential rational basis standard. *Cutter* v. *Wilkinson*, 544 U.S. 709, 716 (2005) (quoting 146 Cong. Rec. 16,698, 16,699 (2000) (joint statement of Sens. Hatch and Kennedy) (the "Joint Statement")). That is why the statute requires prison officials to "*demonstrate,* and not just assert, that the rule at issue is the least

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[6] The Eleventh Circuit committed the same error in *Knight*, concluding that the evidence of less restrictive policies in the "strong majority" of other jurisdictions merely signified that those "other jurisdictions * * * ha[d] elected to absorb th[e] risks." *See* 723 F.3d at 1278, 1286.

restrictive means of achieving a compelling governmental interest." *O'Bryan* v. *Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003) (examining analogous statutory language under RFRA) (emphasis added).

As the First Circuit has put it, "conclusory statements about the need to protect inmate security" do not meet a governmental entity's burden under RLUIPA. *Spratt* v. *Rhode Island Dep't of Corr.*, 482 F.3d 33, 40 n.10 (1st Cir. 2007). Nor do conclusory statements about the efficacy of other, less restrictive alternatives. For if strict scrutiny means anything, it requires at minimum "some consideration [of] less restrictive alternatives" adopted by other jurisdictions, *Couch* v. *Jabe*, 679 F.3d 197, 203 (4th Cir. 2012), *accompanied by* some "explanation * * * of significant differences" that "render[ed]" the less restrictive policies "unworkable," *Spratt*, 482 F.3d at 42. *Accord Warsoldier* v. *Woodford*, 418 F.3d 989, 999 (9th Cir. 2005). In other words, the restrictive policy must be supported by "reasoned judgment" and demonstrated by facts, and not empty assertions or implausible, *post hoc* rationalizations. *Spratt* 482 F.3d at 42 n.14.

As this Court has observed, RLUIPA's legislative history alludes to the historical practice of according "due deference to the experience and expertise of prison and jail administrators." *Cutter*, 544 U.S. at 723 (citations and quotation marks omitted). But *due* deference is not *reflexive* deference, and no such "experience and expertise" was exhibited by Respondents here. And in any event, "due deference" also cannot supplant RLUIPA's explicit textual requirement that the state "*demonstrate*[] that imposition of the burden on that person is in fur-

therance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a) (emphasis added). A state cannot "demonstrate" that it has furthered a compelling governmental interest via the least restrictive means without "consider[ing]" the less restrictive policies adopted by other jurisdictions. The absence of consideration is fatal. But mere consideration is also insufficient under the statute: the state must not only consider the other policies but empirically *demonstrate* their inefficacy as to the particular practitioner.

Arkansas demonstrated no such thing. In the absence of such a showing, there is nothing to which the Court *can* defer—except the very sort of arbitrary and conclusory justification that RLUIPA was intended to eradicate. Joint Statement, *supra*, at 16,699 ("inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations" are not to receive the same deference as actual exercises of "experience and expertise" under RLUIPA); *Warsoldier*, 418 F.3d at 1000 (holding that the government failed to meet strict scrutiny where other jurisdictions were able to accommodate the same religious practice via less restrictive means). Respondents have failed to carry their burden under RLUIPA, and their speculative and unsupported conclusions are not entitled to deference.

II. REASONABLE RELIGIOUS ACCOMMODATIONS MAY ENHANCE PRISON SECURITY.

The requested exemption in this case is, in fact, far more likely to enhance prison security than diminish it. Consistent with *amici*'s own experience, an established body of academic literature supports the proposition that the free exercise of religion among prisoners contributes to prisoner adjustment to harsh prison life, and prisoner rehabilitation from prior criminal activity. Both of these effects, in turn, have a positive impact on prison security and public safety. Accordingly, Respondents' denials are not only arbitrary and unsupported; they are fundamentally short-sighted in light of their purported security objectives.

A. The Empirical Literature Demonstrates That Accommodating Prisoner Religious Practice May Promote Prison Security.

Abundant social science literature shows that respecting the right of prisoners to practice their religion promotes prisoner adjustment to prison life, promotes rehabilitation, and reduces recidivism. *Amici*'s collective experience administering prisons in Colorado, New Hampshire, Oklahoma, Washington and the Federal Bureau of Prisons confirms this research. "Broad[ly]" accommodating religious practices under RLUIPA puts prisons in the best possible position to take advantage of these very real benefits. 42 U.S.C. § 2000cc-3(g).

1. Allowing Prisoners to Practice Their Religion Can Promote Adjustment.

Allowing prisoners to practice their religion in accordance with their faiths can serve an important role in promoting prisoners' adjustment to the new environment in which they find themselves.

Studies show a robust relationship between prison policies that accommodate religious practices and a diminished deviance among prisoners. This relationship is observed across various measures of religious practice or participation, when tested against indicators of "deviance" as varied as instances of disciplinary confinement, Todd R. Clear & Melvina T. Sumter, *Prisoners, Prison, and Religion*, J. of Offender Rehab., Vol. 35(3-4), at 125, 152 (2002); the number of infractions, Thomas P. O'Connor & Michael Perryclear, *Prison Religion in Action and its Influence on Offender Rehabilitation*, J. of Offender Rehab., Vol. 35(3-4), at 11, 26, 28 (2002); and the propensity to engage in conflict with fellow prisoners, Kent R. Kerley *et al.*, *Religiosity, Religious Participation, and Negative Prison Behaviors*, 44 J. for the Sci. Study of Religion 443, 453 (2005). And the free exercise of religion retains its importance as a variable in these contexts "even after other variables [are] entered into the equation." Todd R. Clear *et al.*, *Does Involvement in Religion Help Prisoners Adjust to Prison?* NCCD Focus, Nov. 1992, at 1, 4; *see also* Byron R. Johnson, *Religious Participation and Criminal Behavior*, *in* Effective Interventions in the Lives of Criminal Offenders 3, 14-15 (J.A. Humphrey & P. Cordella eds., 2014).

Amici's experience confirms the conclusions in the literature: allowing prisoners to exercise their religious beliefs can help moderate the harsh impact of prison life. Incarceration introduces severe deprivations of freedoms, including significant impediments to the ability of religious prisoners to practice their religion at a time when those prisoners may need the solace and stability provided by their faith traditions more than ever. For some, faith and religious exercise can provide a new sense of purpose or meaning in the absence of these freedoms. SpearIt, *Religion as Rehabilitation? Reflections on Islam in the Correctional Setting*, 34 Whittier L. Rev. 29, 38-39 (2012); *see also* O'Connor & Perryclear, *supra*, at 28 (faith can contribute "hope and motivation to change" for some prisoners in the correctional setting). For others, the freedom to exercise religious beliefs can lead to engagement with religious communities within the prison, which can have its own intrinsic benefits as well as steering prisoners away from more harmful social groups like prison gangs. *See* Clear *et al.*, *supra*, at 6 (religious exercise "exposes a prisoner less to the problems of prison life"); SpearIt, *supra*, at 48. It is *amici*'s experience that allowing prisoners latitude to exercise their religious beliefs as they see fit enables prison administrators to harness the positive influence of religion in the prison setting.

2. Accommodating Religious Exercise Can Promote Prisoner Rehabilitation and Reduced Recidivism.

Permitting prisoners to practice their faiths in accordance with their beliefs also promotes

rehabilitation and moderates the likelihood of recidivism. Again, the research is abundant.

In 2012, Byron R. Johnson and Sung Joon Jang conducted "the most comprehensive assessment of the religion-crime literature to date by reviewing 270 studies published between 1944 and 2010." Byron R. Johnson & Sung Joon Jang, *Crime and Religion: Assessing the Role of the Faith Factor*, *in* Contemporary Issues in Criminological Theory and Research The Role of Social Institutions: Papers from the American Society of Criminology 2010 Conference 117, 120 (Richard Rosenfeld *et al.* eds., 2012). The results of this meta-analysis "confirm[ed] that the vast majority of the studies"—approximately 90 percent (244 out of 270)—"report pro-social effects of religion and religious involvement on various measures of crime and delinquency." *Id.* The studies that were part of this systematic review "utilize[ed] vastly different methods, samples, and research designs," and yet nearly all pointed to the same conclusion: "increasing religiosity is consistently linked with decreases in various measures of crime or delinquency," a link that was "particularly pronounced among the more methodologically and statistically sophisticated studies that rely upon nationally representative samples." *Id.*; *accord* Byron R. Johnson *et al.*, *A Systematic Review of the Religiosity and Delinquency Literature: A Research Note*, 16 J. of Contemp. Crim. Jus., 32, 46 (2000); Christopher P. Salas-Wright *et al.*, *Buffering Effects of Religiosity on Crime: Testing the Invariance Hypothesis Across Gender and Developmental Period*, 41 Crim. Jus. & Behavior 673, 688 (2014).

B. Congress Was Well Aware Of This Dynamic In Promulgating RLUIPA.

Congress enacted RLUIPA against this academic backdrop—well-developed even by 2000, when RLUIPA was passed. The statute's text confirms Congress's determination that prison officials must accommodate religious freedom when possible, and the legislative history is replete with references to the important role played by allowing prisoners the right to exercise their faiths as they see fit. This legislative history again is consonant with *amici*'s experience.

For example, Senator Strom Thurmond observed that for some prisoners, allowing religious practice "helps rehabilitate them and makes them less likely to commit crime after they are released." *Religious Liberty: Hearing On Issues Relating to Religious Liberty Protection Before the S. Comm. on the Judiciary*, 106th Congress 20 (1999) (statement of Sen. Strom Thurmond) (the "*Religious Liberty* Hearing"). And even while testifying against the bill, New York's Department of Correctional Services Commissioner acknowledged that "every correction administrator in the country recognizes the vital role played by most religious practices and beliefs * * * in maintaining a sense of hope and purpose among individual inmates *and in enhancing overall institutional safety* and well-being." *Id.* at 175 (prepared statement of Glenn Goord, Commissioner, New York State Department of Correctional Services) (emphasis added). As Mr. Goord stated: most prisoners who sincerely practice their religious beliefs "do not pose institutional problems," but rather "promote institutional stability." *Id.* Indeed,

witnesses emphasized the "societal interest" in protecting prisoner religious liberty, given that "[r]eligious observance by prisoners is strongly correlated with successful rehabilitation." *Protecting Religious Freedom After Boerne* v. *Flores: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 7 (1997) (testimony and prepared statement of Charles Colson, President, Prison Fellowship Ministries) (the "*Protecting Religious Freedom* Hearing"); *see also id.* at 76, 79 (peaceful practice of prisoners' religious beliefs has been shown empirically "to have powerful rehabilitative effects" (testimony and prepared statement of Prof. Thomas C. Berg, Cumberland Law School, Samford University)).[7]

This abundant testimony was not lost on Congress. In a floor statement urging passage of RLUIPA, Senator Hatch explained that "[s]incere faith and worship can be an indispensable part of rehabilitation, and these protections [provided by the bill] should be an important part of that process." 146 Cong. Rec. 14,283, 14,285 (2000) (statement of Sen. Hatch on behalf of himself and Sens. Kennedy, Hutchison, Daschle, Bennett, Lieberman and

[7] *See also Protecting Religious Freedom* Hearing 59, 60, 86 (testimony and prepared statement of Sixth Circuit Judge Jeffrey Sutton, then Solicitor of the State of Ohio) (discussing positive role of religion in rehabilitation); *Protecting Religious Freedom After Boerne* v. *Flores (Part III): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 40, 43 (1998) (testimony and prepared statement of Isaac M. Jaroslawicz, Director of Legal Affairs, Aleph Institute) (same).

Schumer). In sum, the rehabilitative impact of freedom of religious practice was squarely before Congress when it considered and passed RLUIPA in 2000, and constituted a motivating factor in the passage of the bill.

C. Courts And Experts Recognize The Impact That Accommodating Religious Exercise Can Have On Prisoner Adjustment and Rehabilitation.

Courts, too, have recognized the salutary relationship between accommodating religious practices inside prison and a prisoner's adjustment and rehabilitation. In *Brown* v. *Livingston*, a Texas prisoner challenged prison policies that prevented unsupervised gatherings of more than four persons for religious services and limited the supervision of prisoners for the purpose of holding religious services to no more than one hour per week. --- F. Supp. 2d ---, Civil Action No. 4:69-cv-00074, 2014 WL 1761288, at *1 (S.D. Tex. Apr. 30, 2014). The court held evidentiary hearings and heard "undisputed testimony" that "overall, the regular practice of religion improves prison safety." *Id.* at *7. The court acknowledged the body of social science research supporting this point, and found that allowing religious prisoners to practice their faith makes for a safer prison unit and a safer community. *Id.* at *8. Even the *state's* witnesses supported these points. *Id.*; *see also Grayson* v. *Schuler*, 666 F.3d 450, 453 (7th Cir. 2012) ("accommodating a genuine religious observance might reduce rather than increase the risk of prisoner misconduct").

Similarly, in the lower court proceedings in *Knight*, the court heard testimony on behalf of the petitioners from George Earl Sullivan—a former Oregon, New Mexico, and Colorado prison official—that providing prisoners the freedom to exercise their religious beliefs promoted prisoners' "support and acceptance of [the] prison environment." *Knight*, Jan. 22, 2009 Hr'g Tr. 149:9-24. By contrast, "prison systems that deny important religious practices such as wearing long hair create resentment and breed anger, hostility and animosity," that can pose "a serious threat of conflict with officers and is a threat to the safety, security, and good order of the prisons." *Knight* Trial Ex. 5, at 11 (Expert Report of G. Sullivan). Thus, Mr. Sullivan stated,

> permitting long hair serve[s] the important purpose of enhancing the safety, security, and good order of the prison, as well as protecting the public safety by reducing resentment and anger among inmates, reducing dissatisfaction and perhaps the desire to escape, and providing optimal rehabilitation opportunities to maximize the changes of integrating into society upon release.

Id. at 8.

Also in *Knight*, Dr. Deward Walker, a Professor of Anthropology at the University of Colorado, testified that the grooming exemptions sought by the Native American plaintiffs in that case enabled a "return to traditionalism" that allowed prisoners to draw on resources needed to overcome the difficulties associated with the transition to prison life. Jan. 21, 2009 Hr'g Tr. 111:19-112:3. Conversely, the denial of

these exemptions could cause “depression, anxiety, resentment, anger, hostility, and antagonism in those whose hair is cut,” due to the spiritual significance of the practice of wearing long hair for Native Americans. *Knight* Trial Ex. 2, at ¶ 7 (Expert Report of D. Walker).

* * *

The fact that the accommodation of religion can have a positive impact on prisoner adjustment and rehabilitation—and, as a result, on prison security—is well established, was a motivating factor underlying RLUIPA’s passage, and has been recognized by the courts. Because religious accommodation generally promotes, rather than detracts from, prison security, religious exemptions should be provided to the “maximum extent” available under the law.

III. PRISON SECURITY IS FURTHER ENHANCED WHEN RELIGIOUS EXEMPTIONS ARE EVALUATED IN WAYS THAT ARE PERCEIVED TO BE NON-ARBITRARY AND FAIR.

RLUIPA imposes a duty on prison officials to demonstrate that any substantial burden imposed on the free exercise rights of prisoners represents the least restrictive means of achieving a compelling state interest. It is not enough, therefore, for prison officials simply to recite that they have considered less restrictive policies adopted by other prison systems and have chosen to reject them. But when prison officials fail even to consider less restrictive means that have proven successful elsewhere – indeed, in a large majority of jurisdictions across the

country – prison security is further undermined by a rulemaking process that prisoners reasonably understand to be arbitrary and unfair.

Numerous studies have shown that prisoner perceptions of fairness in both approach and outcome have a profound impact on overall social order within prisons. In *amici*'s experience, where prisoners see institutional policies as fair, they are far more likely to obey them and view their issuers as legitimate sources of authority.

Indeed, this notion of fairness was central to RLUIPA, which was designed to alleviate "egregious and unnecessary" prison restrictions on religious liberty, *Cutter*, 544 U.S. at 716 (quoting Joint Statement, *supra*, at 16,699), by requiring prison administrators to "*demonstrate*" that any policies that burden religious practice further compelling government interests via the least restrictive means. 42 U.S.C. § 2000cc-1(a) (emphasis added). Here, Respondents' no-beard policy is at odds with the rules in most other U.S. prison jurisdictions, and Respondents have failed to demonstrate the need for this different treatment with case-specific evidence. *See Gonzales* v. *O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418, 436 (2006) (RLUIPA and RFRA require "case-by-case consideration of religious exemptions to generally applicable rules"). Instead of promoting security, Respondents' arbitrary policy is likely to exacerbate prisoner perceptions of arbitrary rulemaking and compromise institutional order. RLUIPA demands more, and so do the very security interests Respondents purport to invoke.

A. Prisoners Are More Likely To Obey Rules They Perceive To Be Fair And Legitimate.

A substantial body of research supports the experience of *amici* that prisoners will tend to view as legitimate those rules that they perceive were created fairly, and that result in a fair outcome under the circumstances. Indeed, perceptions of legitimacy are increasingly seen as a *tool* for increasing voluntary rule compliance: positive prisoner views of the institutional process afforded to them directly correlate with reduced instances of misconduct. Scholars have described these perceptions of fairness as the single "strongest and most consistent predictor" of decisional acceptance, rule compliance, and grievances across organizational settings. Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 Advances in Experimental Social Psychology 115, 131-32 (1992).

When institutional decisions are seen as fair, regulated parties are more likely to see the issuing institution as "legitimate," such that "although at times specific policies can be disagreeable, the institution itself ought to be maintained—it ought to be trusted and granted its full set of powers." Vanessa A. Baird, *Building Institutional Legitimacy: The Role of Procedural Justice*, 54 Pol. Research Q. 333, 334 (2001). Fairness depends in part on the perception that decision-makers have acted with "neutrality," using "assessments of honesty, impartiality, and the use of fact, not personal opinions" in considering one's case. Tom R. Tyler, *Procedural Fairness & Compliance with the Law*, 133 Swiss. J. Econ. & Statistics 219, 228 (1997). In

turn, regulated parties are more likely to internalize these institutional rules and norms as a basis for self-regulation. *See* David .J. Smith, *The Foundations of Legitimacy*, *in* Legitimacy & Criminal Justice: An International Perspective 30 (Tom R. Tyler ed., 2007); Tom R. Tyler, *Why People Obey the Law* 25 (1990) (when people believe that they are being treated fairly, they are more likely to accept the "need to bring their behavior into line with the dictates of an external authority"). This is so even when cooperation may not be in an individual's immediate self-interest but is seen as the "appropriate and proper" course supporting the authorities' objectives. *See* Tom R. Tyler & Jeffrey Fagan, *Symposium: Legitimacy and Criminal Justice, Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 Ohio St. J. Crim. L. 231, 263 (2008).

Amici's experience and targeted studies confirm that these principles hold particularly true in prison environments. The research reveals that fairness-based "justice judgments were directly associated with prisoner misconduct," because prisoners who evaluated prison officials' use of authority as just were significantly less likely to engage in misconduct or be charged with violating prison rules. Michael D. Reisig & Gorazd Mesko, *Procedural Justice, Legitimacy, & Prisoner Misconduct*, 15 Psychology, Crime & Law 41, 54-56 (2009); Anthony E. Bottoms, *Interpersonal Violence & Social Order in Prisons*, *in* Prisons: Crime & Justice: A Review of Research 261 (Michael Tonry & Joan Petersilia eds., 1999) ("staff approaches and skills can in a real sense act as a mediating force" and affect the "eventual outcome of good and bad behaviour" among prisoners). One

study found that a key context for prisoner assaults on staff is "protest," where a prisoner "considers himself to be the victim of unjust or inconsistent treatment by a staff member." *Id.* at 260-61.

This type of prisoner buy-in is important to prison safety; "it remains the case that order * * * depends on the acquiescence and cooperation of prisoners themselves. Without the active cooperation of most prisoners, most of the time, prisons could not function effectively." Jonathan Jackson *et al.*, *Legitimacy and Procedural Justice in Prisons*, Prison Service J., Sept. 2010, at 4, 4. In contrast, feeling "pushed around" tends to motivate prisoner justifications for engaging in violence while incarcerated. Michelle Butler & Shadd Maruna, *The Impact of Disrespect on Prisoners' Aggression: Outcomes of Experimentally Inducing Violence-Supporting Cognitions*, 15 Psychology, Crime & Law 235, 242, 246 (2009) (finding that male prisoners' perceptions of disrespectful treatment affirmatively increased their denial of responsibility for misconduct). Cooperation is also compromised when authorities are viewed as excluding some persons or views from consideration. Jan-Willem van Prooijen *et al.*, *Procedural Justice in Punishment Systems: Inconsistent Punishment Procedures Have Detrimental Effects on Cooperation*, 47 Brit. J. of Soc. Psychology 311, 312-13 (2008) (observation of inconsistent treatment leads individuals to feel marginalized and cooperate less often).

Prisoner cooperation rooted in perceptions of institutional legitimacy and fairness also reduces the need to resort to punishment-based techniques that are less cost-effective and of less enduring impact

than voluntary compliance. *See, e.g.*, Tom R. Tyler, *Psychology and Institutional Design*, 4 Rev. of Law & Econ. 801, 805-09 (2008); *see also* Richard Sparks *et al.*, *Prisons and the Problem of Order* 151 (1996) (maximizing disciplinary control may not be "worth the candle," insofar as it jeopardizes relationships between prisoners and prison staff, sacrifices cooperation, and detrimentally disrupts normal routines). Maintaining prisoner-staff cooperation is central not only to maintaining security but to responding when it is breached. Multiple studies have shown that widespread lack of trust in prison staff is a primary driver of reluctance to report victimization, and that prisoners report only about 9-10% of incidents. Kimmett Edgar et al., *Prison Violence: The Dynamics of Conflict, Fear, and Power* 196 (2003). Primary reasons given by adult prisoners included perceptions that "staff would not do anything" (29%) and "staff do not care" (33%). *Id.*

The experiences of *amici* and extensive scholarship indicate that the interest of prison officials in maintaining secure prisons should be seen as coextensive with supporting prisoner perceptions of fair administration.

B. Reasonable Religious Accommodations Contribute To Perceptions of Fairness, And Thus To Prison Security.

Amici's experience, again supported by the literature, is that granting religious accommodations affirmatively supports perceptions of fairness among

prisoners. As *amici* have observed across prison populations, prisoner perceptions of fairness improve when their religious practices are accommodated through even-handed exemption procedures. Indeed, these principles of fairness were central to the goals of RLUIPA.

As noted above, RLUIPA's legislative history shows that religious exercise has often been burdened in the prison setting in arbitrary, excessive and sometimes discriminatory ways. In fact, one of the elements of unfairness identified in RLUIPA's legislative history was the fundamental inequity manifest in the exact situation presented here, where "what prison officials insist in one facility would bring chaos and a total breakdown of security, works perfectly well in apparently comparable facilities." *Protecting Religious Freedom After Boerne v. Flores (Part III): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 3, 11 (statement of Marc D. Stern, Legal Dir., American Jewish Cong.). As the Joint Statement explained, "[f]ar more than any other Americans, persons residing in institutions are subject to the authority of one or a few local officials," such that "[their] right to practice their faith is at the mercy of those running the institution, and their experience is very mixed." Joint Statement, *supra*, at 16,699. Prison experience showed that "whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." *Id.*[8]

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[8] This Court set out some of the specific arbitrary practices RLUIPA was intended to remedy in *Cutter*, 544 U.S. at 716 n.5. As several of those examples indicate,

RLUIPA was expressly intended to rein these excesses in to the extent they arise in the religious exemption context, by subjecting determinations on requests for religious exemptions to strict scrutiny—thereby requiring that such requests be handled in a non-arbitrary manner. Denials imposing "substantial burdens" on religious practices must further a compelling government interest—one "demonstrate[d]" by the government—for which no less restrictive means of achieving that interest are available. 42 U.S.C. §§ 2000cc-1(a)(1), (2). Thus, any less restrictive means actually adopted by other jurisdictions must not only be "considered" by the state, but "demonstrated" empirically to be unworkable.

RLUIPA's requirement of strict scrutiny, which Respondents have failed to meet in this case, thereby protects religious freedom, promotes fairness, and enhances prison security. As the experience of *amici*

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the potential for uneven administration was of particular consequence to minority religious groups such as Muslims and Native Americans. For example, Muslims constitute 9.3% of federal prisoners and often smaller percentages of state prisoners. U.S. Commission on Civil Rights, *Enforcing Religious Freedom in Prison* 13-15 & Tbls. 2.1, 2.2 (2008) (citing modified data from The Pew Forum on Religion & Public Life, *U.S. Religious Landscape Survey—Religious Affiliation: Diverse & Dynamic*, 10, 12 (Feb. 2008)) (hereinafter "USCCR Report"). And yet Muslim prisoners filed the highest percentage of religious discrimination grievances, accounting for 26.3% of the complaints reaching the Commission from 2005-2007. USCCR Report at 26 (citation omitted). One of the primary violations alleged was "religious grooming and dietary standards." *Id.*

and the social science literature confirm, Religious accommodations in most instances can and should be granted to *further* prison security. Arkansas's conclusion to the contrary is both unsupported and ill-advised, and cannot withstand strict scrutiny.

* * *

CONCLUSION

For the foregoing reasons, and those in Petitioner's brief, the decision below should be reversed.

Respectfully submitted,

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