IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

DAVID RASHEED ALI,	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 9:09-cv-52**
	)	
RICK THALER, DIRECTOR	)	
TDCJ-CID JUSTICE	)	
Defendant.	)	

STATEMENT OF INTEREST OF THE UNITED STATES

The United States files this Statement of Interest pursuant to 28 U.S.C. § 517 because this litigation implicates the proper interpretation and application of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc e*t seq.* ("RLUIPA").[1] RLUIPA protects the religious freedom of individuals confined to institutions by prohibiting practices that substantially burden religious exercise. The statute permits such practices only where they constitute the least restrictive means of furthering a compelling government interest. *See* 42 U.S.C. § 2000cc-1(a). Section 2(f) of RLUIPA confers authority upon the United States to bring suit to protect the religious rights of institutionalized persons, *see* 42 U.S.C. § 2000cc-2(f), including the right of prisoners to practice their religion by wearing facial hair. *See, e.g.*, *Garner v. Morales*, 2009 U.S. App. LEXIS 4583, at *12 (5th Cir. Mar. 6, 2009) (wearing a quarter–inch beard "easily satisfy[ies]" RLUIPA's "broad definition of religious exercise"). Accordingly, the United States has a strong interest in this litigation.

[1] The United States acknowledges that the Defendant may need additional time to respond to this Statement of Interest, as the parties completed summary judgment briefing on March 14, 2012.

The United States has a particular interest in this litigation because it involves issues virtually indistinguishable from those the United States just addressed in its amicus brief filed with the Fifth Circuit in the appeal of *Garner v. Livingston*, No. C-06-218 2011 WL 2038581 (S.D. Tex. May 19, 2011), in which the District Court for the Southern District of Texas found that Texas's prohibition on quarter-inch beards violated RLUIPA.[2] Here, the Texas Department of Criminal Justice ("TDCJ" or "Defendant") likewise denied prisoner David Ali's request to grow a half-inch beard, which Mr. Ali contends is a core aspect of his religious practice. Mr. Ali is an observant Muslim who believes he has a religious obligation to "embrace known Islamic customs and emulate the prophets," including by wearing a half-inch beard. Ali's Opp. to Def's Mot. for Summ. J. ("Opp."), Dkt. No. 154, at 2. TDCJ does not contest the sincerity of Mr. Ali's beliefs or that the no-beard policy substantially burdens his religious exercise. Def's Mot. for Summ. J. ("Def's Mot."), Dkt. No. 147, at 4. Thus, TDCJ's no-beard policy contravenes RLUIPA unless the restriction furthers a compelling government interest and is the least restrictive means for furthering that interest. *See* 42 U.S.C. § 2000cc-2(b). The principal arguments TDCJ raises here in an attempt to satisfy this burden were found unpersuasive by the District Court in *Garner*, and the United States' amicus brief urges the Fifth Circuit to likewise reject them.

Based on the undisputed facts in this litigation, the United States believes that TDCJ's blanket prohibition on religious beards is not narrowly tailored to the generalized budgetary and security interests it asserts. As the *Garner* court recognized and the United States described more fully in its amicus brief, TDCJ already permits approximately 7,000 inmates to wear

[2] The amicus brief filed by the United States in *Garner* (the "*Garner* Brief") is attached here as Exhibit A.

quarter-inch beards through its "clipper shave" program for inmates with certain skin conditions – a program that TDCJ operates consistently with the interests it asserts here. *See* Order at 4-6 and *Garner* Brief at 19-20. Further, the overwhelming majority of correctional facilities in the United States – including the Federal Bureau of Prisons ("BOP") and 40 out of 50 state correctional systems – permit inmates to wear beards for religious reasons while managing interests identical to those of TDCJ. Nor do the minor financial consequences identified by TDCJ in this litigation justify imposing a substantial burden on religious practice, as RLUIPA "may require a government to incur expenses in its own operations to avoid imposing a substantial burden," 42 U.S.C. 2000cc-3(c). TDCJ's attempt to win summary judgment against Mr. Ali by recycling arguments rejected by the *Garner* court is simply unconvincing.

The United States further addressed many of the issues central to Mr. Ali's litigation in a brief supporting a Sikh prisoner's suit against California's ban on beards longer than a quarter inch. *See* Brief Filed by the United States in *Basra v. Cate*, No. cv-11-01676 (C.D. Cal. May 23, 2011) ("*Basra* brief"), attached as Exhibit B. There, the United States relied in part upon expert affidavit by former BOP Assistant Director John Clark, who attested that facilitating inmates' religious practices "is an essential part of good corrections management" and explained that BOP permits its 215,000 inmates to wear half–inch beards without compromising security or incurring significant costs. *See* Aff. of John Clark, attached as Exhibit C, at ¶¶ 7, 20-27. To settle that lawsuit, California agreed to repeal its beard length restrictions and allow all inmates to wear facial hair of "any length." *See* 15 CCR § 3062(e).

The principles animating the *Garner* decision and *Basra* settlement apply with equal force to Mr. Ali's request to practice his religious faith by maintaining a half-inch beard. The United States has a strong interest in ensuring that RLUIPA's requirements are uniformly

understood and enforced. For that reason, and those explained in the attached briefing, the United States respectfully asks this Court to deny TDCJ's motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Statement of Interest of the United States has been served on Defendant, Rick Thaler, Director TDCJ-CID Justice, via the court's CM/ECF filing system, and Plaintiff, David Rasheed Ali at the address below on this the 29th day of March, 2012.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

DAVID RASHEED ALI,	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 9:09-cv-52**
	)	
RICK THALER, DIRECTOR	)	
TDCJ-CID JUSTICE	)	
Defendant.	)	

STATEMENT OF INTEREST OF THE UNITED STATES

EXHIBIT A

No. 11-40653

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

_____

WILLIE LEE GARNER,
also known as WILLI FREE I GAR'NER,

Plaintiff-Appellee

v.

EILEEN KENNEDY, in her official capacity as Director,
Region IV, Texas Department of Criminal Justice, *et al.*,

Defendants-Appellants

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

_____

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEE AND URGING AFFIRMANCE

_____

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11-40653

WILLIE LEE GARNER,
also known as WILLI FREE I GAR'NER,

Plaintiff-Appellee

v.

EILEEN KENNEDY, in her official capacity as Director,
Region IV, Texas Department of Criminal Justice, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEE AND URGING AFFIRMANCE

STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether the Texas Department of Criminal Justice's policy prohibiting prison inmates from growing beards is the least restrictive means of advancing compelling governmental interests under Section 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc-1(a).

INTEREST OF THE UNITED STATES

This case concerns the interpretation of RLUIPA's requirement that a State's imposition of a substantial burden on the religious exercise of one of its prisoners must be the "least restrictive means" of furthering a compelling governmental interest. The Department of Justice is charged with enforcing RLUIPA, see 42 U.S.C. 2000cc-2(f), and is involved in several pending RLUIPA investigations and litigations that concern beard-length issues. The Department, therefore, has an interest in how courts construe the statute. At the request of the Supreme Court, the United States recently filed an amicus brief on petition for writ of certiorari in *Thunderhorse* v. *Pierce*, No. 09-1353, cert. denied, 131 S. Ct. 896 (2011), addressing a court of appeals' application of the "least restrictive means" test in the prison context.

The United States also has filed amicus briefs in appeals that addressed the interpretation of RLUIPA in the prison context more generally, and the interpretation of the "substantial burden" provision in the land-use context. See *Khatib* v. *County of Orange*, 639 F.3d 898 (9th Cir. 2011) (en banc) (prison), cert. denied, 132 S. Ct. 115 (2011), *Nelson* v. *Miller*, 570 F.3d 868 (7th Cir. 2009) (prison), and *Guru Nanak Sikh Society* v. *County of Sutter*, 456 F.3d 978 (9th Cir. 2006) (land use). The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE CASE

1. Factual Background

Plaintiff Willie Lee Garner is a prisoner in the custody of the Texas Department of Criminal Justice (TDCJ), assigned to the McConnell Unit in Beeville, Texas. SR 2230.[1] The TDCJ's grooming policy requires all male inmates to be clean shaven; it bars mustaches, beards, or hair under the lip. Texas Department of Criminal Justice Offender Orientation Handbook, at 10, available at http://www.tdcj.state.tx.us/documents/Offender_Orientation_Handbook_English.pdf (last visited Dec. 23, 2011). Inmates with the objectively verifiable medical condition pseudofolliculitis barbae (razor bumps) are excepted from this prohibition. They may wear a beard of up to a quarter-inch in length. SR 2290-2291, 2293, 2366. These inmates are issued a "clipper-shave pass" to report to the prison barbershop regularly to trim their beard with electric clippers. SR 2281, 2292-2293. Approximately 7,000 inmates of the 155,000 inmates in the TDCJ possess clipper-shave passes. SR 2271, 2292.

Garner identifies himself as a Muslim and contends that his Islamic faith requires him to wear a beard. SR 2230-2231. Garner violated the TDCJ's grooming policy by not shaving, and was disciplined several times as a result. SR

[1] This brief uses the following abbreviations: "R ___" for the Record on Appeal; "SR ___" for the Supplemental Record on Appeal; and "Br. __" for defendants' opening brief filed with this Court.

2232, 2260. According to Garner, his punishment included loss of commissary and recreation privileges, solitary confinement, and negative treatment during the review of his parole application. SR 2232-2233. While Garner asserts that his religion prescribes a "fist-length" beard (closer to four inches than a quarter-inch), he insists only on the right to wear the same quarter-inch beard prisoners with pseudofolliculitis barbae may wear. SR 2235-2236, 2240-2241, 2243-2244.

2. Proceedings Below

In 2006, Garner filed a pro se complaint in the United States District Court for the Southern District of Texas pursuant to 42 U.S.C. 1983 and RLUIPA, alleging violations of his federal constitutional and statutory rights. R 12-53. In September 2007, the district court granted the prison summary judgment. R 724-726. On appeal, the Fifth Circuit affirmed the judgment with respect to Garner's constitutional claims, but reversed and remanded Garner's RLUIPA claims for trial. SR 40-49. On remand, counsel was appointed to represent Garner and the case was reassigned to a different district judge for trial. SR 50-52.

After holding a bench trial, the district court issued a memorandum opinion and order granting in part and denying in part Garner's RLUPA claims.[2] SR 2095-

[2] Garner also contended that his faith required him to wear a head covering known as a Kufi, and that the TDCJ's ban on wearing a Kufi while in transit from one location to another violated RLUIPA's substantial burden provision. SR 2095-2096, 2234. The district court denied this claim. SR 2101-2102. Garner did not

(continued…)

2103. Garner brought his claim pursuant to Section 3 of RLUIPA, which prohibits a State from imposing a "substantial burden" on a religious exercise of one of its prisoners unless the State demonstrates that the imposition of the burden furthers a compelling governmental interest, and does so by the least restrictive means. 42 U.S.C. 2000cc-1(a). The district court held (a) that it is undisputed that Garner's wearing of a beard is a religious exercise, (b) that defendants did not challenge the contention that the TDCJ policies at issue impose a substantial burden on this religious exercise, and (c) that the State of Texas has compelling governmental interests in the safety and reasonably economical operations of its prison system. SR 2097-2098.

The district court then held that defendants failed to show that prohibiting all beards is the least restrictive means of satisfying its compelling interests. The district court stated that there is a lack of consensus among penologists as to whether allowing prisoners to grow beards has any significant relationship to the issue of safety. SR 2099. The district court then rejected defendants' contention that the TDCJ's ability to identify prisoners would be hindered by allowing the quarter-inch beard Garner sought to wear, holding that Muslim prisoners could be shown wearing beards in their identification photos. SR 2099-2100. Next, the

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(…continued)
cross-appeal this issue, and the United States takes no position on the merits of this claim.

district court dismissed defendants' concern that a quarter-inch beard could be a hiding place for weapons or contraband. SR 2100. The district court also rejected defendants' objection that a prisoner with a beard could change his appearance by shaving his beard, finding that a beardless prisoner could just as easily change his appearance by growing a beard. SR 2100. Finally, the district court rejected defendants' economic justifications, finding that the evidence failed to show a significant cost increase for the TDCJ if Muslim inmates were allowed to grow short beards. SR 2100-2101.

SUMMARY OF ARGUMENT

The TDCJ's grooming policy violates RLUIPA. RLUIPA establishes that First Amendment protections of an individual's exercise of his or her religious freedoms apply to inmates. Section 3 of RLUIPA, accordingly, prohibits state and local governments from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the government shows that the burden furthers "a compelling governmental interest" and does so by "the least restrictive means." 42 U.S.C. 2000cc-1(a). The TDCJ's grooming policy bans all inmates, other than those with an objectively verifiable dermatological condition, from wearing beards, and punishes inmates who violate this prohibition with disciplinary sanctions. Defendants do not dispute that this ban imposed a substantial burden on Garner's religious exercise.

The burden thus shifted to defendants to show that their prohibition is the least restrictive means of advancing compelling governmental interests. See 42 U.S.C. 2000cc-2(b), 2000cc-5(2). To satisfy this burden, defendants must produce record evidence showing that their regulation is the least restrictive means of advancing compelling governmental interests, and that none of the proffered alternative schemes would be less restrictive while still satisfactorily advancing those interests. The pronouncements of Congress in enacting Section 3 and the Supreme Court in interpreting Section 3 establish that in order to be the least restrictive means of advancing compelling governmental interests, a prison policy that substantially burdens religious exercise must be well founded in protecting prison security, inmate health, or a similarly compelling penological interest.

The district court correctly held that defendants failed to satisfy their burden. With regard to protecting prison security, the record does not support defendants' contention that the TDCJ's ban on beards is the least restrictive means of advancing that compelling governmental interest. The record lacks any documentation of security problems that trim beards would cause, and includes evidence that many prisons in other States, and the Federal Bureau of Prisons, allow trim beards similar to the one Garner is seeking. Defendants provide no valid reason why a religious exemption for trim beards threatens the TDCJ's interest in inmate identification while a medical exemption does not, and provide

no sound basis for their assertion that an inmate will be able to alter his appearance significantly by shaving a quarter-inch beard.

Defendants' economic arguments also do not satisfy this standard. The record lacks any study on how feasible and costly it would be to accommodate a religious exemption for a quarter-inch beard; rather, the evidence indicates that accommodating a religious exemption will impose only the possible marginal costs of expanding the barbering services to accommodate Muslims and of taking new photographs for identification cards. Defendants' contention that the religious exemption is distinguishable because Muslim inmates like Garner will require more frequent trips to the barbershop to maintain a beard of exactly one-quarter-inch finds no support in the record. Rather, Garner has consistently requested the same treatment afforded to inmates with the medical exemption. No more persuasive is defendants' assertion that allowing a religious exemption will lead to "opportunistic conversion" and excessive costs for the TDCJ. The Supreme Court has empowered a prison to question the sincerity of an inmate's faith, thereby lowering the rate of opportunistic conversions. Even assuming, *arguendo*, that a religious exemption from the no-beard policy leads to a significant number of legitimate inmate requests for the right to wear a quarter-inch beard, defendants' claim fails because they have not shown that the costs will be so excessive as to

prevent the State from achieving other compelling interests such as security or inmate health.

ARGUMENT

THE TDCJ'S BAN ON BEARDS VIOLATES RLUIPA BECAUSE IT IS NOT THE LEAST RESTRICTIVE MEANS OF ADVANCING COMPELLING GOVERNMENTAL INTERESTS

Section 3 of RLUIPA prohibits state and local governments from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the government shows that the burden furthers "a compelling governmental interest" and does so by "the least restrictive means." 42 U.S.C. 2000cc-1(a). Section 3 thus "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). This Court has recognized that this substantial burden "standard poses a far greater challenge than does [traditional free exercise analysis] to prison regulations that impinge on inmates' free exercise of religion." *Freeman* v. *Texas Dep't of Criminal Justice*, 369 F.3d 854, 858 n.1 (5th Cir. 2004).

1. Under RLUIPA, Garner bore the initial burden to show that the TDCJ's policy prohibiting him from wearing a quarter-inch beard substantially burdens his religious exercise. See 42 U.S.C. 2000cc-2(b). Defendants do not dispute (Br. 15)

that Garner satisfied this burden. Accordingly, the burden of proof shifted to the prison to show that its policy not only furthers a compelling governmental interest, but does so by the least restrictive means. See 42 U.S.C. 2000cc-2(b), 2000cc-5(2).

Defendants assert (Br. 15) that the TDCJ's grooming policy furthers compelling governmental interests. The district court found that the State of Texas has compelling governmental interests in the safety and reasonably economical operations of its prison system, and this finding is not being challenged on appeal.

2. In this case, defendants failed to show that their compelling governmental interests are furthered in the least restrictive means. See 42 U.S.C. 2000cc-2(b), 2000cc-5(2). While RLUIPA does not define the phrase "least restrictive means," other First Amendment case law provides a definition. Under the compelling interest standard,[3] the prison here must "demonstrate that no alternative forms of regulation would [accomplish the governmental interest] without infringing First Amendment rights." *Sherbert* v. *Verner*, 374 U.S. 398, 407 (1963); see also *Ashcroft* v. *American Civil Liberties Union*, 542 U.S. 656, 666 (2004) (least

[3] Several courts have observed that in RLUIPA, Congress sought to restore the compelling interest standard that the Supreme Court set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), but later abandoned in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). See, *e.g.*, *World Outreach Conference Ctr.* v. *City of Chicago*, 591 F.3d 531, 534 (7th Cir. 2009); *Pugh* v. *Goord*, 571 F. Supp. 2d 477, 504 n.11 (S.D.N.Y. 2008).

restrictive means test in free speech context requires court to compare challenged regulation to available, effective alternatives); *United States* v. *Hardman*, 297 F.3d 1116, 1145 (10th Cir. 2002) (Hartz, J., concurring) ("'[L]east restrictive means,' as one would naturally interpret the phrase, signifies that the imposition by the government on religious worship must be the minimal imposition to accomplish the government's compelling ends.").

This standard does not require prison officials to refute "every conceivable option in order to satisfy the least restrictive means prong of" RLUIPA. *Hamilton* v. *Schriro*, 74 F.3d 1545, 1556 (8th Cir.) (interpreting least restrictive means prong of RLUIPA's predecessor, the Religious Freedom Restoration Act), cert. denied, 519 U.S. 874 (1996). Instead, where there is evidence that less restrictive alternatives exist, the prison officials must at least show that they have "actually considered and rejected the efficacy of" those alternatives for good reason. *Warsoldier* v. *Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); see, *e.g.*, *Washington* v. *Klem*, 497 F.3d 272, 284 (3d Cir. 2007) (prison "must consider and reject other means before it can conclude that the policy chosen is the least restrictive means"); *Murphy* v. *Missouri Dep't of Corr.*, 372 F.3d 979, 988 (8th Cir.) (remanding for further proceedings where it was "not clear that [the defendant] seriously considered any other alternatives, nor were any explored before the district court"), cert. denied, 543 U.S. 991 (2004).

In determining whether prison officials have satisfied their burden, a court "ha[s] an obligation to ensure that the record supports the conclusion that the government's chosen method of regulation is least restrictive and that none of the proffered alternative schemes would be less restrictive while still satisfactorily advancing the compelling governmental interests." *United States* v. *Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011) (interpreting RFRA); see also *Ashcroft*, 542 U.S. at 669 ("The Government's burden is not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective."). In rejecting alternatives, prison officials must rely on sound evidence, and not assumptions and stereotypes. The government's record evidence must consist of more than conclusory statements that a prison policy is the least restrictive means to further compelling governmental interests. See *Warsoldier*, 418 F.3d at 998-999; *Murphy*, 372 F.3d at 988-989. A prison's claim that a specific restriction on religious exercise is the least restrictive means of advancing compelling governmental interests is significantly undermined by evidence that many other prisons, with the same compelling interests, allow the practice at issue. See *Warsoldier*, 418 F.3d at 1000 ("[T]he failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means.").

3. RLUIPA's legislative history, and the Supreme Court's decision in *Cutter*, provide guidance on how courts should test the State's policy and evidence while avoiding judicial micro-management of state prisons. After stating that courts applying Section 3 should defer appropriately to the policies prison officials institute to maintain order and security, the joint statement of the lawmakers sponsoring RLUIPA also recognized that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet [RLUIPA's] requirements." 146 Cong. Rec. 16,699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) (quoting S. Rep. No. 111, 103d Cong., 1st Sess. 10 (1993)). Along these lines, the Supreme Court in *Cutter* observed that Congress enacted Section 3 to eliminate "'frivolous or arbitrary' barriers [that] impeded institutionalized persons' religious exercise," such as state prisons that served Kosher food to Jewish inmates but refused to serve Halal food to Muslim inmates; prisons that refused to provide sack lunches to Jewish inmates to allow them to break fasts after nightfall; and prisons that refused to allow Chanukah candles while allowing smoking and votive candles. *Cutter*, 544 U.S. at 716 & 717 n.5. The Court then stated that Congress addressed these types of unnecessary barriers to religious exercise by instituting the "compelling governmental interest" and "least restrictive means" standards into prison life. *Id.* at 717 (citation omitted).

The pronouncements of Congress and the Supreme Court regarding Section 3 suggest the following guiding principles for a court to follow in determining whether a prison policy that imposes a substantial burden on religious exercise is the least restrictive means to further compelling governmental interests. First, in accordance with *Cutter*, a prison policy cannot be arbitrary, which is defined generally as "[d]epending on individual discretion" or "founded on prejudice or preference rather than on reason or fact." Black's Law Dictionary 100 (7th ed. 1999). This requirement prohibits a prison from allowing one activity and disallowing another if both would have the same effect, or lack of effect, on the State's compelling interests. In *Warsoldier*, for example, the Ninth Circuit held that the California Department of Corrections' (CDC) hair-length restriction was not the least restrictive means of achieving compelling governmental interests in inmate health and prison security in part because the restriction applied only to male inmates, while the CDC's interests in inmate health and prison security obviously applied equally to offenders of both genders. 418 F.3d at 1000. Along similar lines, in *Washington* the Third Circuit held that the Pennsylvania Department of Corrections' policy limiting a prisoner to 10 books in his cell "arbitrarily limit[ed]" the property an inmate may possess, and was not the least restrictive means of achieving the prison's valid interests in safety and health because it allowed that inmate to keep four storage boxes of personal property and

allowed more than 10 books if the books were approved for educational purposes. 497 F.3d at 285. This analysis clearly applies to prison policies that distinguish between secular and religious activities that have the same effect on a prison's compelling governmental interests. As stated in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 543 (1993), "government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief."

Second, as *Cutter* held, the State must have a sound and supported basis to believe that its policy prohibiting an inmate from engaging in a particular religious practice is the least restrictive means to further compelling governmental interests. A prison may not ground the policy, as RLUIPA's legislative history establishes, on "mere speculation, exaggerated fears, or post-hoc rationalizations." 146 Cong. Rec. at 16,699 (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) (quoting S. Rep. No. 111, 103d Cong., 1st Sess. 10 (1993)). In *Warsoldier*, the CDC justified not applying its hair-length restrictions to female inmates on the ground that they are "much less likely" than their male counterparts to commit violent crimes, as demonstrated by data on assault rates in prison broken down by gender. 418 F.3d at 1000. The Ninth Circuit rejected this justification, holding that the small difference in assault rates "hardly suggest[ed]" that female inmates were much less likely to commit assault than male inmates, and that the data were

unclear whether it was limited to minimum security facilities like the one housing the plaintiff. *Id.* at 1000-1001. Evidence suggesting a religious restriction must be more precise. In *Murphy*, the Eighth Circuit held that "[t]he threat of racial violence is of course a valid security concern, but to satisfy RLUIPA's higher standard of review, prison authorities must provide some basis for their concern that racial violence will result from any accommodation of [the inmate's] request." 372 F.3d at 989. The court deemed testimony that the inmate was racist and that his religion allowed only white inmates to participate in group worship insufficient to meet the government's burden of showing that its limitation of the inmate to solitary practice of his religion in his cell was the least restrictive means of preventing racial violence. *Ibid.*

4. Defendants argue (Br. 16-18) that in rendering its decision, the district court should have acknowledged this Court's decisions in *DeMoss* v. *Crain*, 636 F.3d 145 (5th Cir. 2011) (per curiam) and *Gooden* v. *Crain*, 353 F. App'x 885 (5th Cir. 2009) (per curiam) (unpublished), both of which addressed the quarter-inch beard issue. The district court's omission was not error.[4] In both cases, which

[4] Defendants also cite (Br. 16, 18) as persuasive authority this Court's decisions in *Longoria* v. *Dretke*, 507 F.3d 898 (5th Cir. 2007) (per curiam), and *Diaz* v. *Collins*, 114 F.3d 69 (5th Cir. 1997). These two cases involved challenges to the TDCJ's ban on long hair based upon RLUIPA or its predecessor, the Religious Freedom Restoration Act of 1993. The cases are readily distinguishable

(continued…)

were litigated by pro se plaintiffs at trial and on appeal, this Court affirmed as not clearly erroneous a district court's finding that the TDCJ's policy prohibiting beards did not violate RLUIPA's substantial burden provision because it was the least restrictive means of advancing the State's compelling interests in prison security and controlling costs. *DeMoss*, 636 F.3d at 154-155; *Gooden*, 353 F. App'x at 888-890 & n.4. These holdings did not establish that such RLUIPA challenges fail as a matter of law; a subsequent decision of this Court vacated a district court's dismissal of a prisoner's suit alleging that this grooming policy imposed a substantial burden on his religious exercise, and remanded the case for consideration of the prisoner's suggested alternatives. See *Ali* v. *Quarterman*, 434 F. App'x 322, 325-326 (5th Cir. 2011) (per curiam) (unpublished); see also *Gooden*, 353 F. App'x at 888-889 & n.3 (affirming district court's holding that the grooming policy was the least restrictive means of achieving the State's compelling interest in prison security, but stating, "we make no broad holding that the grooming policy, as it applies to quarter-inch beards, will always be upheld"). Accordingly, *DeMoss* and *Gooden* do not control this case, where the district court found for the plaintiff inmate.

(…continued)
because long hair raises security concerns wholly different from security concerns due to quarter-inch beards.

5. Applying the aforementioned principles to this case demonstrates that the district court did not err in holding that barring Garner from wearing a quarter-inch beard is not the least restrictive means of furthering the State's compelling interests in effective prison security. The evidence in the record does not support defendants' contention that the TDCJ's ban on beards is the least restrictive means of advancing compelling governmental interests; rather, it supports Garner's contention that a religious exemption for a quarter-inch beard would be less restrictive while still satisfactorily advancing the compelling governmental interests. This finding is supported, in part, by the TDCJ's grooming policy, which establishes an arbitrary distinction between inmates who are allowed to wear a quarter-inch beard for medical reasons and those who are not allowed to wear the same beard for religious reasons. The TDCJ's ban on a quarter-inch beard Garner asks to wear for religious reasons is based upon "mere speculation, exaggerated fears, or post-hoc rationalizations." 146 Cong. Rec. at 16,699 (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) (quoting S. Rep. No. 111, 103d Cong., 1st Sess. 10 (1993)).

First, the record evidence does not support defendants' policy. Defendants introduced no studies or reports showing that the TDCJ's ban on beards is the least restrictive means of advancing compelling governmental interests. William Stephens, the TDCJ Correctional Institutions Division deputy director of prison

and jail operations, testified that he recommended to TDCJ officials, based upon his personal experience and discussions with other prison systems, that the TDCJ keep its no-beard policy to further its interests in security. SR 2257, 2283-2285, 2362-2364. Stephens acknowledged, however, that he is not aware of any studies or reports indicating that prison systems that allow inmates to wear short beards have experienced increased security problems as a result. SR 2282-2283. Both Stephens and John Moriarty, the TDCJ Inspector General, raised the possibility of an inmate shaving his short beard to create identification problems, but admitted they lacked knowledge of *any* incidents in the TDCJ, or even in other prison systems, in which an inmate shaved his beard or made any non-clothing-related changes of appearance to hinder identification. SR 2271, 2283-2284, 2381, 2392-2393, 2396. In light of the lack of documentation of security problems that trim beards would cause, the district court acted well within its discretion in finding that defendants' evidence did not adequately support the TDCJ's policy. See *S.E.C.* v. *Gann*, 565 F.3d 932, 939 (5th Cir. 2009).

The record evidence showed instead that Garner's proposed religious exemption for a quarter-inch beard would be less restrictive than a total ban, while still protecting compelling governmental interests. The Federal Bureau of Prisons, and more than 40 out of the 50 States, allow their inmates to wear trim beards similar to the one Garner is requesting either as a matter of course or pursuant to a

religious exemption. See, *e.g.*, 28 C.F.R. 551.2 ("An inmate [in the federal prison system] may wear a mustache or beard or both."); Cal. Code Regs. tit. 15, § 3062(h) (2011) (permitting facial hair for male inmates that is no longer than one-half inch),[5] available at http://www.cdcr.ca.gov/Regulations/Adult_Operations/index.html (follow "DEPARTMENT RULES" hyperlink) (last visited Dec. 23, 2011); Colo. Admin. Reg. 850-11(IV.A.3) (allowing inmates "freedom in personal grooming," including beards that "are kept neat and clean"), available at http://www.doc.state.co.us/sites/default/files/ar/0850_11_0.pdf (last visited Dec. 23, 2011); Or. Admin. R. 291-123-0015(2)(a) (requiring only that "facial hair * * * be maintained daily in a clean and neat manner"), available at http://arcweb.sos.state.or.us/pages/rules/oars_200/oar_291/291_123.html (last visited Dec. 23, 2011); N.H. Dep't of Corr. Policy and Procedure Directive 7.17(IV.D) (providing shaving waiver allowing quarter-inch beard for "[i]nmates declaring membership in recognized faith groups, and demonstrating a sincerely held religious belief in which the growing of facial hair is of religious significance"), available at http://www.nh.gov/nhdoc/documents/7-17.pdf (last

[5] California is in the process of amending section 3062(h) to allow facial hair of any length, consistent with the Federal Bureau of Prison's policy. See Settlement Agreement, *Basra* v. *Cate*, No. CV11-01676 SVW (C.D. Cal. June 5, 2011) (attached as an addendum to this brief).

visited Dec. 23, 2011). Stephens conceded that the experience of prisons that allow facial hair is relevant to the issue of whether the TDCJ could adopt a religious exemption without compromising security or identification. SR 2281. Because institutions from other jurisdictions have the same compelling interest in prison security as the TDCJ, their allowance of beards firmly supports Garner's position that the TDCJ's grooming policy is not the least restrictive means of advancing this interest. See *Warsoldier*, 418 F.3d at 998-1001.

In addition, the TDCJ's grooming policy imposes no similar limitations on inmates' hairstyles, providing further evidence that a ban on beards is not the least restrictive means of furthering the compelling governmental interest in prison security. The TDCJ allows inmates to shave their heads, which both Stephens and his supervisor, TDCJ Correctional Institutions Division Director Richard Thaler, acknowledged interferes with identification at least as much as the possibility of an inmate shaving a quarter-inch beard. SR 2275-2276, 2465-2466. The grooming policy further provides that "[m]ale offenders must keep their hair trimmed up the back of their neck and head," that "[h]air must be neatly cut," and that "[h]air must be cut around the ears." Texas Department of Criminal Justice Offender Orientation Handbook, at 10, available at http://www.tdcj.state.tx.us/documents/Offender_Orientation_Handbook_English.pdf (last visited Dec. 23, 2011). Defendants provided no evidence that trim one-

quarter-inch beards provide any greater impediment to identification than trim haircuts. In fact, because hair need only be neat and trim under the grooming policy, Stephens acknowledged that inmates may grow hair to such an extent that, unlike a quarter-inch beard, it completely hides the contours of the head. SR 2277.

The security concerns defendants raise in their opening brief do not justify the TDCJ's grooming policy. First, the TDCJ's grooming policy allows inmates with pseudofolliculitis barbae to wear a quarter-inch beard for medical reasons. Defendants' ostensible concern (Br. 24) that a beard will hinder identification of inmates within the prison is just as applicable to the inmates they allow to wear beards for medical reasons as to inmates who would do so for legitimate religious reasons.[6] As the district court observed (SR 2099-2100), defendants suggested no reason why Muslim inmates could not be shown wearing beards in their identification photos as well. Cf. *Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 366-367 (3d Cir.) (under standard of heightened scrutiny, police department violated free exercise clause of First Amendment when it refused

[6] In their opening brief, defendants appear to have abandoned the security argument pressed below that a quarter-inch beard will allow inmates to hide weapons or contraband. See *Cinel* v. *Connick*, 15 F.3d 1338, 1345 (5th Cir.) (appellant abandons issues not raised and argued in initial brief on appeal), cert. denied, 513 U.S. 868 (1994). This Court has observed that "contraband or weapons could hardly be hidden in a beard of such a short length." *Green* v. *Polunsky*, 229 F.3d 486, 490 (5th Cir. 2000). Indeed, Stephens conceded this point at trial. SR 2270.

religious exemptions from its prohibition against officers wearing beards, while allowing medical exemptions from same prohibition), cert. denied, 528 U.S. 817 (1999).

Defendants concede (Br. 25) there is no reason why a religious exemption threatens their interest in inmate identification but a medical exemption does not. See *Washington*, 497 F.3d at 285; *Warsoldier*, 418 F.3d at 1000. They distinguish (Br. 25) the medical exemption on the ground that issuing a clipper-shave pass to an inmate with pseudofolliculitis barbae advances other compelling governmental interests – avoiding inmate infections and minimizing the accompanying costs of medical treatment. These interests hardly justify the distinction defendants draw, however, as RLUIPA establishes that protection of religious exercise is a compelling governmental interest as well. See 42 U.S.C. 2000cc-3(g) ("This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."); *Lovelace* v. *Lee*, 472 F.3d 174, 186 (4th Cir. 2006) ("Congress * * * intended to provide as much protection as possible to prisoners' religious rights without overly encumbering prison operations.") (internal quotation marks omitted).

Defendants' argument (Br. 24-25) that an inmate could shave his beard to change his appearance within the prison or in order to escape is also baseless, even with appropriate judicial deference to prison officials. As noted above, TDCJ

officials could not name a single incident in which an inmate shaved his beard, or made any non-clothing-related changes of appearance, to hinder identification. See p. 19, *supra*. Indeed, several federal courts have observed the contrary; they held that shaving a beard of a quarter-inch length, or even one slightly longer, does not provide an escaped inmate with a sufficiently changed appearance to avoid capture. See *Fegans* v. *Norris*, 537 F.3d 897, 907 (8th Cir. 2008) ("An uncut beard creates a better disguise for an escapee than a quarter-inch beard, because it conceals the contours of an inmate's face."); *Mayweathers* v. *Terhune*, 328 F. Supp. 2d 1086, 1095 (E.D. Cal. 2004) (shaving a half-inch beard is unlikely to assist an escapee in eluding capture); cf. *Kuperman* v. *Wrenn*, 645 F.3d 69, 74-75 (1st Cir. 2011) (prison officials submitted an affidavit stating that grooming policy limiting inmates to quarter-inch beard prevents escaped inmate from quickly changing appearance). Accordingly, this justification is based upon "mere speculation" or "exaggerated fears."

Finally, defendants' contention (Br. 26 (citing *Fowler* v. *Crawford*, 534 F.3d 931, 941 (8th Cir. 2008), cert. denied, 129 S. Ct. 1585 (2009))) that "evidence of policies at one prison is not conclusive proof that the same policies would work at another institution" fails to undermine the record evidence. Defendants do not point to any evidence showing that Texas prisons are any different from those in States that allow beards. Of particular relevance are the Federal Bureau of Prisons

and the State of California, which are comparable to Texas in size and for years have permitted their inmates to grow beards even longer than the one Garner is requesting. The Federal Bureau of Prisons "has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners," *Cutter*, 544 U.S. at 725 (quoting Brief for the United States at 24, No. 03-9877), suggesting that beards likewise would not compromise security in the TDCJ; defendants present no argument in their brief of significant differences between the two prison systems that would make the allowance of beards unworkable in Texas. Cf. *Spratt* v. *Rhode Island Dep't Of Corr.*, 482 F.3d 33, 42 (1st Cir. 2007) (Federal Bureau of Prisons policy allowing inmate preaching suggests such activity would not compromise prison security absent explanation by prison officials of significant differences between state unit and a federal prison that would render the federal policy unworkable).

Neither do defendants' economic concerns justify the TDCJ's grooming policy. RLUIPA "may require a government to incur expenses in its own operations to avoid imposing a substantial burden," 42 U.S.C. 2000cc-3(c). Therefore, the prison must show that the additional cost of accommodating Garner's religious exercise is so excessive that it prevents the State from achieving other compelling interests such as security or inmate health. See *Baranowski* v.

Hart, 486 F.3d 112, 125-126 (5th Cir.), cert. denied, 552 U.S. 1062 (2007); cf. *Cutter*, 544 U.S. at 726 ("Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition.").

Based upon the record here, the district court correctly held that defendants failed to prove that their ban on beards is in any way necessary to satisfy their interest in effective prison security. The TDCJ has not offered any evidence on the adverse effect that allowing beards would have on security or inmate health. Instead, Stephens acknowledged that the TDCJ has not conducted a specific study on how feasible and costly it would to accommodate a religious exemption for a quarter-inch beard, and that he does not know of any significant cost problems beards cause for the prison systems that allow them. SR 2287-2289. Stephens' testimony that he "know[s] one guy that's really worried [about costs], and that's [himself]" (SR 2289) and that barbershop equipment "would get used significantly more" if a religious exemption were allowed (SR 2368), contains precisely the type of conclusory statements that are insufficient to meet the government's burden of proof. See *Warsoldier*, 418 F.3d at 998-999; *Murphy*, 372 F.3d at 988-989.

The uncontroverted record evidence further establishes that the costs of a religious exemption would not be excessive. The McConnell Unit already has

barbering services for inmates allowed to wear beards by virtue of their medical condition, and some of the expense of taking new photographs for prisoner identification cards would be covered by fees paid by the prisoners themselves. SR 2280, 2287. The record evidence further provides that the TDCJ Muslim population is approximately 7,100 inmates, which is about the same number of inmates who currently have clipper-shave passes. SR 2292, 2432. Even assuming, *arguendo*, that granting Garner the right to wear a quarter-inch beard will lead to a significant percentage of Muslim inmates requesting the same, accommodating this wish will impose upon the TDCJ only the possible marginal costs of expanding the barbering services to accommodate Muslims and of taking new photographs for identification cards, hardly a significant increase in costs.

On appeal, defendants argue (Br. 19-21) that granting Garner's request to wear a beard will significantly increase costs associated with allowing beards because (1) Muslim inmates must maintain a beard of a quarter-inch in length, thus requiring more barbershop visits than inmates with pseudofolliculitis barbae, who receive a beard trimming approximating a clean shave; and (2) inmates will proclaim membership in religious groups that receive an exception from the no-beard policy, and the size of this group – unlike the group of inmates with a dermatological condition – is not constrained by objective criteria. These arguments either fail to provide a rational distinction between the medical and

religious exemptions or lack a sound basis. They therefore do not establish a ban on beards as the least restrictive means of advancing the TDCJ's compelling interests in effective and economical prison security.

The record evidence does not bear out defendants' first concern. Defendants base this argument upon Garner's statement on cross-examination that his faith does not allow him to be clean shaven. SR 2243. In light of Garner's understanding that the medical exemption requires an inmate's beard to be trimmed but does not leave him clean shaven (SR 2242-2243), Garner's response is at best ambiguous as to whether he objects to the clean shave of a razor or the approximation of a clean shave afforded by a clipper. His response is clarified by his subsequent testimony that the TDCJ "said they would have no problem with the medical exempt with wearing a quarter-of-an-inch beard. So, if I am allowed to wear a beard, that's – that's what I seek to wear, a quarter of an inch." SR 2243. This statement indicates, as the district court concluded, that Garner is seeking relief no greater than the medical exception from the no-beard policy the TDCJ provides for inmates with pseudofolliculitis barbae.[7] See also SR 530, 2050 (stating in district court pleadings that the TDCJ failed to consider "changing its grooming policy to permit all inmates to wear a closely trimmed beard, with a

[7] The United States takes no position on the application of RLUIPA to other circumstances.

requirement that each inmate report for a clipper shave and haircut on a regular schedule similar to the schedules currently followed for inmate haircuts"). Defendants thus are mistaken in their belief that inmates with a religious exception from the no-beard policy will require more frequent trips to the prison barbershop.

Defendants' second concern – that other inmates will opportunistically convert to a religion that has a faith exception from the no-beard policy, leading to excessive costs for the TDCJ – is equally unavailing. Defendants cite (Br. 21) the TDCJ's prior experience of opportunistic conversion when it extended accommodations to inmates to eat a pork-free diet and participate in peace pipe ceremonies, and inmates' ongoing requests for religious exemptions from the grooming policy. Defendants assert, therefore, that "there is good reason to suspect that many inmates would express a faith preference – whether Muslim or otherwise – in an attempt to secure an exception from the grooming code." Br. 21. Contrary to defendants' apparent belief that they must unquestioningly accept an inmate's profession of faith, *Cutter* empowers them to challenge the sincerity of an inmate's religious beliefs, thereby reducing the rate of opportunistic conversion. See *Cutter*, 544 U.S. at 725 n.13. This option does not disappear merely because defendants choose not to exercise it.

Even assuming, *arguendo*, that a religious exemption from the no-beard policy leads to a significant number of legitimate inmate requests for the right to

wear a quarter-inch beard, defendants' claim fails because they have not shown that the requests, or costs, will be so excessive that they will prevent the State from achieving other compelling interests such as security or inmate health. See pp. 26-27, *supra*. The McConnell Unit already contains a barbershop that trims the beards of inmates with pseudofolliculitis barbae. Defendants cannot legitimately deny a religious accommodation based solely on the *possibility* that the additional marginal costs to the prison of the accommodation will be overwhelming. Such an interpretation of RLUIPA's substantial burden provision contravenes RLUIPA's mandate that a prison may have to "incur expenses in its own operations to avoid imposing a substantial burden," and that RLUIPA be interpreted "in favor of a broad protection of religious exercise." 42 U.S.C. 2000cc-3(c), 2000cc-3(g). Accordingly, speculative assertion of increased costs is unavailing.[8] Cf. *Shakur* v. *Schriro*, 514 F.3d 878, 887-890 (9th Cir. 2008) (dismissing prison's assertion of

[8] Defendants also argue (Br. 22-23) that a religious exemption to the no-beard policy will create administrative burdens in the form of enforcing the quarter-inch limit and coordinating the movements of more inmates through the barbershop. For the reasons set forth above, this argument is unavailing. The burden of enforcing the quarter-inch limit is as applicable to inmates with a medical exemption from the grooming policy as it would be to inmates with a religious exemption. See pp. 22-23, *supra*. And defendants fail to quantify the burden of moving additional inmates through the barbershop, much less show that it is so excessive that it would prevent the State from achieving its compelling budgetary interests. See pp. 26-27, 29-31, *supra*.

annual cost to provide Halal or Kosher meals to Muslim inmates, which was not based upon personal knowledge).

CONCLUSION

This Court should affirm the district court's ruling that the TDCJ's ban on beards violates RLUIPA's substantial burden provision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2011, I electronically filed the foregoing Brief for the United States as Amicus Curiae Supporting Appellee and Urging Affirmance with the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

CERTIFICATE REGARDING PRIVACY REDACTIONS AND VIRUS SCANNING

I certify (1) that all required privacy redactions have been made in this brief, in compliance with 5th Cir. Rule 25.2.13; (2) that the electronic submission is an exact copy of the paper document, in compliance with 5th Cir. R. 25.2.1; and (3) that the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

Date: December 27, 2011

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), because:

This brief contains 6980 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because:

This brief has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Times New Roman font.

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

Date: December 27, 2011

ADDENDUM

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

SUKHJINDER S. BASRA, UNITED STATES OF AMERICA, Plaintiffs, v. MATTHEW CATE, *et al*. Defendants.	No. CV11-01676 SVW (FMOx) SETTLEMENT AGREEMENT Judge Steven J. Wilson

I. Introduction

1. This Settlement Agreement is entered into between Plaintiff Sukhinder S. Basra ("Plaintiff") and Defendants Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation ("CDCR"); Terry Gonzalez, Warden of the California Men's Colony ("CMC"); the State of California; Jerry Brown, Governor of the State of California; CDCR; and CMC ("Defendants").

2. This Settlement Agreement addresses Mr. Basra's Complaint, U.S. District Court for the Central District of California, No. CV11-01676 SVW (FMOx) ("lawsuit"), brought under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc, and resolves all claims brought by Mr. Basra against Defendants in this lawsuit.

3. Plaintiff contends that Defendants violated Mr. Basra's right under RLUIPA to exercise his religion because Mr. Basra practices the Sikh faith, which requires its adherents to maintain unshorn hair (Kesh) on their bodies, a requirement that includes facial hair.

4. California Code of Regulations Title 15, Section 3062(h) ("Section 3062(h)") prohibits inmates from wearing facial hair that extends more than one-half inch in length from the face. Plaintiff contends that Section 3062(h) imposes a substantial burden on Mr. Basra's religious exercise. Plaintiff further contends Defendants have disciplined Mr. Basra and he continues to face possible discipline in accordance with prison regulations for violating Section 3062(h). All of the allegations of wrongdoing made by Plaintiff in this lawsuit are denied by any and all Defendants who are or ever were parties to this lawsuit.

5. Plaintiff and Defendants ("the Parties") now desire and intend by this Settlement Agreement to compromise and settle all disputes between them arising out of or relating to the claims in this lawsuit, including any rights to appeal.

6. Therefore, in consideration of the covenants set forth in this Settlement Agreement, the Parties agree to effect a compromise of their disputes on the terms and conditions set forth below:

II. Terms and Conditions

7. The "Effective Date" of this Settlement Agreement shall mean the date that the Court grants the stipulated stay of all proceedings in this matter (see paragraph 15). Each term and condition is material to this Settlement Agreement, and the absence of approval of the entirety of this Settlement Agreement, including without limitation the provision contained in paragraph 15, below, or the failure of the Court to enter the stipulated order of dismissal with every term agreed to by the parties included, shall render this Settlement Agreement null and void, and the Parties agree that any order approving anything other than the entirety of this Settlement Agreement shall be unenforceable.

8. Beginning with the Effective Date of this Settlement Agreement, Defendants agree that they will not discipline Mr. Basra for violations of Section 3062(h).

9. Within 30 days of the Effective Date of this Settlement Agreement, CDCR shall issue a memorandum to all its prisons instructing prison staff that the facial hair length restrictions set forth in Section 3062(h) will no longer be

enforced. This memorandum shall remain in effect until Section 3062(h) is amended or repealed to remove the facial hair length restrictions.

10. Within 90 days of the Effective Date of this Settlement Agreement, Defendants shall begin the process of initiating a change to Section 3062(h) in accordance with the Administrative Procedures Act to eliminate the facial hair length restrictions. The Parties acknowledge that compliance with the Administrative Procedures Act can be a lengthy process, which typically takes more than a year. Defendants will act in good faith in accordance with the Administrative Procedures Act to change Section 3062(h) to eliminate the facial hair length restrictions. Nothing in this Agreement shall prevent Defendants from requiring that inmates maintain their facial hair in a neat and clean manner. Until Defendants amend Section 3062(h), Defendants shall not discipline any inmate for the length of his facial hair.

11. The provisions of this Settlement Agreement shall apply to Mr. Basra while he is incarcerated under the jurisdiction of CDCR, whether in a prison in the State of California or an out-of-state prison that contracts with CDCR.

12. CDCR shall expunge Mr. Basra's record of any reference to violations of Section 3062(h).

13. CDCR shall permit Mr. Basra to wear a grey or white patka, not to exceed 24" by 24," which he may acquire from an approved vendor, subject to the same limitations CDCR or the specific institution where Mr. Basra is housed places on other inmates permitted to wear religious headwear or coverings.

14. The State shall pay $42,000 as complete resolution of all claims of Mr. Basra to his counsel, the ACLU Foundation, Alston & Bird LLP and/or the Sikh Coalition for attorneys' fees and costs arising from this litigation. No interest shall accrue on this amount and no other monetary sum shall be paid to Plaintifs. Any amounts other than attorneys' fees or costs paid to Mr. Basra shall be subject to his restitution obligations under California Penal Code Section 2085.5.

15. The Parties agree to a stay of all proceedings in this action until the enactment of changes to Section 3062(h) to eliminate the facial hair length restrictions and will file a stipulation to stay the matter subject to the Court's approval. This agreement shall be contingent upon the Court's agreement to stay proceedings as requested by the Parties. Following the enactment of changes to Section 3062(h) to eliminate the facial hair length restrictions, the Parties shall file a stipulation of dismissal with prejudice of all claims against Defendants in the case of *Basra v. Cate*, Case No. CV11-01676 SVW(FMOx) (C.D. Cal.).

16. By signing this Settlement Agreement, the Plaintiff agrees that it will releases Defendants, and each of them, and Defendants will release Plaintiff from all claims, past, present and future, known or unknown, arising from or potentially arising from the facts alleged in the Complaint or Complaint in Intervention as soon as Defendants have notified Plaintiff's counsel that the enactment of changes to Section 3062(h) to eliminate the facial hair length restrictions have been completed, but not before. It is the Parties' intention, in executing this Settlement Agreement and in receiving and accepting the consideration referred to, that this Settlement Agreement shall be effective as a full and final accord and satisfaction and release of all claims Plaintiff may have against Defendants or Defendants may have against Plaintiff in this lawsuit. In furtherance of this intention, Plaintiff and Defendants acknowledge that they are familiar with, and expressly waive, the provisions of California Civil Code section 1542, which provides as follows:

> **A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release which if known by him or her must have materially affected his or her settlement with the debtor.**

III. Representations and Warranties

17. This Settlement Agreement is the compromise of various disputed claims and shall not be treated as an admission of liability by any of the Parties for any purpose. The signature of or on behalf of the respective Parties does not

indicate or acknowledge the validity or merits of any claim or demand of the other Party.

18. This Settlement Agreement is binding on the Parties and their agencies, departments, successors, or independent contractors including agents and/or assigns that have responsibility for implementation of the requirements of this Settlement Agreement either currently or in the future.

19. This Settlement Agreement is not intended to impair or expand the right of any person or organization to seek relief against the State, CDCR or its officials, employees, or agents for their conduct or the conduct of CDCR employees for issues not specifically enumerated in this settlement agreement.

20. If any Party believes that another Party has failed to fulfill any obligation under this Settlement Agreement, the Party shall, prior to initiating any court proceeding to remedy such failure, give written notice of the failure to the lead counsel of record for the other Party and attempt in good faith to resolve any such failure. If the Parties are unable to resolve their differences within sixty days of the written notice, then any Party may request the Court to enforce compliance with this Settlement Agreement. Each Party shall be responsible for his own attorneys fees incurred under this paragraph except that should a motion to enforce the Settlement Agreement be necessary, the prevailing party in that proceeding shall be entitled to reasonable attorneys' fees associated with drafting and filing any such motion or opposition to such motion.

21. The undersigned signatories represent that they have full authority from their respective clients to execute this settlement agreement.

22. This Settlement Agreement may be executed by the Parties in counterparts, each of which shall be deemed to be an original executed document and all of which, together, shall constitute one and the same agreement.

23. This Settlement Agreement expresses the entire agreement of the Parties. No recitals, covenants, agreements, representations, or warranties of any kind have been made or have been relied upon by any Party, except as specifically set forth in the Settlement Agreement. Nothing other than this Settlement Agreement shall be relevant or admissible to supplement or vary any of its terms and provisions. All prior discussions, agreements, and negotiations are superseded by and merged and incorporated into this Settlement Agreement. This is an integrated document.

FOR SUKHJINDER S. BASRA

June ____, 2011

_____
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JONATHAN M. GORDON
LEIB MITCHELL LERNER
Alston & Bird LLP

June ____, 2011

_____
PETER J. ELIASBERG
ACLU Foundation of Southern California

June ____, 2011

_____
DANIEL MACH
American Civil Liberties Union
Program on Freedom of Religion and Belief

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FOR SUKHJINDER S. BASRA

June 3, 2011

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June 4th, 2011

Harsimran kaur Dang

HARSIMRAN KAUR DANG
The Sikh Coalition

FOR DEFENDANTS

June 3, 2011

MICHELLE DES JARDINS
Supervising Deputy Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

DAVID RASHEED ALI,	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 9:09-cv-52**
	)	
RICK THALER, DIRECTOR	)	
TDCJ-CID JUSTICE	)	
Defendant.	)	

STATEMENT OF INTEREST OF THE UNITED STATES

EXHIBIT B

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

SUKHJINDER S. BASRA AND UNITED STATES OF AMERICA	)	No. CV11-01676 SVW (FMOx)
Plaintiffs,	)	**UNITED STATES' BRIEF IN SUPPORT OF PLAINTIFF SUKHJINDER S. BASRA'S MOTION FOR A**
v.	)	

MATTHEW CATE, *et al.*,	**PRELIMINARY INJUNCTION**
Defendants.	Honorable Stephen V. Wilson
	Hearing Date: June 6, 2011 Time: 1:30 p.m. Courtroom: 6

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THE UNITED STATES OF AMERICA, by its undersigned attorneys, hereby files this brief in support of Plaintiff Sukhjinder S. Basra's Motion for a Preliminary Injunction.

I. INTRODUCTION

Plaintiff Sukhjinder S. Basra, an inmate at the California Men's Colony Correctional Facility ("CMC") in San Luis Obispo, California, is a lifelong practitioner of the Sikh faith. As an observant Sikh, he is religiously mandated to maintain unshorn hair, including facial hair. This fundamental requirement of his religion signifies his respect for the will of God. Adherents to the Sikh faith believe that cutting one's hair is a grievous sin. Pursuant to these beliefs, Mr. Basra always has maintained his hair and beard uncut and unshaved, including during his incarceration.

California Department of Corrections and Rehabilitation ("CDCR") policy prohibits facial hair longer than one-half inch, without providing any exception for those whose religious practices forbid cutting facial or other bodily hair ("Grooming Policy"). This rule was not enforced against Mr. Basra until after his transfer from Pleasant Valley State Prison ("PVSR"), a more restrictive, higher security CDCR facility, to the minimum security facility in CMC. Once at CMC, Defendants began enforcing this Grooming Policy against Mr. Basra, subjecting him to progressively more severe disciplinary sanctions for practicing his religion.

Mr. Basra is now compelled either to cut his beard and violate a central tenet of his religion, or suffer increasingly severe penalties, including the deprivation of privileges and the risk of longer confinement in prison, in violation of his rights under the Religious Land Use and Institutionalized Person Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.* (2000). Defendants contend that the Grooming Policy is justified by their interest in the security of California's prison facilities, but the security interests they assert do not justify perpetuating the substantial burden imposed on Mr. Basra's religious liberty, one of our society's most fundamental

rights. *See Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002) (RLUIPA is designed to "guard against unfair bias and infringement on fundamental freedoms"). As President Clinton said in signing RLUIPA, "[r]eligious liberty is a constitutional value of the highest order, and the Framers of the Constitution included protection for the free exercise of religion in the very first Amendment. This Act recognizes the importance the free exercise of religion plays in our democratic society." *See* Statement by President William J. Clinton Upon Signing S. 2869, 2000 U.S.C.C.A.N. 662 (September 22, 2000). Indeed, Congress enacted RLUIPA to combat "egregious and unnecessary" restrictions on religious exercise, "[w]hether from indifference, ignorance, bigotry, or lack of resources." 146 Cong. Rec. 16698-99 (2000).

Defendants' Grooming Policy is precisely the type of unnecessary restriction targeted by RLUIPA. The United States urges this Court to grant Mr. Basra's Motion for a Preliminary Injunction.

II. FACTUAL BACKGROUND AND STATEMENT OF THE CASE

Mr. Basra is an observant Sikh who is religiously mandated to maintain unshorn hair, including facial hair. Decl. of Professor Gurinder Sigh Mann in Supp. of Pl. Sukhjinder S. Basra's Mot. for Prelim. Inj., ¶ 7, ECF No. 7-4 (hereinafter "Mann Decl."). His unshorn beard is approximately six inches in length. Members of the Sikh religion have five articles of faith which are worn at all times. One of these five articles is the *kesh*, or unshorn hair. Adherents to the Sikh faith believe that cutting one's hair is a grievous sin and that uncut hair is required for a Sikh to be classified as pure. Basra Decl. in Supp. of Mot. for Prelim. Inj. ¶ 5, Jan. 26, 2011, ECF No. 7-2 (hereinafter "Basra Decl.").

Mr. Basra currently is incarcerated in a minimum security facility within CMC. He is kept in an unlocked, 90-person dormitory room. *Id.* ¶ 7. He initially was incarcerated at PVSP, where he lived in a locked, two-man cell. *Id.* After one

year of discipline-free incarceration at PVSP, CDCR transferred Mr. Basra to CMC on or about February 26, 2010. *Id.*

According to CDCR regulations, "facial hair, including short beards, mustaches, and sideburns are permitted for male inmates and shall not extend more than one-half inch in length outward from the face." Cal. Code Regs. tit. 15, § 3062(h) (2010). The regulations contain no provision for religious exemption. Moreover, they apply system-wide, regardless of the level of security at an individual facility.

When Mr. Basra was incarcerated in a more restrictive setting at PVSP, he kept his beard unshorn but suffered no disciplinary action during his incarceration there. Basra Decl. ¶ 9. While at PVSP, and during the initial portion of his confinement at CMC, CDCR never warned Mr. Basra his beard violated any law or policy, and never disciplined Mr. Basra for having his beard longer than one-half inch. *Id.* When Mr. Basra first entered the state system through the inmate reception center, he was asked to run his fingers through his beard in front of the guards. Since then, however, no CMC employee has ever searched Mr. Basra's beard or asked him to run his fingers through his beard in front of them. Mr. Basra has never been accused of hiding any contraband in his beard. No correctional officer has ever physically manipulated Mr. Basra's beard, run a metal detection wand over it, or asked Mr. Basra to part his beard or run his fingers through it in front of them, for any reason. *Id.* ¶ 10.

Beginning in March 2010, however, CDCR began disciplining Mr. Basra for maintaining his beard at longer than one-half inch in length. *Id.* ¶ 11. Since then, CDCR has subjected Mr. Basra to progressively more severe disciplinary action for failing to comply with the Grooming Policy. On April 3, April 30, and June 28, 2010, Mr. Basra was issued administrative Rules Violation Reports ("RVR") for violating Cal. Code Regs., tit. 15, §3062 (h), "Grooming Standards," for having a beard longer than one-half inch. Basra Decl. ¶¶ 12-14. At the administrative

hearings on each of these violations, Mr. Basra pled not guilty and informed the hearing official that he is unable comply with the grooming standard due to his religious beliefs. Nevertheless, after each hearing, Mr. Basra was found guilty of violating the Grooming Policy. *Id.* For these violations, Mr. Basra received various punishments, including over 40 hours of extra duty, loss of good time credits, and 10 days confinement to quarters. *Id.* During the confinement to quarters period, Mr. Basra was required to stay in his cell and was permitted to leave only to eat, use the rest room, and receive medical attention. He also lost his rights to visitation, phone calls, yard access, day room, canteen, quarterly packages, and accrual of excused time off. *Id*. ¶ 14, fn 1. Mr. Basra appealed each of these charge through all three levels of administrative review, arguing that the disciplinary action substantially burdened his religious exercise. *Id.* ¶¶ 12-14.

On July 19, 2010, Mr. Basra submitted to Defendant Gonzalez a request that he be exempted from the Grooming Policy and allowed to maintain his beard untrimmed. *Id.* ¶17. In this request, he informed the warden that maintaining unshorn facial hair is part of his religious belief and practice. In a letter dated July 28, 2010, CDCR denied Mr. Basra's request, stating in pertinent part:

> [Y]ou are not being discriminated against, as you allude to in your letter . . . . You are being treated the same as the other inmates at CMC . . . . You may have a beard, but you must keep it trimmed to no more than one-half inch in length. There is no provision in the CCR, Title 15 for the Warden to exempt the grooming standards.

Id. ¶ 14.

Other than disciplinary procedures for violations of the grooming code, Mr. Basra has a positive disciplinary record. *Id.* ¶ 16. The penalties for the practice of his religion are becoming more severe, and he is in danger of having his security classification changed. *Id.* ¶8. As a result of the Grooming Policy, Mr. Basra has suffered and likely will continue to suffer disciplinary sanctions,

including but not limited to the following: (1) loss of visitation rights; (2) extra duties; (3) loss of assignment to particular duties; (4) extra restrictions or confinement; and (5) loss of Work Time Credit or risk of loss of credits in the future.

III. APPLICABLE LEGAL STANDARDS

A. Standard for Issuing a Preliminary Injunction

The Supreme Court has held that a "plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, ___, 129 S. Ct. 365, 374 (2008). Prior to the Supreme Court's decision in *Winter*, a number of circuits had employed a sliding scale approach in determining whether to issue a preliminary injunction. Under this approach, the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). The Ninth Circuit had adopted a version of this sliding scale approach under which a preliminary injunction could issue where the likelihood of success is such that "serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor." *Id.* (quoting *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)). In *Cottrell*, the court held that this approach survived the Supreme Court's decision in *Winter*. Under the Ninth Circuit test, then, "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Id.* at 1132.

Accordingly, to obtain a preliminary injunction, Mr. Basra "must show either (1) a likelihood of success on the merits and the possibility of irreparable

injury or (2) the existence of serious questions going to the merits and the balance of hardships tipping in [his] favor." *Warsoldier v. Woodford*, 418 F.3d 989, 993-94 (9th Cir. 2005) (quoting *Nike, Inc. v. McCarthy*, 379 F.3d. 576, 580 (9th Cir. 2004)). Mr. Basra has met the standards of both of these tests. Accordingly, his motion should be granted.

B. RLUIPA Prohibits the Government From Imposing a Substantial Burden on a Prisoner's Religious Exercise Unless the Government's Justification for Imposing the Burden Can Withstand Strict Scrutiny.

RLUIPA provides that no state or locally-owned institution, including correctional facilities, "shall impose a substantial burden on the religious exercise of a [prisoner]." 42 U.S.C. § 2000cc-1(a). "Religious exercise" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

In order to overcome this prohibition on burdening religious exercise, a government must demonstrate that imposition of the burden is: (1) "in furtherance of a compelling governmental interest;" and (2) "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). Under RLUIPA, Mr. Basra bears the initial "burden of going forward with evidence to demonstrate a prima facie claim thats [the Grooming Policy] and its punitive sanctions designed to coerce him to comply with that policy constitute a substantial burden on the exercise of his religious beliefs." *Warsoldier*, 418 F.3d. at 994. Once he has done so, Defendants must show that the substantial burden placed on Mr. Basra is the least restrictive means of furthering a compelling governmental interest. *Id*. at 995.

IV. ANALYSIS

The Grooming Policy substantially burdens Mr. Basra's religious exercise, and Defendants do not contest this point in the Opposition. Defendants attempt to justify the substantial burden by claiming that it serves a compelling governmental

interest—the need to quickly identify inmates and to prevent the introduction, use and distribution of weapons, drugs, and other contraband – and that the Grooming Policy is the least restrictive means of achieving those ends. Defendants' argument fails in light of the Ninth Circuit's decision in *Warsoldier*, 418 F.3d 989, in which the plaintiff challenged CDCR's Grooming Policy prohibiting long hair. Under almost identical facts, the Ninth Circuit rejected these arguments and held that the plaintiff had demonstrated a likelihood of success on the merits of his claim that California's grooming policy prohibiting long hair violated RLUIPA, 42 U.S.C. § 2000cc-1. *Id*.

A. Mr. Basra Is Likely To Succeed on the Merits Because the Substantial Burden Placed on His Exercise of Religion Is Not the Least Restrictive Means of Achieving a Compelling Governmental Interest.

1. <u>Defendants Have Placed a Substantial Burden on Mr. Basra's Exercise of Religion.</u>

A State places a substantial burden on religious exercise when it places "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Warsoldier*, 418 F.3d at 995 (quoting *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981)) (internal quotation marks omitted) (holding that grooming policies requiring inmates to cut their hair intentionally impose a substantial burden); *see also Shakur v. Schriro*, 514 F.3d 878, 881 (9th Cir. 2008); *May v. Baldwin*, 109 F.3d 557, 563 (9th Cir. 1997) (finding substantial burden where important benefits were conditioned on conduct proscribed by a religious faith, a Rastafarian inmate undoing his dreadlocks). The Ninth Circuit has found a substantial burden when the action is "oppressive to a significantly great extent, such that it renders religious exercise effectively impracticable." *Sefeldeen v. Alameida*, 238 F. App'x 204, 205-06 (9th Cir. 2007) (quotation marks omitted) (quoting *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034-35 (9th Cir. 2004)).

In *Warsoldier*, the Court held that imposing discipline such as that imposed upon Mr. Basra for failing to comply with CDCR's grooming regulations is a substantial burden on religious exercise. *Warsoldier*, 418 F.3d at 996. Like the plaintiff in *Warsoldier*, Mr. Basra is not being physically forced to comply with the grooming standard, but he is being forced to choose between abandoning a core tenant of his religion and being subjected to a variety of increasing punishments. The court found such a Hobson's choice to be a substantial burden on religious exercise, noting that imposing such a dilemma "flies in the face of Supreme Court and Ninth Circuit precedent that clearly hold that punishments to coerce a religious adherent to forgo his . . . religious beliefs is an infringement on religious exercise." *Id.* The policy at issue here imposes a substantial burden on Mr. Basra's religious exercise, and Defendants do not contest that this prong of RLUIPA has been met.

2. Defendants Cannot Establish a Compelling Governmental Interest or Least Restrictive Means

Because imposition of the Grooming Policy on Mr. Basra amounts to a substantial burden on his religious exercise, CDCR must show that the imposition of the substantial burden on Mr. Basra serves a compelling governmental interest, and that the policy is the least restrictive means of advancing that interest. *See* 42 U.S.C. §§ 2000cc-1(a), 2000cc-2(b). Here, Defendants cite to prison safety and security to justify depriving Mr. Basra of his fundamental right to exercise his religion. In spite of evidence from other jurisdictions, and the holding in *Warsoldier*, Defendants claim, as they did in *Warsoldier*, that the Grooming Policy is the least restrictive means of achieving those goals. It is not, and the Ninth Circuit has previously rejected these same arguments.

In *Warsoldier*, Defendants argued that their policy prohibiting long hair allowed for the quick and accurate identification of inmates; prevented inmates from hiding contraband or weapons in their hair or on their bodies; and prevented prisoners from disguising their identity by cutting their hair upon escape.

Warsoldier, 418 F.3d at 997. They make the same arguments here. Defendants' Opp. to Mot. for Prelim. Inj., 3-9, ECF No. 32 (hereinafter "Opposition" or "Opp."). While prison safety and security are compelling interests, CDCR could achieve those goals through less restrictive means.

a. The Grooming Policy Is Not Necessary for Prisoner Identification and Prevention of Escape

The prohibition on long beards does not aid in the prevention of escapes or the capture of escapees because CDCR already must employ mechanisms to address the changing appearance of prisoners. In response to the Ninth Circuit's decision in *Warsoldier*, CDCR changed its grooming policy in 2006 to allow hair of any length. Decl. of Randolph Grounds in Supp. of Opp. to Mot. for Prelim. Inj., ¶ 2, ECF No. 32-1 (hereinafter "Grounds Decl."). In *Warsoldier*, the defendants had argued that removing the hair length prohibition would help prisoners escape and elude capture. *Warsoldier*, 418 F.3d at 997. Yet, Defendants have not cited to a single instance since the regulation changed where a prisoner escaped, attempted to escape, or eluded capture by changing his hair length. Indeed, the last instance of escape involving a change of hair length defendants cite to occurred almost fourteen years ago. Opp. Ex. 2, at 2, ECF No. 32-3. These fears either proved to be unfounded, or defendants have found other, less restrictive means, of addressing these dangers.[1]

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[1] Defendants cite heavily to an incident in 1997 in which an inmate escaped by shaving his beard, cutting his hair, fashioning an apparently realistic identification card, donning civilian clothing, and leaving through the front gates of the prison. One assumes that CDCR addressed this situation by resorting to the obvious less restrictive alternatives of preventing inmates from accessing printers, cameras, laminating machines, and civilian clothing, and restricting access to employee identification cards.

Because CDCR already effectively manages prisoners' changes in appearance, the beard length restriction is unnecessary. Changing hair length is just one of a number of ways in which prisoners may change their appearance. During a period of incarceration, prisoners may age, gain and/or lose weight, incur facial scars, get tattoos, lose teeth, and suffer receding hairlines. Decl. of John Clark ¶ 22 (hereinafter "Clark Decl."). Professional correctional management requires any facility to maintain safety and security in spite of these changes. *Id.* ¶ 24. One way to accomplish this task is to require a new photograph and inmate identification whenever these changes occur, and retention of all past inmate photos so the facility has a series of pictures of each inmate in every state of appearance. The Federal Bureau of Prisons ("BOP") manages to administer this practice while incarcerating 215,000 prisoners and facing severe budgetary limitations. *Id.* ¶¶ 10, 22, 27. CDCR likely already has policies and practices in place to maintain security in spite of these inevitable appearance changes, accounting for the lack of a single escape by an inmate who altered his appearance in the last fourteen years. If it does not, than it cannot credibly cite to appearance change as a compelling concern.

Moreover, Defendants' general citations to cost concerns in administering less restrictive alternatives are unpersuasive. Congress underlined the importance of eradicating burdens on religious exercise by explicitly providing that compliance with RLUIPA "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." 42 U.S.C. § 2000cc-3(c).

b. <u>The Grooming Policy Is Not the Least Restrictive Means of Preventing Prisoners From the Concealing Contraband.</u>

Defendants cite to the fear that prisoners will conceal contraband in a long beard. They cite to "numerous occasions" in which prisoners have concealed contraband "within beards and long hair," without offering any temporal or

quantitative specifics. They do not cite a single specific example of an inmate concealing contraband in a beard. Opp. at 4. Moreover, Defendants raised the same concern in *Warsoldier*, 418 F.3d at 997, but, since changing the regulation, CDCR has addressed this concern by searching prisoners' hair. Grounds Decl. ¶ 14. To the extent that concealment of contraband in beards also is a concern, CDCR may employ the same remedy. Any additional administrative burden would be minor, and that burden is outweighed by the interest in protecting a fundamental right. The BOP addresses this concern by regularly searching prisoners to prevent them from concealing contraband on their person. Clark Decl. ¶ 26. The search consists of requiring the prisoner to run his hands vigorously through his hair and through his beard, and then inserting his fingers in his mouth and pulling his cheeks back. Prisoners also are subjected to a handheld metal detection wand. The entire process takes only a few seconds. *Id*.

c. The Grooming Policy Is Overly Restrictive Because It Applies to All Inmates, Regardless of Security Risk.

CDCR has enforced the Grooming Policy against Mr. Basra despite its determination, evidenced by his transfer to a minimum security prison, that he poses a lower security risk. Defendants have the burden of showing that security, their asserted compelling interest, is actually furthered by banning this specific Plaintiff from having an unshorn beard. 42 U.S.C. § 2000cc-1(a) (prohibiting government imposition of a substantial burden on "religious exercise of a person" unless "the government demonstrates that imposition of the burden on *that person*" furthers a compelling government interest) (emphasis added); *see, e.g.*, *Jova v. Smith*, 582 F.3d 410, 415 (2d Cir. 2009) ("[T]he state may not merely reference an interest in security or institutional order in order to justify its actions."); *Washington v. Klem*, 497 F.3d 272, 283 (3d Cir. 2007) ("Even in light of the substantial deference given to prison authorities, the mere assertion of security or health reasons is not, by itself,

enough for the Government to satisfy the compelling governmental interest requirement. Rather, the particular policy must further this interest."); *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 988-89 (8th Cir. 2004) ("[Officials] must do more than offer conclusory statements and offer post hoc rationalizations.") (citations omitted).

Defendants have not demonstrated how security is actually furthered by prohibiting Mr. Basra from keeping his beard unshorn. When Mr. Basra was housed in a medium security facility, Defendants did not require him to shorten his beard, nor did Defendants punish him for maintaining a long beard. Basra Decl. ¶ 9. Mr. Basra has since been transferred to a minimum security facility, where he has maintained a clean disciplinary record, other than discipline he has received for maintaining an unshorn beard in accordance with his religious beliefs. *Id.* ¶¶ 7, 16. Furthermore, Defendants have not pointed to any evidence in their Opposition that Mr. Basra is an escape risk or that he has attempted to conceal contraband in his beard. In *Warsoldier*, the Ninth Circuit found that CDCR's grooming policy prohibiting long hair likely was not the least restrictive means of furthering the proffered security interest, in part because Mr. Warsoldier, like Mr. Basra, was housed in a minimum security facility. The *Warsoldier* court found that the lowered security pressures at minimum security facilities may require policies that are correspondingly less restrictive, and criticized CDCR for failing to address this difference in its polices. 418 F.3d at 999. That same principle applies here. Defendants have made no showing that the burden imposed on Mr. Basra by the Grooming Policy furthers the asserted compelling government interest in security, and therefore have failed to meet their burden under RLUIPA.

d. Because the Federal Bureau of Prisons Is Able To Maintain Safety and Security Without Restricting Beard Length, CDCR's Policy Cannot Be the Least Restrictive Means.

The Federal Bureau of Prisons has a population of approximately 215,000 prisoners, Clark Decl. ¶ 10, in contrast to California's 160,000. Grounds Decl. ¶ 18. It incarcerates organized crime figures, gang leaders, international terrorists, and other violent offenders. Clark Decl. ¶ 10. It must deal with gang rivalries, as well as regional rivalries. *Id.* The BOP also must deal with constant budgetary limitations and shortfalls in the face of an ever-increasing prison population. *Id.* ¶ 27. The BOP does not tolerate escapes or the possession of contraband by prisoners. *Id.* ¶ 11.

The BOP does not place any restriction on the length of prisoners' beards or hair. *Id.* ¶ 9. To guard against the concealment of contraband, BOP staff search prisoners by running a metal detection wand over the prisoners' bodies, and/or by requiring prisoners to vigorously manipulate their hair, beards, and their mouths in the presence of staff. This procedure is not an undue administrative burden. It takes a matter of seconds, and much of it would need to be done even if BOP restricted beard length. *Id.* ¶ 26.

Despite incarcerating some of the most inventive and escape prone prisoners in American history, BOP has not found it necessary to restrict beard length to maintain security. Clark Decl. ¶¶ 18, 25. BOP must manage change of inmates' appearance regardless of any grooming policies, since a prisoner's appearance may change drastically and quickly over the course of an incarceration – they may age, gain or lose weight, get tattoos, receive scars, grow their hair, or lose their hair. *Id.* ¶ 22. The existence or length of one's beard is just one factor in this inevitable appearance change, and BOP must monitor this to ensure safety and security. Instituting a beard length restriction would not alleviate this burden. *Id.* ¶ 17.

In *Warsoldier*, the Ninth Circuit criticized CDCR for failing to consider less restrictive grooming policies when other institutions with the same penological goals were able to accommodate the same religious practices. *See Warsoldier*, 418 F.3d at 999-1000. It held that failure of an institution to distinguish itself from these analogous institutions "may constitute a failure to establish that the defendant was using the least restrictive means." *Id*. at 1000. The court also noted that prison systems such as those run by Oregon, Colorado, Nevada and the BOP have all satisfied their penological interests with much broader policies or with religious exemptions. *Id*. at 999-1000. Here, Defendants have failed to distinguish themselves from the BOP.

Defendants' reliance on *Mayweathers v. Terhune*, 328 F. Supp. 2d 1086 (E.D. Cal. 2004), is misplaced. There, a group of Muslim state prisoners filed suit under RLUIPA challenging CDCR's grooming policy which, at that time, prohibited beards of any length. *Mayweathers*, 328 F. Supp. 2d at 1090-91. The plaintiffs asked for an injunction to allow them to wear half-inch beards, alleging that wearing this short beard was an exercise of their religion. *Id.* The court found CDCR's grooming standard violated RLUIPA, *id.* at 1096, because allowing inmates to wear one-half inch beards was a less restrictive alternative. *Id.* at 1102. The court did not find that allowing one-half inch beards was the least restrictive alternative, because that question was not before it, and the court received no evidence on that point. Defendants' assertion that the court made such a finding is incorrect.

The Ninth Circuit has made clear that grooming policies such as the one at issue here violate RLUIPA because there are less restrictive and equally effective alternatives to accomplish the goal of maintaining safety and security. Defendants cite to no contrary Ninth Circuit authority on this point, nor could they. The experience of the Federal Bureau of Prisons establishes that CDCR's approach is

overly restrictive and needlessly deprives California prisoners of a fundamental right.

B. The Public Interests Animating RLUIPA Favor Issuance of a Preliminary Injunction

As explained above, elimination of the Grooming Policy will not imperil public safety, contrary to Defendants' assertions. Moreover, it is well-settled that "the public has an interest in protecting the civil rights of all persons." *Edmisten v. Werholtz*, 287 F. App'x 728, 735 (10th Cir. 2008) (reversing denial of preliminary injunctive relief). The federal government's interest in protecting individual rights is particularly salient in the context of the religious protections afforded by RLUIPA, "the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens . . . ." *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005). RLUIPA passed both houses of Congress unanimously and was supported by more than seventy religious and civil rights groups representing a diversity of religious and ideological viewpoints. *See* 146 Cong. Rec. S7777-78. Its enactment followed a three year congressional investigation into free exercise violations involving the religious practices of institutionalized persons. *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 380 (7th Cir. 2010). As set forth in a joint statement by RLUIPA co-sponsors Orrin Hatch and Edward Kennedy, Congress found that "[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." *See* 146 Cong. Rec. 16698-99 (2000).

Moreover, facilitating the religious exercise of incarcerated persons serves the important societal interest in rehabilitation of inmates. This interest in rehabilitation was one of the motivations for Congress's passage of RLUIPA. When introducing the bill that would become RLUIPA, Senator Kennedy specifically noted that restrictions on the practice of religion in the prison context

could be counter-productive: "[s]incere faith and worship can be an indispensible part of rehabilitation." *See* 146 Cong. Rec. S6689. Further, this interest has been repeatedly recognized by federal courts. In a decision affirming a district court's finding that a prison violated RLUIPA by denying prayer oils to a Muslim inmate, the Seventh Circuit explained that "RLUIPA's attempt to protect prisoners' religious rights and to promote the rehabilitation of prisoners falls squarely within Congress' pursuit of the general welfare . . . ." *Charles v. Verhagen*, 348 F.3d 601, 607 (7th Cir. 2003); *see also, e.g., Benning v. Georgia*, 391 F.3d 1299, 1310 (11th Cir. 2004) ("rehabilitation of prisoners is also a . . . purpose underlying RLUIPA").

C. Failure To Grant an Injunction Will Result in Irreparable Harm to Mr. Basra

Mr. Basra has been subjected to discipline for adhering to his religious beliefs. Basra Decl. ¶ 18. Because Defendants have denied his religious exemption, he continues to be in violation of the Grooming Policy. He is in immediate danger of being deemed a program failure. 15 Cal. Code Regs. tit. 15, § 3062(m). He already has received a referral to program review to determine if he should be deemed a program failure. Basra Decl. ¶ 14. This kind of "chilling effect" on the exercise of religion constitutes irreparable injury. *See Murphy v. Zoning Comm'n of the Town of New Milford*, 148 F. Supp. 2d. 173, 181 (D. Conn. 2001) (holding that a chilling effect on religious practice was enough to satisfy the irreparable harm requirement).

When evaluating irreparable injury in the context of RLUIPA, courts have determined that the concerns are the same as those in the First Amendment context. Indeed, Congress' expressed intent to protect the free exercise of religion led the court in *Murphy* to conclude the following:

> Since the statute ["RLUIPA"] was enacted for the express purpose of protecting the First Amendment rights of individuals, the allegation that defendants have violated this statute also triggers the same concerns that led

the courts to hold that these violations result in a presumption of irreparable harm.

Murphy, 148 F. Supp. 2d at 180-81.

The "'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Ch. of Scientology v. United States*, 920 F.2d 1481, 1488 (9th Cir. 1990) (quoting *Elrod v. Burns*, 427 U.S. 347 (1976)); *see Guru Nanak Sikh Soc'y v. Cnty of Sutter*, 326 F. Supp. 2d 1140, 1161 (E.D. Cal. 2003). Furthermore, Congress enacted RLUIPA to "protect the free exercise of religion from unnecessary government interference." *Murphy*, 148 F. Supp. 2d at 180 (citation omitted).

Under similar facts, the Ninth Circuit found a burden like the one being placed upon Mr. Basra constituted irreparable injury. *Warsoldier*, 418 F.3d at 1001-02 ("We have previously held that putting substantial pressure on an adherent to modify his behavior and to violate his belief infringes on the free exercise of religion . . . . Because Warsoldier has, at a minimum, raised a colorable claim that the exercise of his religious beliefs has been infringed, he has sufficiently established that he will suffer an irreparable injury absent an injunction barring enforcement of the grooming policy against him.") (internal quotation marks and citations omitted). Therefore, a preliminary injunction is necessary to ensure that Mr. Basra is not threatened with irreparable injury.

D. The Balance of Equities Sharply Favor Granting Issuance of a Preliminary Injunction.

Mr. Basra is being punished for practicing his religion. He is being deprived of a fundamental right. These facts alone merit the issuance of a preliminary injunction.

The interests asserted by Defendants do not alter this balance. Defendants assert that the deprivation of Mr. Basra's fundamental right is necessary to prevent inmate escape and the concealment of contraband, but enjoining Defendants from

enforcing this policy against Mr. Basra would place no burden upon them. For the initial period of Mr. Basra's incarceration – when he was at a more secure facility – Defendants did not feel compelled to enforce the Grooming Policy against him. To date, Defendants have not felt it necessary to search Mr. Basra's beard for contraband and, in fact, have housed him in minimum security facility where he sleeps in an unlocked dormitory. Defendants' past actions confirm they would not be burdened by an injunction against enforcing the Grooming Policy against Mr. Basra.

Mr. Basra has demonstrated he is likely to prevail on his claims. He has also demonstrated that irreparable injury would occur, and that the balance of hardships is sharply in his favor. Public safety will not be imperiled. Rather, the public interest will be served by such an injunction. Accordingly, the United States urges this Court to grant his Motion for a Preliminary Injunction.

V. CONCLUSION

The United States respectfully urges that this Court to grant Mr. Basra's Motion for a Preliminary Injunction.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

DAVID RASHEED ALI,	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 9:09-cv-52**
	)	
RICK THALER, DIRECTOR	)	
TDCJ-CID JUSTICE	)	
Defendant.	)	

STATEMENT OF INTEREST OF THE UNITED STATES

EXHIBIT C

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

SUKHJINDER S. BASRA AND UNITED STATES OF AMERICA	)	No. CV11-01676 SVW (FMOx)
Plaintiffs,	)	**DECLARATION OF JOHN CLARK IN SUPPORT OF BRIEF IN SUPPORT OF PLAINTIFF**

v.	**SUKHJINDER S. BASRA'S MOTION FOR A PRELIMINARY INJUNCTION**
MATTHEW CATE, *et al.*,	
Defendants.	Honorable Stephen V. Wilson
	Hearing Date: June 6, 2011 Time: 1:30 p.m. Courtroom: 6

JOHN L. CLARK, pursuant to 28 U.S.C. § 1746, makes the following declaration under penalty of perjury:

1. My name is John L. Clark. I am a corrections professional with particular expertise in the operation of a large, complex correctional system.
2. I have agreed to work with the United States in this matter to assess policies and practices of the California Department of Corrections and Rehabilitation ("CDCR") that restrict the length of prisoners' facial hair.
3. I have been involved in corrections for over 35 years, including 25 years at the Federal Bureau of Prisons ("BOP"). From 1991-1997, I served as Assistant Director of BOP. As Assistant Director, I was a member of BOP's Executive Staff, BOP's central decision making body on policy and personnel matters. I oversaw agency policy on all detention-related issues and operations, including the coordination of the operations of all federal pretrial facilities. I regularly visited each federal detention center to review and assess operations.
4. Within BOP, I have worked in seven different facilities, including serving as Warden at both the Metropolitan Correctional Center in Miami, Florida

("MCC Miami") and the United States Penitentiary at Marion, Illinois ("USP Marion"), the nation's first "supermax" facility.

5. At the conclusion of my time serving as Assistant Director at BOP, Attorney General Janet Reno appointed me to manage a congressionally established agency tasked with closing the Lorton correctional facility in Washington, DC and transferring its 7,000 inmates to federal custody. The transfer was completed in 2002 and the agency was closed.

6. After the completion of the Lorton transfer, I worked from 2002-2009 as a management consultant for several federal agencies, including the U.S. Marshals Service and the Office of the Federal Detention Trustee within the U.S. Department of Justice, where I helped coordinate oversight of local detention facilities used by the Marshals Service for detaining federal pretrial prisoners. During the course of these duties, I became generally familiar with the operations of hundreds of local facilities with contracts to detain federal pretrial prisoners. I also visited a number of local detention facilities.

Importance of Religious Exercise in the Corrections Environment

7. Corrections professionals widely recognize that allowing prisoners to exercise their religion is an essential part of good corrections management. The closed environment of penal institutions inherently breeds boredom, frustration, and tensions among inmates that may result in aggressive or disruptive behavior. For this reason, providing the comfort of one's religion is an important tool of good corrections management. Encouraging religious exercise can often reduce management problems in correctional settings by occupying prisoners with mental stimulation, providing structured activity on a routine basis, and offering tools for overcoming anger or frustration with the idle existence of life inside prison.

8. In addition, religious exercise can be an important component of prisoners' and detainees' rehabilitation.

Federal Bureau of Prisons

9. BOP recognizes the integral role played by religious exercise in managing prisoners in a correctional setting. BOP does not place any restrictions on the length of federal prisoners' hair or beards.

10. BOP applies these policies to a diverse population of prisoners and pre-trial detainees. Indeed, BOP incarcerates approximately 215,000 prisoners in 115 correctional facilities, encompassing a wide range of security levels and presenting an array of sophisticated threats to maintaining security and good order. BOP incarcerates gang members, gang leaders, international terrorists, and other violent offenders. It also must manage the risk of violence associated with gang and regional rivalries.

11. BOP's policies reflect a lack of tolerance for prisoner escapes and the concealment of contraband.

12. BOP policies, along with those of many other correctional facilities in the United States, reflect the fundamental importance of allowing prisoners to freely exercise their religion. BOP policies were not written in a vacuum; rather, they have been developed and refined based on many years of experience with the real world problems associated with the daily management of a wide variety of correctional facilities.

13. I have applied BOP's grooming policies as Warden of two high profile federal facilities: MCC Miami and the USP Marion "supermax" facility.

(i) Metropolitan Correctional Center in Miami, FL

14. I served as Warden of MCC Miami for two years, from 1988-1989. At that time, the facility housed 800-1,100 detainees in a space designed to accommodate only 400.

15. Each of these detainees was charged with a federal felony. Occupants of MCC Miami included many very violent offenders, dangerous drug dealers and organized crime figures, a terrorist accused of bombing an airliner, and other notorious criminals. Former Panamanian dictator Manuel Noriega was sent to the facility to await prosecution after his seizure by the U.S. military in 1990. After he was convicted, he served a number of years of his sentence there under highly secure conditions.

16. Ensuring detainees' freedom of religious exercise has long been an important component of corrections management at MCC Miami. During my tenure there, the facility did not place any restrictions on the length of prisoners' hair or facial hair. That policy remains unchanged.

(ii) U.S. Penitentiary, Marion, IL

17. I left MCC Miami in 1989 to become Warden of USP Marion – then the highest security federal prison in the United States. Marion opened in 1968 as an administrative maximum security penitentiary to replace Alcatraz and house the nation's most dangerous federal criminals. USP Marion continued to carry out this critical mission until 1993 when the construction of a new administrative maximum security facility in Florence, Colorado was completed and the prisoner population was transferred. At that time, Marion took on the function of a high security federal penitentiary.

18. Marion has incarcerated some of the most inventive, escape prone and violent criminals in American history, including mob bosses John Gotti and Demeco Scarfo.

19. During my tenure at USP Marion, USP Marion did not place any restrictions on the length of inmates' hair or facial hair. It remains the policy of USP Marion to not place any restrictions on the length of inmates' hair or facial hair.

Analysis of CDCR's Grooming Policy

20. I have reviewed court filings in this litigation, incidents reports produced by Defendants, and the declarations of Toni Bair and Chief Deputy Warden Grounds.

21. I understand that CDCR currently allows prisoners to wear hair of any length, but restricts the length of prisoners' beards to one-half inch.

22. BOP must contend with the constant and sudden change of the appearances of a large number of inmates. Each of the 215,000 inmates may change his or her appearance dramatically and quickly over the course of an incarceration. An inmate may: cut his hair, grow his hair long, change his hair style, lose his hair, gain weight, lose weight, get tattoos, receive scars, lose teeth, and age.

23. To aid quick identification of inmates, BOP requires that a new photo be taken and a new identification be issued at regular intervals, and whenever staff notice an inmate's appearance is changing. BOP retains past photographs of each inmate, such that it possesses a series of photographs of each inmate in various states of appearance.

24. Professional correctional management requires any facility to maintain safety and security in spite of prisoners' constantly changing appearance. BOP has instituted a variety of security measures that do not depend on personal knowledge and quick identification of inmates to prevent their escape.

25. Based on extensive knowledge and experience of managing the day to day operations of a large correctional system, BOP has not found it necessary to restrict beard length in order to maintain security.

26. Concealment of contraband is a serious issue in all correctional facilities, and the BOP is vigilant in preventing it. BOP prisoners are searched regularly, randomly, and before and after participating in certain activities,

such as visits. Searches are conducted by running a hand-held metal detection wand over a prisoner's person and/or by requiring the prisoner to run his fingers vigorously through hair and beard and to insert his own fingers in his mouth and pull cheeks back. These searches are conducted quickly and can be completed in a matter of seconds.

27. BOP is subject to severe budgetary limitations, shortfalls, and cuts while incarcerating an increasingly large population of inmates. These budgetary restrictions have not prevented the BOP from administering the security measures described above. Professional correctional management requires that these measures be taken in any correctional facility.

I declare under penalty of perjury that the foregoing is true and correct.

DATED May 22, 2011

John L. Clark