No. 13-6827

In the Supreme Court of the United States

GREGORY HOUSTON HOLT, AKA ABDUL MAALIK MUHAMMAD, PETITIONER

v.

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

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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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.*, by prohibiting petitioner from growing a one-half-inch beard in accordance with his religious beliefs.

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INTEREST OF THE UNITED STATES

This case presents an important question about the scope of protection afforded to prison inmates' religious exercise by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.* The United States has a substantial interest in the resolution of that question. Both private plaintiffs and the Attorney General may bring actions under RLUIPA for declaratory and injunctive relief, 42 U.S.C. 2000cc-2(f), and the United States has participated in RLUIPA cases in district courts and courts of appeals involving challenges to prison grooming rules. In addition, the Federal Bureau of

Prisons (BOP) is subject to the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, which imposes the same substantive standard on federal prisons that RLUIPA imposes on state and local prisons.

STATEMENT

1. Congress enacted RLUIPA to provide statutory protection against religious discrimination and unjustified infringement of the free exercise of religion by state and local governmental entities. The statute applies to two specific contexts: land use regulation and institutionalization. The provision principally at issue in this case is Section 3(a) of RLUIPA, which provides:

> (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 [42 U.S.C. 1997], 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). Section 4(b) of RLUIPA specifies that a "plaintiff shall bear the burden of persuasion on whether" a challenged law "substantially burdens the plaintiff's exercise of religion." 42 U.S.C. 2000cc-2(b). Section 8(2), in turn, makes clear that the government defendant bears the burdens of proof and

persuasion on whether the substantial burden imposed "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000cc-5(2) (defining "demonstrates" to mean "meets the burdens of going forward with the evidence and of persuasion").

RLUIPA "protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter* v. *Wilkinson*, 544 U.S. 709, 721 (2005). Congress enacted RLUIPA in part to address "'frivolous or arbitrary' barriers" that have "impeded institutionalized persons' religious exercise." *Id.* at 716 (quoting *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. 16,699 (2000) (*Joint Statement*)). And, as this Court noted in *Cutter*, Congress "anticipated that courts" entertaining complaints under Section 3 of RLUIPA "would apply the Act's standard with 'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.'" *Id.* at 723 (quoting *Joint Statement*, 146 Cong. Rec. at 16,699); see *id.* at 717.

2. Petitioner describes himself as a "devout fundamentalist Muslim" who holds as a tenet of his faith that he must grow and maintain a beard. J.A. 18. Petitioner is incarcerated in an Arkansas state prison. J.A. 17. The Arkansas Department of Correction has a policy that prohibits inmates from wearing beards of any length, except that inmates with dermatological

conditions may be permitted to wear quarter-inch beards. J.A. 17, 118, 164. The stated reason for the no-beard policy is "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." J.A. 164. When an inmate does not comply with the no-beard policy, he is subject to disciplinary action and disciplinary consequences may be assessed cumulatively if an inmate persists in refusing to shave. J.A. 18, 23-24, 164.

Petitioner alleges that he has been subject to multiple disciplinary actions for refusing to shave his half-inch beard. J.A. 18, 55. In May 2011, petitioner filed a prison grievance seeking permission to wear a half-inch beard in observance of his faith. See J.A. 20, 25. Prison officials denied petitioner's request and subsequently denied his appeal of that decision. J.A. 25, 164.

3. a. Petitioner filed a pro se complaint in federal district court and sought a preliminary injunction preventing respondents from enforcing the grooming policy against him to the extent he sought to wear a half-inch beard. J.A. 16-22, 29, 162-163. The district court entered a preliminary injunction and temporary restraining order based on its conclusion that respondents had "not met their 'burden of demonstrating that the grooming policy is the least restrictive means to achieve security as *applied* to'" petitioner. J.A. 34 (quoting *Fegans* v. *Norris*, 537 F.3d 897, 908-909 (8th Cir. 2008)).

On remand from the district court, a magistrate judge held a hearing at which both petitioner and

representatives from the State testified. See J.A. 35, 48-159.

Petitioner testified about his religious beliefs and about his experience with respondents' grooming policy. J.A. 54-58. He testified that his administrative grievance was denied on the ground that inmates could hide contraband in beards even if the beards were limited to a half inch in length. J.A. 56. In response to that concern, petitioner testified that inmates commonly transport weapons and contraband in the hair on their head, which can be longer than a half-inch on top if it does not reach past the middle of the nape of the neck. *Ibid.* Petitioner further testified that he did not understand why a half-inch beard would pose a security threat but a quarter-inch beard (which respondents permit for inmates with dermatological conditions) would not. J.A. 57. In response to respondents' concern that permitting beards in prison would enable an escaping inmate to quickly change his appearance, petitioner pointed out that respondents could take both clean-shaven and bearded photos of an inmate to use for identification purposes, as the New York Department of Corrections does. J.A. 69. With respect to respondents' concern that petitioner would be targeted by other inmates, petitioner testified that he had not experienced any problems at the prison in the nearly three months he had been allowed by the preliminary injunction to grow his beard to a half inch in length. J.A. 57-58, 65. Petitioner also testified that, according to his research, prisons in other states (such as New York and California) permit inmates to grow beards. J.A. 55-56, 69.

On behalf of respondents, Warden Gaylon Lay testified that allowing some inmates to grow beards

would present security problems because inmates would be able to hide contraband in the beard, would be able to change their appearance upon escape by shaving, and might become a target of other inmates by virtue of receiving special treatment. J.A. 79-80, 84-87. Warden Lay also testified that a half-inch-beard rule would be difficult for the prison to administer because it would be difficult to measure an inmate's beard length on a consistent basis. J.A. 80. On cross-examination, Warden Lay conceded that inmates currently hide contraband in a number of places, including their clothing. J.A. 98. Warden Lay acknowledged that other major prison systems permit inmates to grow beards. J.A. 101. He admitted that he did not know why those prisons had adopted that policy and explained that he believed many of those prisons are different from the Cummins facility (where petitioner is housed) because Cummins uses open barracks (rather than cell-block) housing and operates an agricultural program that permits inmates to travel beyond the prison's walls. J.A. 101-102. He testified that he did not know whether other prisons that allow beards have had problems with escaping inmates' changing their appearance and stated that, if the prison was not allowed to order an inmate to shave at all, it could not take a photo of him clean-shaven. J.A. 104-106.

Assistant Director Grant Harris also testified on behalf of respondents. He testified that an inmate might be able to conceal a cell-phone SIM card (or subscriber identity module) in a half-inch beard—which could then be used in a cell phone to facilitate drug trafficking in a prison. J.A. 114-117. He further

testified that he was not aware of grooming policies employed by other States. J.A. 119.

b. The magistrate issued an oral ruling, which was later followed by written findings that were ultimately adopted by the district court. J.A. 153-181.

The magistrate explained orally that he would deny petitioner's request for an injunction because he did not believe petitioner was likely to prevail on the merits of his claims. J.A. 153-159. The magistrate relied on the Eighth Circuit's decision in *Fegans* v. *Norris*, *supra*, which rejected an inmate's request under RLUIPA to grow a long beard and long hair. J.A. 154-157. The magistrate conceded that, "looking at [petitioner] and [his] beard, * * * it's almost preposterous to think that [he] could hide contraband in [the] beard." J.A. 155. But the magistrate felt compelled by *Fegans* to defer to respondents' proffered penological justifications for refusing petitioner's request to grow a half-inch beard regardless of whether the concerns driving those justifications had ever "actually materialized." J.A. 154-155; see J.A. 156 ("*Fegans* * * * tells me exactly what I have to do in this case.").

In his written findings, the magistrate reiterated that he would not issue an injunction both because the balance of harms favored respondents and because petitioner was not likely to succeed on the merits. J.A. 162-169. He further recommended that the district court dismiss petitioner's complaint under the Prison Litigation Reform Act of 1995 (PLRA), 28 U.S.C. 1915(e)(2)(B), 1915A(a), which requires dismissal of a prisoner complaint that fails to state a claim on which relief may be granted. J.A. 169-178. The magistrate recommended rejecting petitioner's con-

tention that respondents' grooming policy is not the least restrictive means of furthering their legitimate penological interests. J.A. 175-177. The magistrate distinguished respondents' allowance of a quarter-inch beard for inmates with dermatological conditions because petitioner seeks to grow a beard that is longer. J.A. 175-176. The magistrate also accepted respondents' justification for not adopting a practice used by New York whereby a prison photographs inmates with and without facial hair to facilitate identification. J.A. 176. Finally, the magistrate concluded that respondents' grooming policy does not substantially burden petitioner's religious practice because respondents permit him to possess a prayer rug and list of distributors of Islamic materials, to maintain his religiously mandated diet, to correspond with a religious advisor, and to observe religious holidays. J.A. 176-177.

The district court adopted the magistrate's written findings and recommendations and dismissed petitioner's complaint. J.A. 179-182. The district court entered a stay of its order pending appeal. J.A. 183.

4. The Eighth Circuit affirmed in an unpublished opinion. J.A. 184-187. The court of appeals agreed with the district court that respondents "met their burden under RLUIPA of establishing that [their] grooming policy was the least restrictive means of furthering a compelling penological interest." J.A. 186 (citing *Fegans*, 537 F.3d at 903). The court relied on its previous statement in *Fegans* that, although prison policies from other jurisdictions are relevant to determining whether less restrictive means might further a defendant's penological interests, evidence of such policies does not outweigh the deference owed

to the judgment of prison officials about what is appropriate for a particular institution. J.A. 186-187 (citing *Fegans*, 537 F.3d at 905). The court of appeals denied petitioner's motion for a stay. J.A. 191.

5. Petitioner sought review and injunctive relief in this Court. The Court granted petitioner's motion for an injunction pending disposition of petitioner's petition for a writ of certiorari, enjoining respondents from enforcing their grooming policy "to the extent that it prohibits [petitioner] from growing a one-half-inch beard in accordance which his religious beliefs" until the Court either denied the petition for a writ of certiorari or rendered judgment. J.A. 192. A grant of certiorari followed. J.A. 193-194.

SUMMARY OF ARGUMENT

A. When a prison imposes a substantial burden on an inmate's religious exercise, RLUIPA requires the prison to establish that imposing the burden is the least restrictive means of furthering a compelling governmental interest. A prison cannot meet that burden by merely stating that the challenged regulation or practice furthers the prison's interest in security. Every prison has a compelling interest in maintaining proper security, but not every restriction on an inmate's religious exercise meaningfully advances that interest. When Congress enacted RLUIPA, it made clear that courts should accord deference to prison administrators' considered judgments about how to run safe and efficient prisons. Congress also made clear, however, that such deference is not due when a prison justifies a restriction based on exaggerated fears or mere speculation. RLUIPA assigns to the defendant "the burdens of going forward with the evidence and of persuasion" on whether a challenged

practice "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000cc-1(a), 2000cc-5(2).

A RLUIPA defendant need not think up and shoot down every conceivable alternative means of furthering its compelling interests. But a defendant must demonstrate why any less restrictive alternative that is identified in the administrative grievance process would not adequately advance its compelling interests in the particular case. When the record reveals that other prisons or prison systems regularly employ less restrictive means of furthering their compelling interests, moreover, a defendant must explain why those less restrictive alternatives would not adequately further the government's interests with respect to the particular plaintiff at issue. And when a prison provides an exception to a general rule for secular reasons (or for only certain religious reasons), the prison must explain why extending a comparable exception to a specific plaintiff for religious reasons would undermine its compelling interests.

B. The district court and court of appeals erred in concluding that respondents carried their burden in this case. Respondents have contended that their no-beard grooming policy is necessary to further their compelling interest in security. Prison security is a compelling government interest—but respondents did not demonstrate that refusing to allow petitioner to grow a half-inch beard is the least restrictive means available to further that interest.

Respondents first argued that their no-beard policy is necessary because inmates might use beards to smuggle contraband into the prison. Although preventing the flow of contraband into a prison is a com-

pelling goal, respondents failed to demonstrate that allowing petitioner to grow a half-inch beard would undermine that goal. The magistrate judge who observed petitioner at the hearing remarked that it is "almost preposterous" to think that petitioner could hide anything in his half-inch beard. J.A. 155. And respondents' witnesses admitted that inmates have multiple places to hide contraband, including in mustaches and in hair that is longer than a half inch, both of which are allowed by respondents' grooming policy. The courts below erred by requiring petitioner to prove that respondents' security concern is exaggerated; it is *respondents* who must prove that their response is *not* exaggerated. They failed to do so.

Respondents similarly failed to demonstrate that refusing to allow petitioner to grow a half-inch beard is the least restrictive means of furthering their interest in easily identifying inmates who escape from prison. Petitioner pointed out that other prison systems take photos of inmates with and without beards in order to facilitate identification. Respondents did not explain why they could not employ that less restrictive practice. Nor did respondents explain why allowing inmates with dermatological conditions to grow quarter-inch beards is consistent with their identification interest while allowing petitioner to grow a half-inch beard is not.

Although respondents contend that allowing petitioner to grow a beard might either subject him to violence from other inmates or make him a leader among inmates, respondents introduced no evidence that either fear has any basis in reality. Petitioner has been allowed to maintain a half-inch beard throughout this litigation, and the record contains no

evidence of any problems. Nor did respondents produce any evidence that inmates with medical-exception quarter-inch beards have been either victimized or unduly revered by other inmates.

The record also does not establish that allowing petitioner to maintain a half-inch beard would impose administrative burdens on respondents. Respondents already have a system of monitoring inmates with medical-exception quarter-inch beards, and they did not establish that they would be unable to do the same for petitioner.

Finally, respondents failed to explain why they cannot adopt the less restrictive means adopted by nearly every other jurisdiction in the country. Respondents' witnesses professed ignorance about the practices of other jurisdictions; that is insufficient to meet respondents' burden to prove that their no-beard policy is the least restrictive means of furthering their compelling interests. Respondents also asserted that they cannot do what more than 40 other States, the District of Columbia, and BOP do because respondents' facility uses open barracks for housing and operates a farm work program. That explanation falls short under RLUIPA because other jurisdictions that allow beards also operate prisons with similar features and because respondents did not explain why they cannot use less restrictive alternatives such as assigning petitioner to non-barracks housing and non-farm work assignments.

ARGUMENT

RESPONDENTS FAILED TO DEMONSTRATE THAT BANNING PETITIONER'S HALF-INCH BEARD IS THE LEAST RESTRICTIVE MEANS OF FURTHERING THEIR COMPELLING INTERESTS

Respondents' grooming policy prohibits all Arkansas inmates from growing beards. The only exception to that policy permits inmates with certain medical conditions to grow a quarter-inch beard. Respondents make no exception for any inmate whose religious beliefs require him to grow a beard. Petitioner is such an inmate. Petitioner is an adherent of Islam and believes that his religion compels him to wear a beard. His request for an exemption from respondents' no-beard policy was denied, as was his proposed compromise that he be permitted to grow a half-inch beard. Respondents' refusal to allow petitioner to grow a half-inch beard substantially burdens his religious exercise.[1] RLUIPA requires respondents to justify that burden as the least restrictive means of furthering a compelling government interest, and respondents failed to satisfy their burden in this case.

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[1] The magistrate concluded that the no-beard policy does not substantially burden petitioner's religious exercise because he is able to engage in other types of religious exercise such as maintaining the required diet and observing certain religious holidays. J.A. 176-177. That conclusion was error and the court of appeals did not endorse it, holding instead only that respondents established that their policy is the least restrictive means of furthering a compelling penological interest. J.A. 186. In their brief in opposition, respondents did not appear to contest that their policy imposes a substantial burden on petitioner's religious exercise.

A. RLUIPA Requires Defendants To Prove That Imposing An Identified Substantial Burden On An Individual Inmate's Religious Exercise Is The Least Restrictive Means Of Furthering A Compelling Government Interest

1. The "[l]awful incarceration" of an individual "brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974) (brackets in original) (quoting *Price* v. *Johnston*, 334 U.S. 266, 285 (1948)). An inmate does not check his constitutional rights at the prison door; but when the full protection of a right would be "inconsistent with proper incarceration," the Constitution offers less protection than it would to a person who is not incarcerated. *Overton* v. *Bazzetta*, 539 U.S. 126, 131 (2003); see *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 348 (1987) (*Shabazz*); *Pell*, 417 U.S. at 822. In the prison context, this Court has upheld restrictions on constitutional rights when the regulation that imposes the restriction is "reasonably related" to "legitimate penological interests." *Turner* v. *Safley*, 482 U.S. 78, 89 (1987); see *Bazzetta*, 539 U.S. at 131-137 (restrictions on freedom of association); *Shaw* v. *Murphy*, 532 U.S. 223, 228-232 (2001) (limits on inmate correspondence); *Thornburgh* v. *Abbott*, 490 U.S. 401, 407-419 (1989) (restrictions on receipt of subscription publications); *Shabazz*, 482 U.S. at 348-353 (work rules limiting inmates' attendance at religious services).

RLUIPA statutorily elevates the protection afforded to inmates' religious exercise by replacing *Turner*'s requirement that a burden on a First Amendment free-exercise right be reasonably related

to a legitimate penological interest with a requirement that such a burden survive heightened scrutiny. Section 3(a) of RLUIPA prohibits a state or local government from imposing a substantial burden on the religious exercise of an institutionalized person unless the government can demonstrate that the burden "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000cc-1(a). RLUIPA requires a plaintiff to bear the burden of establishing that a challenged practice substantially burdens his religious exercise. 42 U.S.C. 2000cc-2(b). In contrast, RLUIPA requires defendants to establish that the burdensome practice or regulation "is the least restrictive means of furthering [a] compelling governmental interest. 42 U.S.C. 2000cc-2(b), 2000cc-5(2). In particular, RLUIPA requires a defendant to justify imposition of the burden on the specific plaintiff challenging the practice or regulation under RLUIPA's compelling-interest standard. 42 U.S.C. 2000cc-1(a)(1) (requiring government to "demonstrate[] that imposition of the burden on *that person*" "is the least restrictive means of furthering [a] compelling governmental interest") (emphasis added).

In upholding RLUIPA against an Establishment Clause challenge in *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005), this Court noted that, in the application of RLUIPA's substantive standard, "[c]ontext matters." *Id.* at 723 (brackets in original) (quoting *Grutter* v. *Bollinger*, 539 U.S. 306, 327 (2003)). The Court acknowledged that the lawmakers supporting RLUIPA "anticipated that courts would apply the Act's standard with 'due deference to the experience and expertise of prison and jail administrators in

establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with considerations of costs and limited resources.'" *Ibid.* (quoting *Joint Statement*, 146 Cong. Rec. at 16,699); *id.* at 725 n.13 ("It bears repetition, however, that prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area."); see *id.* at 720 ("Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."). Those lawmakers also recognized, however, that prison regulations and policies grounded on "mere speculation" or "exaggerated fears" will not suffice to meet RLUIPA's requirements. *Joint Statement*, 146 Cong. Rec. at 16,699 (quoting S. Rep. No. 111, 103d Cong., 1st Sess. 10 (1993)).

2. RLUIPA does not permit, much less require, courts to second-guess prison officials' well-informed judgments about what security measures are necessary to the safe and effective operation of a correctional institution. Deference to the penological expertise and judgment of such officials is not due, however, unless the officials explain how a challenged regulation advances a compelling government interest. Prison security is obviously a compelling government interest. But not every restriction on an inmate's religious liberty furthers that interest. RLUIPA assigns to defendants "the burdens of going forward with the evidence and of persuasion" on whether a burdensome practice serves a "compelling governmental interest." 42 U.S.C. 2000cc-1(a), 2000cc-5(2). Prison administrators cannot meet that burden by simply asserting a security interest or citing adminis-

trative burdens. They must explain the connection between the relevant restriction and improved security.

Even when a restriction does serve a compelling government interest, moreover, a prison official must demonstrate that the restriction is the least restrictive means of furthering that interest. To satisfy that burden, a defendant must explain why a less restrictive practice would be insufficient to further the prison's compelling interest. The defendant must also explain why providing a limited exception to a general policy where necessary to alleviate a substantial burden on an individual's religious exercise would undermine such interest. A prison administrator's unsubstantiated statement that lifting or lessening a substantial burden would impede a prison's ability to further a compelling interest is insufficient to carry the defendant's burden.

RLUIPA thus requires courts to balance the deference due to the expertise of prison administrators with the statute's requirement that defendants do more to justify the imposition of a substantial burden on religious exercise than rely on speculation or unjustified fears. Courts generally perform that balancing by requiring prison administrators to offer evidence—usually in the form of affidavits from prison officials—explaining how the imposition of an identified substantial burden furthers a compelling government interest and why it is the least restrictive means of doing so, with reference to the circumstances presented by the individual case. Once a defendant has offered such evidence, courts grant due deference to the expertise brought to bear in formulating the prison's policies. See, *e.g.*, *Koger* v. *Bryan*, 523 F.3d

789, 800 (7th Cir. 2008); *Washington* v. *Klem*, 497 F.3d 272, 283 (3d Cir. 2007); *Spratt* v. *Rhode Island Dep't of Corr.*, 482 F.3d 33, 39-40 (1st Cir. 2007); *Lovelace* v. *Lee*, 472 F.3d 174, 190 (4th Cir. 2006); *Hoevenaar* v. *Lazaroff*, 422 F.3d 366, 370 (6th Cir.), cert. denied, 549 U.S. 875 (2006). In light of RLUIPA's requirement that a defendant justify imposing a substantial burden on the particular plaintiff's religious exercise, see 42 U.S.C. 2000cc-1(a), courts have appropriately required that a defendant's explanation relate to the specific accommodation the plaintiff seeks and to the needs of the particular institution where the inmate is housed. See *Smith* v. *Ozmint*, 578 F.3d 246, 252-254 (4th Cir. 2009); *Odneal* v. *Pierce*, 324 Fed. Appx. 297, 300-301 (5th Cir. 2009).

As a means of ensuring that prison officials demonstrate that the application of a challenged practice to a particular plaintiff is the least restrictive means of furthering a compelling governmental interest, courts of appeals have appropriately required that officials demonstrate that they have considered whether there are alternative, less restrictive means of furthering the relevant interest. Prison officials need not undertake the "herculean burden" of "refut[ing] every conceivable option in order to satisfy the least restrictive means prong of" RLUIPA. *Hamilton* v. *Schriro*, 74 F.3d 1545, 1556 (8th Cir.) (applying RFRA), cert. denied, 519 U.S. 874 (1996). But when the complaining inmate identifies less restrictive alternatives that he would consider acceptable, prison officials must at least demonstrate that they have "considered and rejected the efficacy of" those alternatives. *Warsoldier* v. *Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); see, *e.g.*, *Washington*, 497 F.3d at 284; *Murphy* v.

Missouri Dep't of Corr., 372 F.3d 979, 989 (8th Cir.), cert. denied, 543 U.S. 991 (2004).

At a minimum, defendants' obligation to address potential alternatives extends to those alternatives specifically identified in the course of the administrative grievance process. Incarcerated persons are required by the PLRA, 42 U.S.C. 1997e(a), to exhaust administrative grievance procedures prior to filing a suit under federal law with respect to prison conditions, including a suit to enforce RLUIPA. See *Cutter*, 544 U.S. at 723 n.12; J.A. 20-21, 25-26. The requirement that an inmate request a religious accommodation through a prison's internal grievance procedures permits prison officials and inmates to work together in the first instance to develop practical solutions that accommodate an inmate's religious exercise while advancing an institution's compelling interests. That process also serves the function of developing an evidentiary record about what potential alternatives would be acceptable to a plaintiff and why such alternatives would or would not adequately further the institution's compelling interests as applied to the plaintiff. If an inmate ultimately files suit under RLUIPA, a defendant should be prepared to address the feasibility of potential alternatives identified through the administrative process.

Moreover, if the record includes evidence that different prison systems—or different prisons within the same system—provide exemptions to a rule that imposes a substantial burden on religious exercise or otherwise utilize less restrictive means of furthering their interests, defendants must explain why they cannot adopt those less restrictive practices as well. *E.g.*, *Koger*, 523 F.3d at 801; *Spratt*, 482 F.3d at 42;

Warsoldier, 418 F.3d at 1000. The same is true with respect to evidence that the defendant institution permits exemptions for some purposes, religions, or populations, but not for others. *E.g.*, *Newby* v. *Quarterman*, 325 Fed. Appx. 345, 352 (5th Cir. 2009); *Mayfield* v. *Texas Dep't of Crim. Justice*, 529 F.3d 599, 614-615 (5th Cir. 2008). At the same time, courts recognize that "evidence of policies at one prison is not conclusive proof that the same policies would work at another institution." *Spratt*, 482 F.3d at 42. In the face of evidence that other institutions employ less restrictive means, an institution must satisfy the same burden generally applicable under RLUIPA: it must demonstrate that its practices are the least restrictive means of furthering its compelling interest under the facts at issue in the particular case.

B. Respondents Failed To Carry Their Burden Under RLUIPA Of Establishing That Prohibiting Petitioner's Half-Inch Beard Is The Least Restrictive Means Of Furthering Prison Security

1. Respondents argued below that their no-beard policy furthers their compelling interest in security in three ways. First, respondents argued that prohibiting beards of any length makes it harder for inmates to smuggle contraband into and around the prison. J.A. 84, 114-117, 130. Second, respondents argued that prohibiting beards of any length facilitates the identification and apprehension of escaped inmates who might otherwise be able to change their appearance quickly by shaving. J.A. 80. Finally, respondents argued that allowing petitioner to grow a half-inch beard might make him the target of violence (or admiration) from other inmates. J.A. 87, 118-119. Respondents also argued that allowing petitioner to

grow a half-inch beard would impose prohibitive administrative burdens on prison employees. J.A. 80. The district court and court of appeals erred in holding that respondents satisfied their burden under RLUIPA on the basis of these arguments.

a. Respondents' witnesses testified before the magistrate that, if inmates were permitted to grow half-inch beards, they would be able to smuggle contraband such as needles, drugs, razor blades, homemade darts, and cell phone SIM cards into the prison. J.A. 84, 114-117, 130. Preventing inmates from smuggling such contraband into a prison is a compelling interest; but a RLUIPA defendant does not satisfy his burden by merely asserting that prohibiting half-inch beards furthers that interest. The magistrate who directly observed petitioner stated that it is "almost preposterous to think that [petitioner] could hide contraband in [his] beard." J.A. 155. The magistrate nevertheless accepted respondents' explanation, believing that "the law is that [prison officials] get deference * * * if they're able to articulate that there is a concern" even if that concern has never "actually materialized." *Ibid.*; J.A. 154 (stating that "deference to the prison officials" is required "if they're able to state legitimate penological needs"). That was error.

Prison administrators are not entitled to deference based on an unsupported "state[ment]" or "articulat[ion]" of a penological "concern." J.A. 154-155. Congress specified in RLUIPA that the statute "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [RLUIPA] and the Constitution." 42 U.S.C. 2000cc-3(g). Congress also required defendants to "meet[] the burdens of going forward with the evi-

dence and of persuasion" on whether imposing a particular burden on the specific plaintiff "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000cc-1(a), 2000cc-5(2). Respondents presented no evidence that an inmate could hide contraband in a half-inch beard. The magistrate erred by allowing respondents to prevail based on speculative assertions and exaggerated fears about what inmates *might* do. See *Joint Statement*, 146 Cong. Rec. at 16,699.

The court of appeals compounded the district court's error by placing the burden on petitioner to produce "substantial evidence" that the "response of prison officials to security concerns is exaggerated." J.A. 186. That formulation inverts the proper allocation of burdens. As discussed, prison officials bear the burden of demonstrating that a challenged restriction is *not* an exaggerated or speculative response to a perceived security risk. Once a plaintiff establishes a substantial burden, he has satisfied his burden of proof under RLUIPA unless or until the defendant "provides prima facie evidence that it has made, or has offered in writing to make, a specific accommodation to relieve such a substantial burden," at which point the plaintiff "has the burden of persuasion that the proposed accommodation is either unreasonable or ineffective in relieving the substantial burden." *Joint Statement*, 146 Cong. Rec. at 16,700. Respondents have not contended (let alone produced any evidence) that they at any point accommodated or offered to accommodate petitioner's religious need to grow a beard. The court of appeals thus erred in stating that petitioner had a burden to prove that respondents'

unsupported security concerns were exaggerated or otherwise unjustified.

The district court and court of appeals further erred by assuming that the result in this case was dictated by the Eighth Circuit's decision in *Fegans* v. *Norris*, 537 F.3d 897 (8th Cir. 2008). J.A. 154-157, 175-176, 186. Like this case, *Fegans* involved a challenge to respondents' no-beard policy; but (as the district court acknowledged, see J.A. 154) the plaintiff in that case sought to grow a longer beard. *Fegans*, 537 F.3d at 906. The district court and court of appeals in *Fegans* apparently did not require the defendants in that case to do more than merely articulate a security concern—but even setting that error aside, the Eighth Circuit's holding in *Fegans* that prison officials did not violate RLUIPA by declining to provide a *different* accommodation to a *different* inmate cannot dictate the result in this case. An inmate with a long beard may (or may not) present different security issues than an inmate with a half-inch beard. The inmate in *Fegans*, moreover, had a history of attempted escape and of smuggling contraband on his person. *Id.* at 900, 907. A prison might justifiably deny an accommodation to an inmate with such a history even though it might not properly do so to an inmate who lacks such a history.[2]

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[2] Some evidence in the record indicates that petitioner had an altercation with a prison barber who attempted to shave his beard. J.A. 70-73. Although petitioner announced that he was "at war" with the inmate barber, petitioner testified that he intended to convey only that he was upset with the barber and did not intend to threaten him. *Ibid.* Nothing in the record suggests that petitioner was disciplined in connection with that incident. In general, if an inmate who is permitted to grow a half-inch beard as an accommodation creates a security risk by initiating hostile alterca-

The magistrate's error (which was endorsed by the district court and court of appeals) is highlighted by respondents' policy of allowing inmates to wear the hair on their head longer than half an inch and to grow mustaches. Inmates can and do hide contraband in many places, including their hair and clothing. See J.A. 56, 85-86, 98, 103-104, 106, 110, 114, 117, 121-122, 127, 130. Respondents should have been required to explain how allowing petitioner to grow a half-inch beard would exacerbate that problem. They offered no such explanation. Respondents' contention that prison guards might be injured by searching a half-inch beard for contraband (even if the magistrate were incorrect to think it "almost preposterous" that petitioner could hide anything in such a beard) is insufficient to satisfy their burden when guards presumably have safe means of searching hair on a prisoner's head that is longer than a half inch and of searching mustaches.

b. Respondents also failed to carry their burden of proving that denying petitioner's request to grow a half-inch beard is the least restrictive means of ensuring that petitioner is easily identifiable and cannot quickly change his appearance if he escapes. Even without an accommodation, respondents' current grooming policy permits inmates who escape to quickly change their appearance by shaving a mustache or cutting their hair. See J.A. 85, 104-105. Respondents did not explain why allowing petitioner to grow a half-inch beard would undermine their compelling interest in security in a way that allowing inmates to grow mustaches and hair longer than a half inch would not.

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tions with a barber, it may be appropriate to withdraw that accommodation to further proper security interests.

In addition, respondents allow inmates with dermatological conditions to grow a quarter-inch beard even though those prisoners may change their appearance upon escape by shaving. In general, when a prison grants secular exemptions from a general rule but refuses to a grant a comparable religious exemption, the prison must demonstrate that the secular exemption does not undermine the purpose of the general rule in the same way that the requested religious exemption would. See *Washington*, 497 F.3d at 284-285; *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 363-365 (3d Cir.) (Alito, J.), cert. denied, 528 U.S. 817 (1999).

Respondents also failed to explain why the approach taken in other jurisdictions is insufficient to advance the State's interest in facilitating recapture of prisoners who escape. Before the magistrate, petitioner explained that other jurisdictions have a practice of taking one photo of an inmate clean-shaven and another of the inmate with a beard. A prison system with two such photos would not have difficulty identifying an inmate who escaped regardless of whether he shaved his beard or kept it. (Indeed, the prison would be better off with respect to identifying that inmate than with respect to identifying a clean-shaven inmate who grew a beard after escaping.) When confronted with the two-photo approach, respondents' witness merely stated that, if the prison was not allowed to order an inmate to shave at all, it could not take a photo of him clean-shaven. J.A. 104. That response is inadequate for at least two reasons. First, respondents already have a photo of petitioner clean-shaven. Second, even if they did not—or even if a prison could show that a periodic shaving is needed to

update photos—surely requiring an inmate to shave once (or once a year or once a quarter) is a less restrictive means of furthering respondents' compelling interests than requiring him to shave every day.[3]

c. Similarly, respondents failed to establish that their refusal to allow petitioner to grow a half-inch beard was the least restrictive means of ensuring that petitioner did not become either the object of violence from other inmates or a leader among inmates. Respondents failed to introduce any evidence that that concern is well-founded. During the pendency of this case, petitioner has been permitted to grow and maintain a half-inch beard. J.A. 34-35, 183, 192. At the time of the magistrate's hearing, petitioner had been permitted to maintain a beard for more than two months. See J.A. 34-35, 48. Yet respondents introduced no evidence tending to show that petitioner's beard had marked him as either a target of violence or a candidate for leadership. See J.A. 57. Respondents also did not present evidence that inmates who are permitted to grow quarter-inch beards for medical reasons have ever been targeted or revered. Even in the prison context, the compelling-interest test is not "traditionally the sort of thing that can be satisfied by the government's bare say-so." *Yellowbear* v. *Lampert*, 741 F.3d 48, 59 (10th Cir. 2014).

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[3] Courts have noted that other prison systems either do use or could use a dual-photograph (or similar) system. *Ross* v. *Coughlin*, 669 F. Supp. 1235, 1240-1241 (S.D.N.Y. 1987); *Phillips* v. *Coughlin*, 586 F. Supp. 1281, 1284 (S.D.N.Y. 1984); see *Garner* v. *Kennedy*, 713 F.3d 237, 247 (5th Cir. 2013); *Ali* v. *Quarterman*, 434 Fed. Appx. 322, 325 (5th Cir. 2011); *Luckette* v. *Lewis*, 883 F. Supp. 471, 481 (D. Ariz. 1995).

Moreover, prison officials cannot prevail under RLUIPA's compelling-interest/least-restrictive-means standard by appealing to a general need for uniformity. In *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) (*O Centro*), this Court rejected the federal government's argument that RFRA (which employs the same substantive standard as RLUIPA) did not require an accommodation where a statutory scheme "simply admits of no exceptions." *Id.* at 430. The Court explained that, except where "the Government can demonstrate a compelling interest in uniform application of a particular program, * * * RFRA operates by mandating consideration * * * of exceptions to 'rule[s] of general applicability.'" *Id.* at 435-436 (brackets in original) (quoting 42 U.S.C. 2000bb-1(a)). The Court noted that RFRA had expressly adopted the compelling-interest test as set forth in cases such as *Sherbert* v. *Verner*, 374 U.S. 398 (1963), in which the "Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S. at 431. The same is true in the context of RLUIPA.

d. Finally, respondents' invocation of the administrative burdens of permitting petitioner to grow a half-inch beard, see J.A. 80, 84, 107, is insufficient to satisfy RLUIPA's strict-scrutiny standard. Respondents' witness asserted that the prison could not "manage" a half-inch beard limit for "15,000 people" (*i.e.*, the number of inmates in the Arkansas Department of Correction system). J.A. 80, 102. Nothing in the record supports a supposition that

every inmate would request to grow a half-inch beard. Nor would RLUIPA give every prisoner the right to do so; RLUIPA requires accommodations to a prison practice only when the practice imposes a substantial burden on religious exercise. In interpreting RFRA, this Court rejected the federal government's argument that it should not be required to provide an accommodation based on fears that "there would be no way to cabin religious exceptions once recognized." *O Centro*, 546 U.S. at 430.

Moreover, respondents' contention that they could not adequately monitor the length of petitioner's beard is belied by the apparent ease with which they administer the medical quarter-inch-beard exception. Prison barbers use clippers on a regular basis to shave inmates who are granted the medical exception. Respondents made no showing that providing the same treatment to petitioner (with a slightly longer clipper guard) would impose any burden on respondents, let alone interfere with the furtherance of a compelling government interest.

2. a. As noted at p. 19, *supra*, when a RLUIPA defendant is presented with evidence that other prisons or prison systems employ less restrictive means of furthering the same compelling interest, the defendant must explain why those less restrictive means would not be sufficient in the particular prison at issue (and/or for the particular prisoner who is the plaintiff). Every prison in the country has a compelling interest in security. But the vast majority of state prison systems in this country permit inmates to grow beards either for any reason at all or at least for religious reasons. BOP would permit a beard such as that requested by petitioner here, 28 C.F.R. 551.2 ("An

inmate may wear a mustache or beard or both."), as would the vast majority of States, see *Garner* v. *Livingston*, No. CA-C-06-218, 2011 WL 2038581, at *2 (S.D. Tex. May 19, 2011) (noting "more than 40 of the 50 state prison systems allow their inmates to grow beards"), aff'd in pertinent part, 713 F.3d 237 (5th Cir. 2013); Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 955, 964-972 (2012) (suggesting more than 40 States, the District of Columbia, and BOP would allow petitioner to grow a half-inch beard). Only Alabama, Arkansas, Florida, Georgia, South Carolina, Texas, Virginia, and possibly Louisiana and New Hampshire would not accommodate petitioner's request. *Id.* at 970-972 (describing state policies); N.H. Dep't of Corr., *Manual for the Guidance of Inmates* 10 (2011) (limiting beards to a quarter inch). Evidence that other jurisdictions use less onerous practices may not always require a defendant to adopt less restrictive means of furthering its compelling interests. But particularly where the vast majority of other jurisdictions employ less restrictive practices, a defendant jurisdiction must at least explain why it cannot do so as well.

Even when applying a lower level of scrutiny (outside the RLUIPA context) to a prison's regulation of inmates' constitutional rights, this Court has noted 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), limited on other grounds by *Abbott*, 490 U.S. at 413-414; see *Bazzetta*, 539 U.S. at 134 (upholding visitation policies and noting that "numerous other States have imple-

mented similar restrictions"); *McKune* v. *Lile*, 536 U.S. 24, 35 (2002) (upholding prison sex offender treatment program and noting that BOP and other States employed similar programs) (plurality opinion); *Turner*, 482 U.S. at 93 (relying on similar practices of BOP and other States in finding "no obvious, easy alternative" to a restriction on inmate correspondence); *id.* at 98 (striking down restriction on inmate marriage in part because BOP's less restrictive practice was an "obvious, easy alternative[]"). And in determining that a prison's use of race to segregate inmates must be subject to strict scrutiny in *Johnson* v. *California*, 543 U.S. 499 (2005), 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." *Id.* at 508.

b. In some circumstances, a prison may be able to demonstrate that it cannot offer the type of accommodation offered by other jurisdictions because of the unique features of a particular prison or because of the circumstances of a specific plaintiff. Under RLUIPA, a defendant must prove such an assertion with evidence. In this case, respondents' witness testified that he was not familiar with the less restrictive practices of other jurisdictions (although such practices were addressed in the RLUIPA challenge to the same grooming policy in *Fegans*, 537 F.3d at 905). J.A. 101-102, 105-106, 110-111, 119. A prison official cannot satisfy his burden under RLUIPA of establishing that a challenged practice is the least restrictive means of furthering a compelling government interest by expressing ignorance of the less restrictive practices of other jurisdictions. When such less restrictive practices are brought to an official's attention, the

official must take reasonable steps to understand how those practices work and to explain why they would not adequately advance the relevant compelling government interests in his prison.

Although respondents' witnesses testified that they did not know about the less restrictive practices of other prison systems (or about how successful such practices are at maintaining security), see J.A. 101-102, 105-106, 110-111, 119, they asserted that they could not adopt such practices in their facility because many inmates are housed in barracks-style quarters (rather than closed cells) and because inmates travel in and out of the prison to work on the prison's farm, J.A. 101-102. Those assertions are insufficient for two reasons.

First, respondents were required to explain why those features of their prison are incompatible with permitting petitioner to grow a half-inch beard. Contraband smuggling is a concern in all prisons and, as discussed at p. 24, *supra*, inmates have opportunities to smuggle contraband into and around prisons with or without a half-inch beard. Respondents' housing structure and farm work assignments may indeed increase the opportunities for contraband smuggling and distribution. But when inmates can smuggle contraband in their hair, mustaches, and clothing (to name a few hiding spots), it is not apparent that allowing petitioner to grow a half-inch beard would materially affect respondents' security situation. Respondents did not attempt to explain why an inmate with a half-inch beard who is assigned to work on the farm would have an easier time smuggling contraband into the prison than a similar inmate in another facility who is permitted to interact with the outside world in

a different way. It appears that at least some prison systems that allow inmates to grow beards have also assigned inmates to jobs outside the prison gates. *Shabazz*, 482 U.S. at 346 (New Jersey inmates had work details off prison grounds)[4]; *Baynes* v. *United States*, 302 Fed. Appx 334, 334-335 (6th Cir. 2008) (BOP facility transported inmates outside prison fence for work duties); *Jeldness* v. *Pearce*, 30 F.3d 1220, 1222-1223 (9th Cir. 1994) (Oregon prison programs included a forest camp and farm annex).[5] Similarly, some prison systems that permit beards also provide dormitory-style accommodations for inmates. See, *e.g.*, *Unger* v. *United States*, 110 F.3d 70 (9th Cir. 1997) (Table), 1997 WL 124332, at *5 (BOP-run facility houses inmates in "barracks-style 'flats,' which are large, open, common areas within the prison housing units"); *Taylor* v. *Michigan Dep't of Corr.*, 69 F.3d 76, 78 (6th Cir. 1995) (Michigan prison housed inmates "in a dormitory style barracks, with approximately 60 inmates to a room").[6]

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[4] See N.J. Dep't of Corr., *Understanding the New Jersey Department of Corrections Prison System* 17-18 (2007) (noting that New Jersey continues to offer "Agri-Industry" jobs and other outside jobs to some inmates).

[5] See Or. Dep't of Corr., *South Fork Forest Camp*, http://www.oregon.gov/doc/OPS/PRISON/pages/sffc.aspx (last visited May 28, 2014) (describing Oregon facility with forest camp work detail).

[6] See, *e.g.*, Mich. Dep't of Corr., *Chippewa Correction Facility (URF)*, https://www.michigan.gov/corrections/0,4551,7-119-1381_1385-5161--,00.html (last visited May 28, 2014) (describing Michigan correctional facility with dormitory-style housing); Mich. Dep't of Corr., *Muskegon Correctional Facility (MCF)*, http://michigan.gov/corrections/0,4551,7-119-1381_1385-5372--,00.html (last visited May 28, 2014) (same).

Second, respondents did not explain why less restrictive alternatives were not available. Respondents' witness testified that *some* inmates are housed in barracks-style dormitories. J.A. 101. Respondents should have explained why they cannot place petitioner in non-barracks housing and allow him to grow a half-inch beard there. It is also unclear from the record whether all inmates are required to take farm work assignments. If some inmates have inside assignments, respondents might be able to assign a bearded petitioner to such a job. RLUIPA requires actual consideration of such less restrictive alternatives—and if they will not adequately advance the government's compelling interests, RLUIPA requires a prison administrator to explain why that is so. Respondents did not meet that burden in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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