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 CORRECTION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OPPOSING A WRIT OF CERTIORARI

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January 16, 2014

QUESTION PRESENTED

Whether officials at a maximum-security prison violated the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, by prohibiting Petitioner from growing a beard, despite his religious desire to do so, where the grooming policy is necessary to protect the security and good order of the prison and where the evidence, including Petitioner's own actions, obviate that less restrictive alternatives are unworkable.

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STATEMENT OF THE CASE

Petitioner Gregory Holt, an inmate in the Arkansas Department of Correction ("ADC"), seeks this Court's review of a decision of the United States Court of Appeals for the Eighth Circuit that rejected Petitioner's Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc ("RLUIPA") challenge to the ADC's grooming policy. Mr. Holt is a Salafi Muslim who seeks to grow a beard in observance of his religion, but in contravention of the grooming policy.

The ADC's grooming policy, outlined in Administrative Directive 98-04, states, in part, as follows:

> D. No inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip. Medical staff may prescribe that inmates with a diagnosed dermatological problem may wear facial hair no longer than one quarter of an inch.

The purpose of the policy is "to provide for the health and hygiene of incarcerated offenders, and to maintain a standard appearance throughout the period of incarceration, minimizing opportunities for disguise and for transport of contraband and weapons." AD 98-04 (Trial Exhibit 1).

A. Statutory Background

Section 3 of RLUIPA provides that "no state or local government shall impose 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." § 2000cc-1(a)(1)-(2). The Act defines "religious exercise" to include "any exercise of

religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc-5(7)(A). To secure redress for inmates who encountered undue barriers to their religious observances, Congress carried over from RFRA the "compelling governmental interest/least restrictive means" standard. Congress noted, however, that it expected that courts adjudicating cases under Section 3 would accord "due deference to the experience and expertise of prison and jail administrators." 146 Cong. Rec. 16698, 16699 (2000).

B. The Proceedings Below

1. On June 28, 2011, Petitioner filed suit in the United States District Court for the Eastern District of Arkansas, claiming that ADC's policy and efforts to enforce the policy violated his First Amendment rights as well as those afforded to him pursuant to RLUIPA. (Docket Entry No. 2) Petitioner sought injunctive relief only. Petitioner also filed a Motion for Preliminary Injunction and Temporary Restraining Order, in which he sought a preliminary and permanent injunction ordering ADC Director Ray Hobbs and Cummins Unit Warden Gaylon Lay to cease enforcement of the grooming policy, to allow Petitioner to grow a one-half-inch beard, and to cease disciplinary efforts against inmates who grew one-half-inch beards. (Docket Entry No.3) Petitioner asked that the District Court impose an injunction without affording the Director or Unit Warden an opportunity to respond. Respondents were unaware of Petitioner's filings. On October 18, 2011, the District Court granted the motion and preliminarily enjoined ADC from forcing Petitioner to trim his beard shorter than one-half-inch in length. (Docket Entry No.

28) Respondents first learned of the case upon service of the Summons and Complaint on November 16, 2011.

2. An evidentiary hearing on the merits of Petitioner's First Amendment and RLUIPA claims was held before a Magistrate Judge six weeks later. (Docket Entry No. 73) At the hearing, Respondent Gaylon Lay, Warden of the Cummins Unit, and Grant Harris, ADC Assistant Director, testified as follows to the specific rationale for the ADC grooming policy. Lay's objections to Petitioner's request to maintain a one-half-inch beard were deeply rooted in security. (Trial Tr. 33) A person can quickly alter his appearance if he is allowed to grow a beard, such as shave his beard immediately upon escape. (*Id.*) Inmates have previously hidden contraband on their person, including homemade darts and other weapons, which would fit in an inmate's one-half-inch beard. (*Id.* at 34) Monitoring beard length would create difficulties for him and his staff on a daily basis. (*Id.*)

Lay testified about a specific incident involving the Petitioner that occurred after the issuance of the preliminary injunction. Although Petitioner's litigation position is that he would comply with a policy restricting his beard to one-half-inch in length, Petitioner threatened physical harm to a barber at the Cummins Unit when the barber tried to trim Petitioner's beard to that length. (Trial Tr. 34, 35) Petitioner accused the barber of cutting his beard too short. (*Id.* at 36) Warden Lay explained that the barbers cannot be changed merely because a particular inmate disagrees with the length of his beard. (*Id.* at 37) He also expressed his concerns

about how to determine the exact length of an inmate's beard in such a way to avoid confrontations in the future. (*Id.* at 34)

Lay further testified that contraband could be hidden inside the cheek, and any alteration to the appearance of the check would be masked by facial hair. While these issues have been problems in the past years, the population of inmates entering the ADC now is younger and more violent, which creates even greater security problems than in previous years. (Trial Tr. 40) And there are numerous difficulties in attempting to monitor the more than 15,000 inmates within the ADC; affording them with one more place to hide weapons or contraband would not be in the interest of security and safety for either employees or inmates. (*Id.* at 34)

The majority of prison facilities in other states have cell block housing units where inmates are housed in one- or two-person cells. In contrast, the Cummins Unit and several other Units within the ADC have open barracks, each housing up to 50 inmates. (Trial Tr. 53) This arrangement allows inmates greater access to one another, and greater opportunities for the use of weapons on other inmates, compared to facilities in which only one or two inmates are together in a cell. Warden Lay was also not aware of many other state facilities operating agricultural programs like the ADC does. (*Id.* at 54) At the Cummins Unit, many inmates engage in assigned agriculture work mostly outside the fence. (*Id.*) Inmates who work outside the prison fence often attempt to smuggle weapons, drugs and other contraband into the prison; therefore, allowing beards would create new opportunities for smuggling such items without detection. Lastly, Mr. Lay testified

that allowing Petitioner to maintain a beard, while not affording the same opportunity to other inmates, would elevate Petitioner's status above that of other inmates, thereby creating the real possibility of harm to Petitioner as well as others. (Trial Tr. 40) One important goal of the ADC is to treat all inmates fairly and alike.

ADC Assistant Director Grant Harris testified about a particular department-wide problem involving contraband the ADC has encountered over the last several years, namely, the introduction of cell phones into the facilities. In 2011, the ADC confiscated in excess of 1,000 cell phones from inmates. (Trial Tr. 65) The cell phone is now the primary covert means for relaying information between the inmates and the outside world including the delivery of contraband. Mr. Harris presented the Court with a cell phone SIM card that had been confiscated from a facility. The Court examined the SIM card and even measured it, which was three-eighths-inch by three-eighths-inch in diameter and easily capable of being secreted in an inmate's beard. (Respondents' Trial Exhibit No. 2) The SIM card is the piece of the phone that contains network identification and other information vital for the operation of the cell phone by the inmate seeking to facilitate the delivery of weapons and contraband. Mr. Harris testified that a SIM card can easily be hidden inside a one-half-inch beard, thus severely compromising the ADC's efforts to prevent the flow of contraband into, and within, its prison facilities.

Mr. Harris also expressed serious concern for officer safety if officers were required to perform hands-on inspections of facial hair to search for contraband and weapons. Officers would, he testified, be exposed to being cut, stabbed, and the like

from razor blades, dirty needles, or other items. (Trail Tr. 80) Mr. Harris also testified that he shared Mr. Lay's concerns about giving one inmate perceived preferential treatment over other inmates. (*Id.* at 70)

Petitioner also testified at the hearing. He testified that he had discovered a case in which Muslim inmates were allowed to maintain a one-half-inch beard. Based upon that case, Petitioner sought leave of the ADC to allow him to maintain a one-half-inch beard. (Trial Tr. 10) He did not challenge the head hair portion of the policy, only the beard section. (Trial Tr. 11) He conceded that Respondents have a compelling governmental interest in maintaining safety and security within the institution. (Trial Tr. 11) He also testified that not all Muslims believe a man must maintain a beard. (*Id.* at 13) And he acknowledged that he is able to honor his religion in a variety of other ways without wearing a beard, such as the use of a prayer rug during his worship times, reading and studying the Koran, communicating with a religious advisor, maintaining the required diet, and observing religious holidays. (Docket Entry No. 82)

Petitioner admitted that approximately three weeks prior to the January 2012 hearing, he received a haircut and beard trim from the Cummins Unit barber. (Trial Tr. 24) Petitioner conceded that he had a confrontation with the barber over the length the barber was cutting his beard. Petitioner informed the prison staff he was "at war" with the barber and threatened physical harm to the barber if they were to cross paths in the future. (*Id.* at 25) As a result of Petitioner's actions, which the ADC considered a serious, genuine threat, the ADC required that the

Petitioner and the barber no longer be allowed to have any contact with one another.

Petitioner confronted Warden Lay and Assistant Director Harris with alternative policies he believed would allow him to maintain a one-half-inch beard, while addressing ADC's security and other concerns. Both Lay and Harris explained why Petitioner's proffered options were unworkable and provided support for their opinions. Petitioner did not offer any testimony other than his own, nor did he offer any documentary evidence at the hearing.

In addition to receiving the testimony offered by Petitioner, Warden Lay, and Assistant Director Harris, as well as the documentary evidence offered by ADC, the Magistrate Judge took judicial notice of the evidence that had been submitted in a previous ADC RLUIPA case. *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008). During the bench trial in *Fegans*, ADC Director Larry Norris testified that the ADC prohibition on inmate facial hair prevented inmates from changing their appearance, and made it easier for law enforcement to track and identify an inmate following an escape. (Docket Entry No. 82) He also said that "an uncut beard would make identification more difficult and would facilitate the smuggling of contraband. 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." *Fegans*, 537 F.3d at 907.

3. Following the hearing, the Magistrate Judge issued Proposed Findings and Recommendations that Petitioner's claims should be dismissed and that the court's previous order granting a preliminary injunction should be vacated. (Docket

Entry 82) The District Court approved and adopted the Proposed Findings and Recommended Disposition in their entirety. A few days later, however, the court granted Petitioner's motion to stay the lifting of the preliminary injunction.

Petitioner appealed the dismissal of his RLUIPA claim, but not the dismissal of his First Amendment claim, to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed in a short, unpublished opinion. Applying strict scrutiny, the Eighth Circuit concluded that Respondents had met their burden under RLUIPA of establishing that the ADC's grooming policy was the least restrictive means of furthering a compelling penological interest, notwithstanding Petitioner's citation to cases indicating that prisons in other jurisdictions have sometimes been able to meet their security needs while allowing inmates to maintain facial hair. *Holt v. Hobbs*, 509 Fed.Appx. 561, 2013 WL 2500568 (8th Cir. 2013).

Following the Eighth Circuit's decision, the Respondents moved the District Court to vacate the preliminary injunction. The District Court did so on September 16, 2013. Petitioner then petitioned for a writ of certiorari and, two weeks later, moved for a Stay of Enforcement Pending his Petition for Certiorari. On November 14, 2013, this Court granted Petitioner's application for an injunction. Respondents are currently enjoined from enforcing the ADC's grooming policy to the extent that it prohibits the Petitioner from growing a one-half-inch beard.

REASONS FOR DENYING THE PETITION

The Eighth Circuit's unpublished decision denying Petitioner's RLUIPA claim does not warrant this Court's review. Petitioner erroneously argues that there is a split among the circuits regarding how RLUIPA applies to prison policies that prohibit facial hair. Closer examination of those cases reveals that, rather than a true split on any matter of law, each case applied the same legal analysis under RLUIPA to varied and nuanced factual records. The differing outcomes reflect differences in the proof presented to the courts and not disagreements about the applicable law.

Nor does Petitioner's First Amendment claim warrant review. That claim is not properly before this Court because he did not appeal the District Court's dismissal of it. He may not now advance an argument already abandoned on appeal.

In any event, this case is a poor vehicle for any further analysis of RLUIPA. The District Court took judicial notice of the evidence considered when the ADC's grooming policy was created in 1998, and it considered the new testimony of prison officials who, based on their expertise and experience, convincingly refuted the notion that any proffered alternatives were feasible. The evidentiary record is devoid of evidence suggesting that ADC's concerns are overstated or that a proffered alternative is feasible. Other than Petitioner's own testimony about what the policy should be, the record contains no evidence at all rebutting the evidence submitted by the ADC. The Court should not take a case in which the trial court's evidentiary

record is so one-sided. Accordingly, the petition for a writ of certiorari should be denied.

I. THE LOWER COURTS UNIFORMLY APPLY RLUIPA STANDARDS TO DIFFERING FACT PATTERNS AS THEY ARISE.

In arguing that the Eighth Circuit's decision warrants review, Petitioner contends that there is a split among the circuits regarding the application of RLUIPA to prison policies that restrict inmate facial hair. There is not. Closer examination of the relevant cases reveals that, rather than a true split as to substantive law, each court applied the same legal standard in addressing factual records that varied from case to case. The differences in outcomes reflect differences in the proof presented in each case.

Specifically, Petitioner points to decisions by three federal courts of appeals – the Fourth, Fifth, and Ninth Circuits – holding that prison bans on beards violate RLUIPA. But the Fourth and Fifth Circuits have also issued decisions *upholding* prison bans on beards against RLUIPA challenges. None of those decisions prompted *en banc* review, presumably because the courts of appeal recognized that the differences in results stemmed from differences in the facts rather than any differences in legal standards. Importantly, the Ninth Circuit decisions were expressly based on the state's failure to offer proof on the "least restrictive means" issue.

The Ninth Circuit. In 1995, Muslim prisoners asked the court (1) to prevent the California DOC from disciplining inmates when they missed work on

Fridays in order to attend Jumu'ah Prayer and (2) to allow inmates to maintain one-half-inch beards for religious purposes. *Mayweathers v. Newland*, 258 F.3d 930 (9th Cir. 2001). A total of 15 preliminary injunctions in favor of particular inmates were issued during the pendency of the litigation, allowing them to attend Jumu'ah Prayer to maintain one-half-inch beards. The district court eventually granted a permanent injunction in favor of the inmates when the state failed to adequately justify that its policy restricting beard length was necessary for security concerns. The Ninth Circuit affirmed the district court's decision. The Ninth Circuit's decision reflected the failure of the state to present evidence in support of its beard policy, not a misinterpretation of applicable law. *Mayweathers v. Terhune*, 32 F.Supp.2d 1086 (E.D.CA. 2004).

The same is true of *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005), decided the following year. There, a Native American inmate presented a RLUIPA challenge to a specific portion of a grooming policy pertaining to hair length. In reversing the district court, the Ninth Circuit held that the prison had failed to meet the second prong of its burden under RLUIPA. The California prison argued that safety and security of both inmates and prison staff were compelling interests, but it presented only conclusory statements rather than persuasive evidence that the hair grooming policy was the least restrictive means of ensuring prison security. *Id.*, 418 F.3d at 999.

The Fifth Circuit. The Fifth Circuit has twice ruled that prison restrictions on beard length *do not* violate RLUIPA. *See, DeMoss v. Crain*, 636

F.3d 145 (5th Cir. 2011) (per curiam); *Gooden v. Crain,* 353 Fed. Appx. 885 (5th Cir. 2009) (per curiam). The court has once ruled otherwise. *See Garner v. Kennedy,* 713 F.3d 237, 248 (5th Cir. 2013). The Fifth Circuit explained that its previous rulings were based upon "a substantially different record" than the record in *Garner,* mandating the different outcomes. *Id.*

The Fourth Circuit. The Fourth Circuit in *McRae v. Johnson,* 261 Fed. App'x. 554 (4th Cir. 2008), affirmed the dismissal of RLUIPA claims brought by a group of inmates challenging the Virginia Department of Corrections' ("VDOC") grooming policy. The district court explicitly relied upon the evidence presented by the VDOC demonstrating the security risks posed by allowing inmates to wear long hair or facial hair. *Id.*at 560. VDOC Director Gene Johnson, a prison administrator with more than 40 years of prison experience, testified that Virginia's prohibition on facial hair was the least restrictive means of suppressing contraband, maintaining the health and safety of inmates and staff, and preventing prisoners from quickly changing their appearance. *Id.* at 558. Specifically, Johnson testified that prior to the implementation of the VDOC grooming policy, he had witnessed a correctional officer injured by a razor blade hidden in an inmate's hair; had seen inmates conceal contraband such as wires, rope, rocks, and tobacco in their hair; had known of beards that caused delays in medical treatment by concealing serious conditions such as tumors and lesions; and had witnessed facial hair infested with lice and spiders. *Id.* Despite the plaintiff's attempts to counter this evidence with testimony

from a prison management consultant, the district court, and ultimately the Fourth Circuit, held that the State had met its burden under RLUIPA. *Id.*

One year later, the Fourth Circuit examined a very different record on appeal and determined that a South Carolina Department of Corrections grooming policy, which required the forcible shaving of the heads of noncompliant inmates, violated RLUIPA. *Smith v. Ozmint,* 578 F.3d 246 (4th Cir. 2009). In *Smith,* the court found that the state failed to present sufficient evidence to establish that compelling inmates to shave their heads constituted the least restrictive alternative.

In a 2012 case, the Fourth Circuit determined that a VDOC policy prohibiting inmates from wearing a one-eighth-inch beard for religious reasons violated RLUIPA. *Couch v. Jabe,* 679 F.3d 197, 199 (4th Cir. 2012). The court based its decision on the state's failure to present sufficient evidence in support of its case – not upon a differing view as to the correct legal standard. *Id.* at 204. In each of the Fourth Circuit cases, the same legal standard was applied, but different evidentiary records resulted in different outcomes.

Other Courts. In his Supplemental Brief, Petitioner cited seven additional cases.[1] Of those seven, only one, *Muhammad v. Sapp,*[2] an

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[1] *Couch v. Jabe*, 679 F.3d 197 (4th Cir. 2012); *Garner v. Kennedy*, 713 F.3rd 237, 85 Fed.R.Serv.3d 248 (5th Cir. 2013); *Jova v. Smith*, 582 F.3d 410, 416 (2d Cir. 2009); *Knight v. Thompson*, 723 F.3d 1275 (11th Cir. 2013); *Lovelace v. Lee*, 472 F.3d 174 (4th Cir. 2006); *Muhammad v. Sapp*, 494 Fed.Appx. 953, 2012 WL 5359235 (11th Cir. 2012); and *Washington v. Klem*, 497 F.3d 272, 283 (3rd Cir. 2007).

unpublished case from the Eleventh Circuit, addressed beard grooming policies under RLUIPA. The Eleventh Circuit's holding in that case was consistent with the Eighth Circuit's decision here. In *Muhammad,* an inmate in the Florida Department of Correction challenged a policy that required inmates to shave or be forcibly shaved. The district court held that the prison's policy did not violate RLUIPA, even though the prisoner contended that his religious beliefs provided that he should not cut his beard. The district court found that the prison's grooming policies furthered a compelling government interest and were the least restrictive means of furthering that compelling interest. The Eleventh Circuit affirmed the district court's decision.

Petitioner also cited (Supp. Br. 1-4) the Eleventh Circuit's denial of *en banc* rehearing in *Knight v. Thompson*, 723 F.3d 1275 (11th Cir. 2013). As an initial matter, the facts here are not similar to those in *Knight.* In *Knight*, a group of Native American inmates in Alabama's DOC sought to maintain unlimited hair length for religious reasons. Beards were not at issue in *Knight.* Moreover, the Eleventh Circuit's decision in *Knight* is entirely consistent with the Eighth Circuit's decision here. Both sides in *Knight* relied upon expert testimony and numerous evidentiary exhibits admitted at trial. The Eleventh Circuit found in favor of the prison, citing to *Cutter v. Wilkinson, supra.* The court concluded that although RLUIPA protects, to a substantial degree, the religious observances of

[2] 494 Fed.Appx. 953, 2012 WL 5359235 (11th Cir. 2012)

institutionalized persons, it does not give courts *carte blanche* to second guess the reasoned judgments of prison officials. *Knight*, 723 F.3d at 1283.

Finally, in addition to the cases cited by Petitioner, the court in *Kuperman v. Wrenn,* 645 F.3d 69, 80 (1st Cir. 2011), noted that its dismissal of a Jewish inmate's RLUIPA beard-length claim rested upon the failure of the inmate to submit "admissible evidence to counterbalance Prison Officials' affidavits." *Kuperman,* 645 F.3d at 80.

The circuit courts have not held that facial hair restrictions are always permissible; nor have they held that such restrictions are always impermissible. Rather, they have based their rulings on the facts presented, examined each grooming policy in the context of the factual record, and considered each state's particular circumstances under RLUIPA's strict-scrutiny standard. That is precisely what Congress anticipated courts entertaining RLUIPA challenges would do, "accord[ing] 'due deference to the experience and expertise of prison and jail administrators.'" *Cutter v. Wilkinson*, 544 U.S. 709 (2007).

II. RESPONDENTS PROPERLY APPLIED THE STRICT SCRUTINY STANDARD AND REBUTTED THE FOUR ALTERNATIVES TO THE ADC GROOMING POLICY ASSERTED BY PETITIONER AT THE EVIDENTIARY HEARING.

Petitioner argues that the circuits are divided over "whether a prison system must actually consider less restrictive measures before rejecting them" and "whether a prison system must demonstrate that it cannot grant religious accommodations that other systems have successfully granted." (Pet. Supp. Br. at

2-3). Petitioner is wrong. There is no split among the circuits as to the legal standard applicable to RLUIPA grooming cases.

A. Lower Courts Agree That Congress Mandated a Strict-Scrutiny Standard When it Enacted RLUIPA.

Section 3 of RLUIPA requires courts to apply strict scrutiny to government actions that substantially burden the religious exercise of institutionalized persons. *Benning v. Georgia*, 391 F.3d 1299, 1304 (11th Cir. 2004); *Freeman v. Texas Dep't of Criminal Justice,* 369 F.3d 854, 857–58 n.1 (5th Cir. 2004); *Lovelace v. Lee*, 472 F.3d 174, 186 (4th Cir. 2006); *Murphy v. Missouri Dep't of Corr.*, 372 F.3d 979, 987 (8th Cir. 2004). Thus, prison officials must prove that any substantial burden upon an inmate's religious exercise is necessary because it is the least restrictive means of accomplishing a compelling state interest.

Petitioner argues that, because various courts have placed differing degrees of weight on certain types of evidence, there must be a circuit split regarding the underlying legal standard. But the strict-scrutiny standard is one of this Court's most clearly-defined legal tests. It is applied every day by lower courts in cases raising various types of claims, such as cases involving race-based decisions and claims involving the alleged deprivation of fundamental rights. Lower courts have demonstrated an ability to apply the strict-scrutiny standard without bright-line rules that establish what evidence must be deemed dispositive or entitled to the most weight. Petitioner further argues that the Eighth Circuit failed to properly apply the strict-scrutiny standard because it showed deference to Respondents'

experience and expertise in the unique area of prison security. (Pet. Supp. Br. at 4.) Contrary to Petitioner's argument, deference to prison officials is not incompatible with strict scrutiny. In fact, this Court specifically said in *Cutter v. Wilkinson* that, in enacting RLUIPA, Congress "anticipated that courts would apply the Act's standard with due deference to prison administrators' experience and expertise." *Id.*, 544 U.S. 709 (2005). Therefore, rather than abdicating its judicial role or demonstrating any deviation from the appropriate legal standards, the Eighth Circuit's deference to Respondents' expert judgment regarding prison security was a direct application of this Court's holding in *Cutter*.

B. There Is No Record Evidence That Feasible, Less Restrictive Alternatives to ADC's Grooming Policy Exist.

At the evidentiary hearing, Petitioner questioned Warden Lay and Assistant Director Harris about four proposed alternatives to the ADC grooming policy: (a) indefinite housing in administrative segregation; (b) visual inspection of beard lengths; (c) alternating photographs of inmates; and (d) hands-on inspection by staff. At the hearing, ADC presented testimony persuasively explaining why these proffered alternatives were unworkable. Although Petitioner argued there were at least four options, he presented no evidence at all rebutting ADC's evidence that the options were not feasible.

Petitioner first suggested that perhaps he, and presumably any other inmate who desired to grow a one-half-inch beard, could be housed in administrative segregation, for as long as he wished. (Trial Tr. 27) Respondents rejected this option based upon Eighth Circuit case law, in which the Court held that indefinite

administrative segregation may violate due process. *Williams v. Hobbs*, 662 F.3d 994 (8th Cir. 2011).

In response to Respondents' safety concerns regarding the proper identification of inmates and how growing beards would alter their appearance, Petitioner proposed that inmates be photographed clean shaven as they enter the ADC and then photographed again once they had grown a one-half-inch beard. (Trial Tr. 56) ADC officials testified that between 15,000 – 17,000 inmates are in the custody of the ADC. Photographing inmates and then having to ascertain which appearance the inmates were exhibiting each day would be an arduous and overly-burdensome task for the already overtasked staff.

Next, Petitioner inquired about the possibility of visually monitoring inmate beard lengths in order to determine when one was out of compliance. (Trial Tr. 59) In response, testimony was given as to how different people have differing hair types which will grow at different thicknesses and rates. Determining precisely how long a beard is would be difficult, especially if the inmate and correctional staff member disagreed as to the precise length. Petitioner had himself violently disagreed with his barber over the actual length of his beard. Respondents testified they did not see a workable method for gauging the lengths without touching the inmates and using a measuring tape to precisely measure the length of potentially thousands of beards on a daily basis. (Trial Tr. 59)

Lastly, Petitioner recommended that staff members not only visually inspect each inmate beard on a daily basis, but that they physically inspect the one-half-inch beard on a daily basis. (Trial Tr. 59) As a practical matter, officers do not

generally lay hands on inmates' above the shoulders. If they were to need to physically inspect and search every beard, serious security concern for officer safety would arise. Specifically, an officer physically running his or her hand through an inmate beard could result in that officer cutting or pricking his or herself with dirty needles or broken razorblades. (Trial Tr. 80). As such, hands-on inspections of inmate beards would create a further detriment to the safety and security of the facility.

In his writ petition, Petitioner offers several new alternatives for consideration, including running a metal detector over the facial area in a "wave," providing special religious barbers, and disciplining inmates who grow beards longer than one-half-inch. (Pet. Br. at 10). These alternatives are flawed for several reasons. First, none of these options was raised in Petitioner's pleadings nor discussed before the District or Circuit Courts. And, no evidence was presented in support of, or opposition to, such alternatives, and thus, the record is devoid of evidence. There is no evidence in the record whether providing a special religious barber for some inmates but not others could work. Similarly, because the use of hand-held metal detectors was never mentioned, no evidence was offered on such devices, including their availability, feasibility, reliability, or cost.

Petitioner's new third alternative is that inmates whose beards grow longer than one-half-inch should be disciplined. But, as already noted, Petitioner refused to have his beard trimmed and sought judicial intervention to prevent ADC from disciplining him. As the confrontation between Petitioner and the barber demonstrates, the idea that every inmate's beard should be frequently measured

and trimmed, and that every non-compliant inmate should be immediately disciplined would raise intractable problems as to manpower and the safety and security of inmates and employees alike. Petitioner has offered no explanation to address potentially violent interactions between bearded prisoners and the barbers needed to ensure compliance with a one-half-inch policy.

It is unclear from Petitioner's Supplemental Brief when he believes a prison system must actually consider less restrictive alternatives. But, in the present case, the record evidence showed that such alternatives were considered and rejected as infeasible both at the time the policy was originally adopted and then again in response to Petitioner's suit.

The Magistrate Judge took judicial notice of the evidence of alternatives considered prior to the issuance of the grooming policy. *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008) In 2003, inmate Michael Fegans sued ADC Director Larry Norris and other ADC personnel, claiming the ADC's failure to provide a religious exemption to the grooming policy violated his constitutional rights and RLUIPA. During the bench trial held in *Fegans*, evidence was presented detailing the history of Administrative Directive 98-04 ("AD 98-04"), the grooming policy enacted in 1998 by Norris. The evidence presented was that, in 1997, Director Norris' staff conducted research pertaining to the hair and grooming policies of five other states and the Federal Bureau of Prisons. The information gathered, along with the experiences Norris and his staff had encountered over the years with contraband and other security concerns, played a role in formulating the ADC grooming policy. *Fegans*, 537 F.3d at 905.

Prior to the enactment of AD 98-04, prison officials considered other alternatives to creating a hair limit and no beard policy, and in fact tried one such option. Under the former ADC grooming policy, which permitted long hair, prison officials found that the use of hair to conceal contraband or to change appearance after an escape had in fact occurred. *Id.*

Petitioner also raises the question in his Supplemental Brief "whether a prison system must demonstrate that it cannot grant religious accommodations that other systems have successfully granted." (Pet. Supp. Br. at 1). Respondents assert that this question is not proper for consideration. At the evidentiary hearing, Petitioner did not introduce any evidence regarding policies or practices of any other department of correction. He called no witnesses who could testify as to the specific policies being applied in other states. Rather, Petitioner inquired of the Warden and Assistant Director about their knowledge of other state policies, to which they responded they did not have any specific knowledge.

Again, judicial notice was taken of the *Fegans* case and the evidence presented at trial. In 1998, Director Norris issued a new grooming policy for all Arkansas prisons. Fegans argued that the ADC's grooming policy was not the least restrictive means available because other prison systems employ more liberal grooming policies. Those alternatives were considered and rejected as less effective in meeting the ADC's security and safety concerns.

The circuit courts have consistently based their rulings on the facts presented in each case, considering each state's particular circumstances. There is simply no

split among the circuits on any matter of applicable law that would warrant a grant of certiorari.

III. PETITIONER'S FIRST AMENDMENT CLAIM IS NOT PROPERLY BEFORE THIS COURT

Petitioner appealed only the dismissal of his RLUIPA claim to the Eighth Circuit; he abandoned his First Amendment claim, provided he even raised in the first place. In his Reply Brief at the Eighth Circuit, Petitioner argued that he had never intended to assert a First Amendment claim. The Eighth Circuit did not consider his First Amendment Claim and affirmed the District Court's dismissal of the RLUIPA claim. Petitioner's First Amendment claim is therefore not properly before this Court. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). The Court "ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield, Mass. v. Kibble*, 481 U.S. 257 (1987). Because Petitioner failed to appeal the dismissal of his First Amendment claim, he has either knowingly waived or forfeited that claim. *See Puckett v. U.S.*, 556 U.S. 129 (2009).

IV. THIS CASE IS A POOR VEHICLE FOR REVIEWING THE LEGAL STANDARDS UNDER WHICH PRISON GROOMING POLICIES MUST BE EVALUATED UNDER RLUIPA

Even if the Court were otherwise inclined to consider prison beard policies under RLUIPA, this case is a poor vehicle for doing so. The Eighth Circuit did not publish its decision in this case. As a consequence, the Eighth Circuit's decision has no precedential value within the circuit. Even if there were a genuine circuit split – and there is not – the decision below would not deepen it.

Respondents introduced evidence, including specific examples of evolving security concerns involving contraband and how allowing inmates to maintain a one-half-inch beard would greatly intensify those problems. Petitioner did not provide evidence to contradict the ADC's thorough justification of its grooming policy. The District Court analyzed the RLUIPA standard as to the specific facts of Petitioner's case. The Eighth Circuit reviewed the District Court's analysis of the evidence and affirmed.

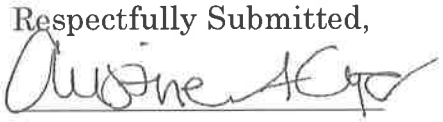
The evidence offered to the Court regarding cell phones, agricultural field work performed outside the prison fence, and documented behavior of the Petitioner, makes this a poor vehicle for re-evaluating RLUIPA. Grant Harris testified about security problems the Department has had involving cell phones and SIM cards, and how allowing inmates to grow beards would very likely increase those problems.

Moreover, Respondents presented evidence that a less restrictive means of maintaining security while allowing Petitioner to maintain a one-half-inch beard pursuant to the preliminary injunction was not possible. The dangerous situation created by Petitioner (as a potential population sample of one) when he threatened the barber, clearly illustrates the validity of Respondents' concerns.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

By: 

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CERTIFICATE OF SERVICE

I, Christine A. Cryer, Assistant Attorney General, do hereby certify that on this 16th day of January, 2014, I mailed the foregoing document by U.S. Postal Service to the following counsel of record:

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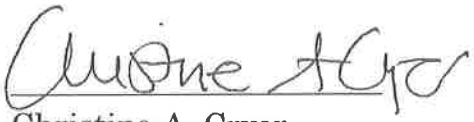
By: 

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