No. 09-1353

In the Supreme Court of the United States

IRON THUNDERHORSE, PETITIONER

v.

BILL PIERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

BILL COBB
Deputy Attorney General
for Civil Litigation

DAVID C. MATTAX
Director of
Defense Litigation

JONATHAN F. MITCHELL
Solicitor General

JAMES P. SULLIVAN
Assistant Solicitor General
Counsel of Record

M. CAROL GARDNER
Assistant Attorney General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
James.Sullivan@oag.
state.tx.us
(512) 936-1700

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Miscellaneous:

Blank Page

In the Supreme Court of the United States

NO. 09-1353

IRON THUNDERHORSE, PETITIONER

v.

BILL PIERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

The Acting Solicitor General makes an airtight argument for outright denial of the petition, even as he suggests that something more is in order. In the view of the United States, petitioner has identified a "case-specific error," U.S. Br. 8, and a splitless statutory issue, *id.* at 15-18. Being "keenly attuned to this Court's practice with respect to the granting or denying of petitions for certiorari," *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 96 (1994), the Acting Solicitor General correctly concludes that the petition should be denied for these flaws, U.S. Br. 21.

Appended to this sound recommendation is an ill-conceived alternative: "grant the petition, summarily reverse the judgment of the court of appeals, and remand for further proceedings." U.S. Br. 21. The asserted basis for summary reversal further counsels denial by revealing the insignificance of this proposed error-correction mission. See *id.* at 18-21. It is said that the Fifth Circuit twice misjudged Fifth

Circuit precedent in holding that the TDCJ grooming code survives petitioner's challenge under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. 2000cc *et seq.* According to the Acting Solicitor General, the court below failed to apply its own admittedly correct RLUIPA standard because it overestimated the controlling effect of its prior decisions concerning the TDCJ grooming code.

Even were it true that the Fifth Circuit so erred, summary reversal would be inappropriate. In any event, the Fifth Circuit correctly applied its own precedent in affirming the judgment for respondents. Remanding this case may yield a second bench trial in the district court and a lengthier opinion from the court of appeals, but all this busywork is unlikely to change the outcome of litigation—only the quantity. The proposed summary reversal would needlessly tax the scarce resources of the federal courts, from top to bottom. Respondents urge the Court to follow the better of the Acting Solicitor General's two recommendations, by simply denying the petition.[1]

---

[1] Respondents join the Acting Solicitor General in referring to "summary reversal." U.S. Br. 20. Were the Court to "remand for application of the correct legal standard," *id.* at 21, prior practice suggests it would *vacate* the judgment. See, *e.g.*, *Sears* v. *Upton*, 130 S. Ct. 3259, 3261 (2010) (per curiam); Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—And an Alternative*, 107 Mich. L. Rev. 711, 717 n.19 (2009) ("Suppose * * * the Supreme Court determines that the court below erred by using an improper standard. The Supreme Court will often vacate and direct the court below to apply the proper standard to the facts, rather than the Court itself applying the correct standard and affirming or reversing.").

A. The Fifth Circuit's Purported Error, Which Concerns Only The Parties And Involves Mere Application Of Circuit Precedent, Does Not Warrant Summary Reversal

1. This Court is cautious in dispensing "the bitter medicine of summary reversal." *Spears* v. *United States*, 129 S. Ct. 840, 845 (2009) (Roberts, C.J., dissenting); see *Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting) ("rare disposition"). Such sparing use makes sense, not least because "this Court is not a forum for the correction of errors." *Boag* v. *MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting). Accordingly, a dose of summary reversal is not indicated to cure what is insignificant. See *Bd. of Educ.* v. *McKluskey*, 458 U.S. 966, 973 (1982) (Stevens, J., dissenting) (seeking "sufficient national importance to require summary reversal"); Eugene Gressman et al., *Supreme Court Practice* 351 (9th ed. 2007) [hereinafter *Stern & Gressman*] ("[T]he clearly erroneous decision correctible by summary reversal should involve an error of greater magnitude than the mere technical, harmless, or parochial error.").

The Acting Solicitor General does not favor the Court with an explanation of why his perceived error is so important as to warrant summary reversal. Indeed, he concedes that his advice addresses a "case-specific error." U.S. Br. 8. Petitioner and respondents are understandably interested in having the particular record they made at trial evaluated under the correct legal standard, but this is hardly a matter of public import. Cf. *Layne & Bowler Corp.* v. *W. Well Works, Inc.*, 261 U.S. 387, 393 (1923).

2. Nor does the Acting Solicitor General contend that the decision below squarely conflicts with any from this Court. Instead, he complains that the court of appeals failed to apply an agreeable RLUIPA standard already reflected in circuit precedent. U.S. Br. 20. Insignificance is thus doubled, along with the impropriety of summary reversal, because the Fifth Circuit's application of Fifth Circuit precedent is no concern of this Court. See *Presley* v. *Georgia*, 130 S. Ct. 721, 726 (2010) (Thomas, J., dissenting) ("[T]he Court should reserve [summary reversal] for cases that our precedents govern squarely and directly."). The error said to justify summary reversal is "an intramural matter to be resolved by the Court of Appeals itself." *Stern & Gressman*, *supra*, at 254.

Summary reversal is therefore inappropriate even if the Acting Solicitor General is right about the Fifth Circuit's having misapplied circuit precedent. And if he is wrong about that error—or if this Court declines to play the en banc court of appeals—then summary disposition will represent a lamentable development in the Court's GVR practice. This Court should not open a cage for the SRRCPASGS—the Summary Remand for Reapplication of Circuit Precedent upon the Acting Solicitor General's Suggestion. See *Webster* v. *Cooper*, 130 S. Ct. 456, 457 (2009) (Scalia, J., dissenting) (noting first SRMEOPR hatched in captivity); *Wellons* v. *Hall*, 130 S. Ct. 727, 733 (2010) (Scalia, J., dissenting) (welcoming SRIE, or SRTAEH, to the "growing menagerie"); *Jefferson* v. *Upton*, 130 S. Ct. 2217, 2229 (2010) (Scalia, J., dissenting) (classifying newly acquired SRPPRNHB).

B. The Fifth Circuit Correctly Affirmed The District Court's Denial, Following A Bench Trial, Of Petitioner's Grooming-Code Claim

1. The Acting Solicitor General believes "the [Fifth Circuit's] error in this case is clear." U.S. Br. 20. He is mistaken. Petitioner's RLUIPA challenge to the TDCJ grooming code presented a straightforward issue under the law of the circuit. Having decided a series of cases concerning the legality of that policy, the Fifth Circuit was familiar with the terrain. See, *e.g.*, *Powell* v. *Estelle*, 959 F.2d 22 (5th Cir. 1992) (per curiam); *Diaz* v. *Collins*, 114 F.3d 69 (5th Cir. 1997); *Longoria* v. *Dretke*, 507 F.3d 898 (5th Cir. 2007) (per curiam). In *Odneal* v. *Pierce*, 324 F. App'x 297 (5th Cir. 2009) (per curiam), and elsewhere, the Fifth Circuit had demonstrated its full comprehension of what RLUIPA demands of government defendants. See U.S. Br. 12, 15-17 (noting Fifth Circuit precedent with approval); cf. *Davis* v. *Scherer*, 468 U.S. 183, 192 n.9 (1984) ("We see no reason to doubt * * * that the Court of Appeals * * * had full knowledge of its own precedents and correctly construed them.").

Odneal illustrates the Fifth Circuit's eye for subtle differences among grooming-code claims. BIO 14-15 (describing *Odneal*'s remand for proceedings concerning kouplock hairstyle). In this case, however, the panel saw no material distinction between petitioner's claim and those rejected in earlier decisions. Pet. App. 8a ("The magistrate judge properly found that [*Diaz*] and [*Longoria*] foreclosed Thunderhorse's RLUIPA claim against the TDCJ's hair length policy."). The court noted arguments and evidence concerning the policies of

other prisons and TDCJ's imperfect enforcement of its grooming code, but briskly concluded that *Diaz* and *Longoria* were controlling. *Id.* at 10a n.3.

2. By affirming a bench-trial denial of petitioner's grooming-code claim, the court of appeals impliedly held that respondents carried the RLUIPA burden of persuasion. See 42 U.S.C. 2000cc-1(a), 2000cc-2(b), 2000cc-5(2) (prescribing government's burdens of production and persuasion). Had the Fifth Circuit written an extra paragraph or two, it would be easier to discern why petitioner's "evidence of potentially less restrictive alternatives that was not part of an earlier case," U.S. Br. 19, did not counterbalance the winning evidentiary proffer TDCJ developed in prior litigation and employed in this case, see Pet. App. 9a n.2. Because the Acting Solicitor General equates silence on this point with summarily reversible error, it is well to note what might have been said in response to the "arguments and evidence not addressed in *Diaz* or *Longoria*." U.S. Br. 19.

a. Petitioner submitted evidence "that other prison systems (including the federal Bureau of Prisons) permit long hair." U.S. Br. 19. This was hardly news to the Fifth Circuit. See *Bisby* v. *Crites*, 312 F. App'x 631, 632 (5th Cir. 2009) (per curiam) (rejecting equal-protection claim and noting that "[plaintiff] does not indicate how prisoners in other state systems and the federal system are similarly situated to Texas prisoners"); *Powell*, 959 F.2d at 25 (discussing "testimony about experiences in other state prison systems" in pre-RFRA case).

Petitioner's evidence has only mild persuasive force. See *Fowler* v. *Crawford*, 534 F.3d 931, 941 (8th Cir. 2008) ("Courts have repeatedly recognized

that evidence of policies at one prison is not conclusive proof that the same policies would work at another institution." (internal quotation marks omitted)). Petitioner declares that prisons without grooming codes (or with religious exemptions to the same) successfully cope with "the same issues of preserving prison security as the TDCJ." Pet. 24. Nothing in the record proves that the comparison is apt. See Pet. App. 84a-86a. The Acting Solicitor General answers petitioner's point with a self-evident proposition: "Different prison systems * * * hold different types of inmate populations and are subject to different types and degrees of logistical constraints." U.S. Br. 18. Petitioner's comparative argument falsely assumes States without grooming codes have solved the challenges faced by TDCJ.

The Acting Solicitor General claims respondents have not "explain[ed] why the alternative, less restrictive practices utilized in other prison systems would not work in [petitioner's] unit." U.S. Br. 19. But the practice of those prisons—letting prisoners grow long hair—is *precisely* the alternative TDCJ has considered and rejected. See *Diaz*, 114 F.3d at 73; *Diaz* v. *Collins*, 872 F. Supp. 353, 358-359 (E.D. Tex. 1994). It is not as though TDCJ refuses to borrow another's innovative solution. Cf. *Cheema* v. *Thompson*, 67 F.3d 883, 885 n.3 (9th Cir. 1995) ("[T]he record included the policies of two California school districts, which allowed [Sikh daggers] so long as the blades were dulled, no more than 2 1/2 inches, and securely riveted to their sheaths. The natural question was why the same compromise would not work here."), cited in *Warsoldier* v. *Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005).

b. Petitioner also gave evidence, in the form of the grooming code itself, that TDCJ allows female inmates to grow long hair. Pet. 4. The Acting Solicitor General requests an explanation of why the "inconsistent application of the grooming policy to * * * Texas's female inmate population[] did not indicate that a less restrictive alternative was appropriate." U.S. Br. 19. The answer is that TDCJ's male and female inmates are not similarly situated, as courts have held in rejecting equal-protection challenges to the TDCJ grooming code. *Longoria*, 507 F.3d at 904-905; *Woods* v. *Johnson*, 1996 WL 458064, at *1 & n.6 (5th Cir. 1996) (per curiam); *Diaz*, 872 F. Supp. at 359 n.4.[2]

c. Finally, petitioner presented evidence that he and another inmate grew long hair while in TDCJ custody. Candid testimony from a TDCJ official explained this "fail[ure] to attain the unattainable—perfect consistency in enforcing the prison's rules." *Ustrak* v. *Fairman*, 781 F.2d 573, 575-576 (7th Cir. 1986) (Posner, J.). Given the security interests at stake, TDCJ endeavors to enforce its grooming code. See, *e.g.*, Bench Trial Tr. 23 (testimony of petitioner) ("I have disciplinary cases going back 30 years where I've repeatedly refused to comply with the grooming code * * * ."). Nevertheless, regrettable oversights in enforcement have occurred as a result of staff shortages. See *id.* at 222 (testimony of TDCJ official) ("I can tell you as an agency, the number one problem we face today is a shortage of 3,500

---

[2] The Fifth Circuit might have said more about petitioner's gender argument had he included it in his briefs in that court.

correctional officers. When you're that short, there's some things that do not get accomplished in time, and there are sometimes [sic] in enforcement of the shaves. It is a definite safety issue * * * .").

C. The Proposed Remand Proceedings Would Consume Scarce Resources To No Good End

1. Justice Stevens once observed, "We are far too busy to correct every error that we perceive among the thousands of cases that litigants ask us to review." *McKluskey*, 458 U.S. at 972 (dissenting opinion). Suppose, however, that this Court puts aside other, more pressing business long enough to implement the Acting Solicitor General's summary-reversal proposal.[3] Then what?

2. The Acting Solicitor General suggests that, upon summary reversal and remand, the Fifth Circuit "should * * * remand[] the case to allow respondents to respond to petitioner's evidence of potentially less restrictive alternatives." U.S. Br. 20. It appears he would reset the matter for another bench trial before the Eastern District of Texas, although a lapse in familiarity with the case's procedural history may obscure his message. Compare *ibid.* (stating "the court of appeals in this case erred in affirming the magistrate judge's grant of summary judgment to respondent on petitioner's

---

[3] See Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 88 (1959) ("[M]any decisions on petitions for certiorari must call for sustained study. Notably is this true in the happily exceptional instances in which the Court simultaneously grants certiorari and summarily reverses the judgment below.").

hair-length claim"), with Pet. App. 3a (noting that appeal followed bench trial, not summary judgment).

At this second bench trial, respondents will build a longer record based on evidence entered in *Odneal*, thus meeting petitioner's effort to distinguish *Diaz* and *Longoria* on their facts. In *Odneal*, the kouplock case, TDCJ officials gave testimony explaining that TDCJ's inmate population is dissimilar to that of the Federal Bureau of Prisons; describing visits to prisons in other States with comparable populations; and confirming the unfeasibility of abandoning the grooming code. Defs.' Mot. Summ. J., Apps. B-C, *Odneal* v. *Dretke*, No. 04-cv-454, Doc. 155 (S.D. Tex.). Officials testified further that TDCJ's male inmates are demonstrably more likely than TDCJ's female inmates to act aggressively, hide dangerous contraband, and hazard escape. *Ibid.* With this additional evidence to insulate the TDCJ grooming code from petitioner's RLUIPA challenge, it is hard to imagine any result but judgment for respondents. After all, respondents won the first bench trial on the grooming-code claim, see Pet. App. 81a-83a, and their evidentiary proffer will improve in round two.

3. On appeal from the second bench trial, the Fifth Circuit is likely to affirm a judgment for respondents. The court of appeals might think it prudent to write an extra-credit opinion, its first composition having received a failing grade. Using approved Fifth Circuit materials, see U.S. Br. 12, 20, and taking care to show its work this time, the Fifth Circuit can explain that *Diaz* and *Longoria* are indistinguishable, notwithstanding petitioner's points concerning other prisons, female inmates, and imperfect enforcement. Judge Colloton's fine opinion

for the court in *Fegans* v. *Norris*, 537 F.3d 897 (8th Cir. 2008), might provide inspiration as the Fifth Circuit pens its third opinion in petitioner's case.

4. Summary reversal thus entails considerable expenditure of effort—by the district court, the court of appeals, and this Court—in pursuit of a better opinion justifying the same judgment. Such poor stewardship of scarce judicial resources is wasteful, even counterproductive. If "[b]usy appellate judges sometimes write imperfect opinions," *Calderon* v. *Coleman*, 525 U.S. 141, 147 (1998) (Stevens, J., dissenting), that is all the more reason to avoid pointless multiplication of their labors.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

BILL COBB
Deputy Attorney General
for Civil Litigation

DAVID C. MATTAX
Director of
Defense Litigation

December 2010

JONATHAN F. MITCHELL
Solicitor General

JAMES P. SULLIVAN
Assistant Solicitor General
Counsel of Record

M. CAROL GARDNER
Assistant Attorney General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
James.Sullivan@oag.state.
tx.us
(512) 936-1700

Blank Page