

No. 13-6827

In the Supreme Court of the United States

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

*v.*

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

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

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**PETITIONER'S REPLY BRIEF**

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## ARGUMENT

### **I. The Judgment Below Is Based on a Legal Rule That Conflicts with the Rule in Other Circuits.**

Respondents say that all circuits have applied the same legal standard to varied facts. BIO 10-15. And they say they should win on the merits. BIO 17-21. The findings of fact, and the Magistrate’s review of the evidence, refute both claims. The judgment below was based on an Eighth Circuit *rule* that requires extraordinary deference to prison officials. That rule conflicts with the rule of other circuits, and it negates the statutory standard that governs this case.

#### **A. The Judgment Below Was Rendered in Spite of the Facts, not Because of the Facts.**

The Magistrate is the only judicial officer who either heard the witnesses or saw petitioner’s beard. His recommendations were based on the Eighth Circuit rule, despite his view of the facts: “After hearing testimony of two ADC officials concerning the specific rationale for the ADC grooming policy, this Court finds that the principles in *Fegans* apply ....” 2012 WL 994481, \*1 (E.D. Ark., Jan. 27, 2012). *Fegans* is *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008). After summarizing respondents’ testimony, the Magistrate said:

Although Plaintiff makes *compelling* arguments that an inmate could easily hide contraband in many places other than a one-half-inch beard, the prison officials are entitled to deference. *Gladson v. Iowa Dep’t of Corrs.*, 551 F.3d 825, 831-32 (8th Cir. 2009). And the safety and security concerns advanced by the ADC officials are *reasonable* — particularly the fact that an escaping inmate could quickly change his appearance by shaving off his beard. *Regardless*, the concerns expressed by the ADC officials are nearly identical to those embraced by the majority in *Fegans*, 537 F.3d 898.

2012 WL 994481, \*4 (emphasis added). Plaintiff's arguments were compelling, defendants' testimony was merely reasonable, but regardless, I am bound by precedent. The District Judge fully adopted these views. "[T]he proposed findings and recommended disposition should be, and hereby are, approved and adopted *in their entirety in all respects.*" Order at 1 (Doc. 93, March 23, 2012) (emphasis added).

In his oral review of the evidence, not expressly adopted by the District Judge, the Magistrate was more blunt. Addressing petitioner, the Magistrate said:

*[I]t's almost preposterous to think that you could hide contraband in your beard, but there's a bigger picture here, and I think that the law is that they get deference, and if they're able to articulate that there is a concern, and even the Fegans case says it doesn't have to be that the concern has actually materialized.*

Transcript 106 (Jan. 4, 2012) (Appendix to BIO) (emphasis added).

The Magistrate repeatedly said he was "constrained" or "restricted" by *Fegans*:

*[S]o while you make a really good argument, Mr. Muhammad, I — I am very much constrained by the holding in Fegans. I think that I would be, you know, not doing my job if I didn't apply Fegans as persuasive authority that tells me exactly what I have to do in this case.*

Tr. 107 (emphasis added). And again: "I'm *constricted* by that holding." *Ibid.* And again: "I'm really *constricted* by that — by that holding." Tr. 106 (all emphases added).

The Magistrate felt constrained even though the facts in *Fegans* were quite different:

*[Y]ou've done a good job, Mr. Muhammad, of distinguishing the fact that you want the half inch, that Fegans was arguing for a more — more freedom in growing his beard, but the principles are still the same. The principles are, as I said, deference to the prison officials if they're able to state legitimate penological needs.*

Tr. 105-06 (emphasis added). Fegans wanted “shoulder-length hair” and a beard that was “uncut altogether.” 537 F.3d at 904, 906. But facts didn’t matter. The Magistrate understood the Eighth Circuit rule to require deference to whatever respondents said.

The Eighth Circuit affirmed after summarizing respondents’ testimony in one conclusory sentence. 509 Fed. Appx. 561, 562 (8th Cir. 2013). It too relied on *Fegans*, and it too ignored factual differences between the cases. *Fegans* had principally relied on *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996). 537 F.3d at 902. Hamilton wanted hair of unlimited length; his hair had once been four-feet long. *Id.* at 1548. But factual differences were no more relevant in *Fegans* than here. A half-inch beard, an uncut beard with shoulder-length hair, or four feet of hair potentially tied up in an enormous ball — these are all the same in the Eighth Circuit. These cases have not turned on facts, but on a rule of effectively unlimited deference to prison officials.

### **B. The Eighth Circuit Rule Is a Weaker Version of the Pre-RLUIPA Constitutional Rule.**

The Magistrate understood *Fegans* to require him to rule for respondents if they could “state” or “articulate” “legitimate penological needs.” Tr. 106. But reasonable relationship to “legitimate penological objectives,” or “legitimate penological interests,” is the *constitutional* standard. *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349, 352 (1987); *Turner v. Safley*, 482 U.S. 78, 87, 89 (1987).

RLUIPA provides a more protective *statutory* standard. RLUIPA requires respondents to “*demonstrate[]*” their interests, not “state” or “articulate” them, and to demonstrate “compelling governmental interest” and “least restrictive means,” not

just any “legitimate” interest. 42 U.S.C. §2000cc-1. “Demonstrate[]” means to meet the burdens of going forward and of persuasion. §2000cc-5(2).

Of course the prison “context matters,” prison security is a compelling interest, and the expertise of prison officials is entitled to “due deference.” *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005). But not everything prison officials do is necessary to security — let alone the least restrictive means. Courts must decide when expertise is genuine and how much deference is “due.” The essentially unlimited deference in the Eighth Circuit effectively repeals the statute, putting the constitutional standard in its place.

This substitution clearly appears in the evolution of the Eighth Circuit rule. The court below closely paraphrased the *Fegans* rule that effectively puts the burden of proof on petitioner: “absent substantial evidence in record indicating that response of prison officials to security concerns is exaggerated, courts should ordinarily defer to their expert judgment in such matters.” 509 Fed. Appx. at 562 (citing *Fegans*). *Fegans* quoted this rule from *Hamilton*; both opinions italicized “substantial.” *Fegans*, 537 F.3d at 903 (quoting *Hamilton*, 74 F.3d at 1553). *Hamilton* quoted this rule from *Pell v. Procunier*, 417 U.S. 817, 827 (1974) — a constitutional case and the first opinion in this Court to invoke “legitimate penological objectives.” *Id.* at 822. *Hamilton* also relied on *Iron Eyes v. Henry*, 907 F.2d 810 (8th Cir. 1990). 74 F.3d at 1554-55. *Iron Eyes* was a long-hair case decided under the constitutional standard — reasonable relationship to legitimate penological interests. 907 F.2d at 813.

This Court characterized *Pell* and three similar cases in *Turner*:

In none of these four “prisoners’ rights” cases did the Court apply a standard of heightened scrutiny, but instead inquired whether a prison regulation that burdens fundamental rights is “reasonably related” to legitimate penological objectives, or whether it represents an “exaggerated response” to those concerns.

482 U.S. at 87.<sup>1</sup> So *Pell* did *not* apply “heightened scrutiny,” and it was assimilated to the constitutional standard of reasonably related to legitimate penological interests. *Ibid.* But the Eighth Circuit applies *Pell* in RLUIPA cases, even though RLUIPA *requires* heightened scrutiny — requires the compelling-interest and least-restrictive-means test, tempered by “due” deference to prison officials. When that deference is so great that it reverts to the constitutional standard, deference effectively negates the statutory standard.

*Hamilton* arose under the Religious Freedom Restoration Act, 42 U.S.C. §2000bb *et seq.* (1994), when that Act applied to the states. Like RLUIPA, RFRA required compelling interest and least restrictive means. Relying principally on one sentence of the Senate committee report, *Hamilton* reasoned that Congress meant in prison cases to restore the standard that governed before *O’Lone*. 74 F.3d at 1552 (quoting S. Rep. 103-111, 1993 U.S.C.C.A.N. 1892, 1899). In concluding that this meant the *Pell* standard, the court disregarded the committee’s explanation that it meant a higher level of scrutiny derived from a different line of cases. *Ibid.* More important, the court relied almost exclusively on legislative history and gave essentially no weight to the statutory text.

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<sup>1</sup> The other three cases referenced were *Block v. Rutherford*, 468 U.S. 576 (1984); *Bell v. Wolfish*, 441 U.S. 520 (1979); and *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119 (1977).



In practice, the Eighth Circuit standard is *more* deferential than the constitutional standard. This Court's constitutional cases engaged in substantial analysis of the challenged prison rules. *O'Lone*, 482 U.S. at 350-53; *Turner*, 482 U.S. at 91-99. In *Turner*, the Court unanimously struck down Missouri's ban on most prisoner marriages, despite testimony that the ban served security and rehabilitation interests. The Court found that testimony exaggerated, illogical, and unable to explain why the federal prison system's more individualized rule would not suffice. *Id.* at 97-99. In contrast, the Magistrate here reasonably understood the Eighth Circuit to require that he defer even to testimony that was "almost preposterous." Tr. 106.

### **C. This Eighth Circuit Rule Conflicts with the Rule in Other Circuits.**

Other circuits give much closer scrutiny to the testimony of prison officials. Petitioner has documented express circuit splits on whether respondents must actually consider less restrictive measures, and whether they must demonstrate why they cannot adopt less restrictive practices from other prison systems. Pet. 6-10; Supp. Br. 2. The Eleventh Circuit has explicitly acknowledged the split on these issues. *Ibid.* Respondents claim that these disagreements are merely details of implementing a uniform underlying standard. BIO 15-16. And they say the Eleventh Circuit agrees with the Eighth. BIO 14. This last point is true. The Eighth and Eleventh Circuits are on one side of the split; the First, Second, Third, Fourth, Fifth, and Ninth are on the other. Supp. Br. 2-5.

On the fundamental question whether courts must defer to prison officials' testimony no matter how conclusory or implausible, the Tenth Circuit just joined the more protective side of the split. *Yellowbear v. Lampert*, 2014 WL 241981 (10th Cir., Jan. 23, 2014) (Gorsuch, J.). *Yellowbear* gave content to the idea of deference in the context of strict scrutiny: “[T]he deference this court must extend the experience and expertise of prison administrators does not extend so far that prison officials may declare a compelling governmental interest by fiat.” *Id.* at \*9. Rather, deference may “nudge a questionable case across the line.” *Ibid.* Neither of those statements is consistent with the rule in the Eighth Circuit.

Respondents say that conflicting outcomes in different circuits merely reflect different evidentiary records. But judicial characterization of the evidence inevitably reflects the degree of deference to prison officials.

Unlike the Eighth Circuit, *Yellowbear* carefully examined the state's evidence. 2014 WL 241981, \*5-\*13. It emphasized that merely *considering* less restrictive alternatives is not enough. “[T]he government's burden here isn't to *null* the claimant's proposed alternatives, it is to *demonstrate* the claimant's alternatives are ineffective to achieve the government's stated goals.” *Id.* at \*12.

Or consider *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005). The court said the prison officials had offered “only conclusory statements.” BIO 11. Yet that testimony, summarized in 418 F.3d at 997, was at least as detailed as that of respondents here. *Warsoldier* examined the plausibility of that testimony in light of other information. *Id.* at 997-1001. The Eighth Circuit summarized respondents'

testimony in one sentence and accepted it without analysis. 509 Fed. Appx. at 562. *Warsoldier* required proof that defendants had “actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.” 418 F.3d at 999. The Eighth Circuit did not. *Warsoldier* gave significant weight to the practices of other prisons. *Id.* at 999-1000. The Eighth Circuit explicitly did not. 509 Fed. Appx. at 562.

Similarly in *Garner v. Kennedy*, 713 F.3d 237 (5th Cir. 2013), the court rejected the state’s cost argument because there had been no cost studies and the alleged costs were unquantified. *Id.* at 245-46. *Yellowbear* made a similar point. 2014 WL 241981, \*8. In *Garner*, the state justified its no-beard rule in part on the ground that prisoners could change their appearance by shaving a beard. The court rejected that justification on three grounds: Prisoners could change their appearance in other ways permitted by the rules, prison officials could take a new photograph if an inmate changed his appearance, and other large prison systems permit beards. *Id.* at 247. Petitioner emphasized all three of these points below. Tr. 39, 49-50, 53, 56-57, 97-98. The difference is not in the evidence, but in the standard of review.

Strict scrutiny may be a familiar standard, BIO 16, but strict scrutiny combined with due deference is *not* familiar. The conflicting cases reveal substantial disagreement about this standard. This Court should resolve the disagreement.

## II. Respondents Offered Only Conclusory Testimony.

Respondents say that certiorari should be denied because they so clearly justified their policy. BIO 3-7, 17-21. They did not. Their conclusory and illogical justifications were accepted only because the Eighth Circuit rule requires such a high degree of deference.

Respondents say that prisoners can hide contraband in a half-inch beard; they particularly emphasize cell-phone SIM cards. BIO 5. This is the testimony that the Magistrate found “almost preposterous.” Tr. 106. The Magistrate measured the SIM card at  $9/32$  by  $13/32$  of an inch — nearly as long as petitioner’s beard. Tr. 79. It would be far easier for a prisoner to drop a SIM card in his shoe, or in a pocket. The item would be much better hidden, and gravity would work for concealment instead of revelation. Respondents’ agreed that prisoners hide contraband in many places, including clothes, socks, shoes, boots, coats, and the hair on top of their heads. Tr. 51, 56, 58, 78. The SIM card “can be concealed just about anywhere.” Tr. 67. Pieces of phones “have been walked down the hall in flip flops.” *Ibid.* Officers smuggle contraband for prisoners. Tr. 73. Respondents’ were reduced to arguing that a half-inch beard provided one more place. Tr. 58. But common sense and the Magistrate’s assessment show it to be an especially ineffectual place.

Respondents argue that officers might cut themselves if they have to run their hands through petitioner’s beard searching for contraband. BIO 5-6, 19. But this danger depends on the premise that contraband could be hidden there in the first place. And officers could require prisoners to vigorously run their own hands through

their beards, dislodging anything hidden there. Pet. 10. Respondents try to explain why some of petitioner's suggested alternatives wouldn't work, BIO 19-20; they make no effort to refute this one.

Respondents say that prisoners can alter their appearance by growing or shaving beards. Petitioner asked each witness why respondents could not require a clean-shaven photo of each prisoner on admission, and a second photo if he grew a beard. Tr. 56. Warden Lay gave an utterly nonresponsive answer, simply listing ways in which inmates might change their appearance. *Ibid.* Assistant Director Harris said only that Warden Lay had already answered that question, and immediately returned to talking about contraband. Tr. 74.

Respondents suggest without citation that two photographs would be unworkable for 15,000 prisoners. BIO 18. Neither witness said anything like that in response to the photograph question. And the magistrate had just said, in a different context, "I didn't find it very compelling that having to manage 15,000 people with beards is at issue either, so." Tr. 55. Many men do not want beards, and of those who do, only those with religious motivations are protected by RLUIPA.<sup>2</sup>

Respondents say they cannot enforce a half-inch beard rule because they cannot tell how long a beard is. BIO 18. But they allow quarter-inch beards for medical reasons. BIO 1. They do not explain how they can estimate a quarter-inch but not a half-inch; no explanation is possible. As Warden Lay volunteered, "you could start, I guess, with a particular clipper guard that's a particular length." Tr. 37.

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<sup>2</sup> Counsel has not found this fact in the record, but petitioner represents that respondents photograph all prisoners annually at Cummins and every ninety days at Varner, the two units where he has been housed.

At least one state provides a sketch of a rule-compliant haircut. Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 963 (2012) (reprinting Alabama’s sketch). If half-inch clippers and general familiarity with half an inch are not enough, respondents could provide guards and prisoners with similar sketches — or photographs — of compliant half-inch beards.

Respondents say that allowing petitioner but not others to grow a beard would give petitioner special privileges and potentially generate a hostile reaction. BIO 5. At trial, this was generalized in a question about “any inmate that is allowed to do something that other inmates are not allowed to do.” Tr. 70. Mr. Harris answered, “That’s the last thing you would want to happen in an institution.” *Ibid.* Nothing better illustrates respondents’ refusal to take RULIPA seriously. RLUIPA necessarily requires religious exceptions; respondents claim a compelling interest in never granting any exception to anyone for anything.

Petitioner testified that the California prison system allows half-inch beards, citing *Mayweathers v. Terhune*, 328 F. Supp. 2d 1086 (E.D. Cal. 2004). Tr. 9-10. He cross-examined about why respondents could not permit beards as other prison systems do. Respondents knew nothing of the experience of these other systems, and had made no effort to learn. Tr. 53-54, 57-58, 62-63, 71, 77, 82.

In fact, thirty-nine states, the United States, and the District of Columbia permit beards either for all prisoners or for prisoners with religious motivation. Prison grooming policies are collected in Sidhu, 66 U. Miami L. Rev. at 964-72. Pennsylvania limits beards to three inches; none of the other permissive jurisdictions limit beards

to any specific length. California has since repealed the half-inch limitation that petitioner described. Some jurisdictions impose qualitative limits for hygiene, sanitation, identification, or security.

Of the remaining eleven states, Idaho and Mississippi allow half-inch beards and Indiana allows 1-1/2 inch beards. Texas recently had its no-beard rules invalidated. *Garner*, 713 F.3d 237. That leaves at most seven jurisdictions with rules as restrictive as respondents': Alabama, Arkansas, Florida, Georgia, South Carolina, Virginia (which failed to sustain its rule on summary judgment, *Couch v. Jabe*, 679 F.3d 197 (4th Cir. 2012)), and possibly Louisiana, which tightly limits hair length but does not mention beards in the rule that Professor Sidhu quotes.

It is hard to imagine a compelling interest in refusing religious exceptions to a rule that forty-five jurisdictions do not enforce. Certainly respondents cannot “demonstrate[]” a compelling interest without considering the experience in these jurisdictions. Respondents' say that petitioner did not introduce these policies below. BIO 21. But he repeatedly raised the issue posed by these policies, and the burden of proving compelling interest and least restrictive means is on respondents.

Respondents say that contraband is a special problem at the Cummins Farm, because it has open barracks and work sites outside the fence. BIO 4. But that does not make a half-inch beard a better hiding place, and all prisons constantly fight contraband; that problem is hardly unique to Cummins. Nor do respondents disclose that they transferred petitioner to the Varner Supermax unit, so that any unusual features at Cummins have become mostly or entirely irrelevant.

Finally, respondents point to petitioner’s verbal outburst against a barber that petitioner accused of cutting off his beard. BIO 3; Tr. 24-26, 35-37, 47-49. The incident led to a grievance by petitioner, not to a disciplinary action against him. See Tr. 47. So it was probably not as serious as respondents now try to portray it. The facts were disputed and the Magistrate did not resolve them, but one thing is clear. The barber was trained, if at all, under respondents’ current policy. The incident has little predictive value for barbers trained under a policy that complies with RLUIPA.

No deference is “due” to respondents’ testimony in this case. They reflexively rejected, without serious thought, every argument for half-inch beards. They claimed expertise but knew nothing of experience elsewhere. Their testimony was variously implausible, illogical, evasive, and “almost preposterous.” Tr. 106. They simply refuse to take seriously the possibility that RLUIPA may sometimes require exceptions to prison rules.

The factual claims in respondents’ Brief in Opposition required this somewhat detailed review of the evidence. But this is not just a case about error correction. It is about the Eighth Circuit rule that required deference to this implausible testimony — deference so great that it effectively negates an act of Congress. And it is about clarifying an important but unfamiliar standard of review: compelling interest with due deference to defendants’ expertise.



## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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