No. 13-6827

IN THE

Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A ABDUL MAALIK MUHAMMAD,
Petitioner,

v.

RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS, *ET AL.*,
Respondents.

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P.O. Box 6179

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

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

SUMMARY OF ARGUMENT

The government may not impose a substantial burden on the religious exercise of a prisoner unless doing so is necessary to a compelling state interest that cannot be furthered by less restrictive means. 42 U.S.C. § 2000cc-1. There is no dispute in this case that the hair grooming policies enforced by Arkansas corrections officials impose a substantial burden on the religious rights of the prisoner plaintiffs. There is also no dispute that the hair grooming policies in the Arkansas prison system are more restrictive than those in place in the overwhelming majority of

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

Petitioners have made all these points, and *amici*

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

The Eighth Circuit's decision should be reversed.

ARGUMENT

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

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

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

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

correction officials that restrictive grooming policies

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

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

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

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

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

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

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

The Eighth Circuit concluded, however, that deference to Arkansas's prison officials was warranted *in the absence of* "substantial evidence in [the] record indicating that [their] response * * * to security concerns [was] exaggerated," and notwithstanding that the Petis "su0VmJcmm.rctcgEcmmm0sepalhk0[m2 [s pagmJhlcks"pagh0w0

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

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

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

therance of a compelling governmental interest" and "is the least restrictive means of furthering that

II. REASONABLE RELIGIOUS ACCOMMODATIONS MAY ENHANCE PRISON SECURITY.

The requested exemption in this case is, in fact, far more likely to enhance prison security than diminish it. Consistent with *amici*

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

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

Studies show a robust relationship between prison policies that accommodate religious practices and a diminished deviance among prisoners. This relationship is observed across various measures of religious practice or participation, when tested against indicators of "deviance" as varied as instances of disciplinary confinement, Todd R. Clear

Amici*'s experience confirms the conclusions in the literature: allowing prisoners to exercise their religious beliefs can help moderate the harsh impact of prison life. Incarceration introduces severe deprivations of freedoms, including significant impediments to the ability of religious prisoners to practice their religion at a time when those prisoners may need the solace and stability provided by their faith traditions more than ever. For some, faith and religious exercise can provide a new sense of purpose or meaning in the absence of these freedoms.** SpearIt, ***Religion as Rehabilitation? Reflections on Islam in the Correctional Setting*, 34 Whittier L. Rev. 29, 38-39 (2012)**; ***see also

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

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

witnesses emphasized the "societal interest" in protecting prisoner religious liberty, given that "[r]eligious observance by prisoners is strongly correlated with successful rehabilitation." *Protecting Religious Freedom After Boerne* v.

Schumer). In sum, the rehabilitative impact of

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

* * *

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

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

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

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

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

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

turn, regulated parties are more likely to internalize these institutional rules and norms as a basis for self-regulation. *See* David .J. Smith, *The Foundations of Legitimacy*, *in* Legitimacy & Criminal Justice: An International Perspective 30 (Tom R. Tyler ed., 2007); Tom R. Tyler, *Why People Obey the Law* 25 (1990) (when people believe that they are being treated fairly, they are more likely to accept the "need to bring their behavior into line with the dictates of an external authority"). This is so even when cooperation may not be in an individual's immediate self-interest but is seen as the "appropriate and proper" course supporting the authorities' objectives. *See* Tom R. Tyler & Jeffrey Fagan, *Symposium: Legitimacy and Criminal Justice, Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 Ohio St. J. Crim. L. 231m05syp] [§2cwcg"ag0hcg0ke[d2 [Jg5VsSpwh5k0wgstpa

prisoners. As *amici* have observed across prison populations, prisoner perceptions of fairness improve

RLUIPA was expressly intended to rein these excesses in to the extent they arise in the religious exemption context, by subjecting determinations on requests for religious exemptions to strict scrutiny—thereby requiring that such requests be handled in a non-arbitrary manner. Denials imposing "substantial burdens" on religious practices must further a compelling government interest—one "demonstrate[d]" by the government—for which no less restrictive means of achieving that interest are available. 42 U.S.C. §§ 2000cc-1(a)(1), (2). Thus, any less restrictive means actually adopted by other

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

* * *

CONCLUSION

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

Respectfully submitted,

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

DAVID FATHI
DANIEL MACH
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW
Washington, DC 20005
(202) 548-6603
(202) 548-6604

RANDALL C. MARSHALL
AMERICAN CIVIL LIBERTIES UNION OF ALABAMA, INC.
P.O. Box 6179
Montgomery, AL 36106
(334) 265-2754

ANDREA W. TRENTO
HOGAN LOVELLS US LLP
100 International Drive
Baltimore, MD 21202
(410) 659-2700

JONATHAN L. ABRAM*
ELIZABETH HAGERTY
HOGAN LOVELLS US LLP
555 13th Street
Washington, DC 20004
(202) 637-5600

* *Counsel of Record*
Counsel for Amici Curiae

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