

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

**BRIEF OF *AMICUS CURIAE*
WOMEN'S PRISON ASSOCIATION
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

Amicus Women's Prison Association (WPA) is the nation's oldest organization dedicated to helping women and their families navigate the criminal justice system. Founded in 1845, WPA helps women while they are imprisoned and as they reenter society. It also advocates alternatives to incarceration.

Because religion is central to the identity of many female inmates and provides them an unparalleled source of hope, strength, and restoration, WPA is concerned about prison policies that restrict the rights of women to practice their faith. Absent robust legal protection, women in prison face unique threats to their dignity.

The Religious Land Use and Institutionalized Persons Act (RLUIPA) safeguards the religious practices of incarcerated women as well as men. Because this case will likely determine RLUIPA's grooming protections for all inmates, regardless of sex, WPA must add its voice. In particular, WPA supports female inmates whose faith is threatened by the undue deference to prison officials now operating in some circuits.

¹ Pursuant to Rule 37.6, counsel for *amicus* states that no party's counsel authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made any monetary contribution intended for the brief's preparation or submission. Letters reflecting the consent of the parties to the filing of the brief have been filed with the clerk.

SUMMARY OF ARGUMENT

Female grooming practices often have profound cultural significance. A woman's hairstyle can reveal her age, class, cultural or ethnic identity, and even her outlook on life itself. Tellingly, women who shave their heads or refuse to cut their hair—whether for reasons of solidarity, mourning, rebellion, or fashion—stand out. A simple choice of hairstyle can mark a woman as traditional, playful, professional, radical, or demure.

Hair has particular importance for women of faith. Many Muslim women, for example, are so committed to honoring God by covering their hair that they feel naked without a headscarf. Similarly, Native American religions teach that hair is a gift from the divine. And Sikh women believe they are forbidden from cutting any hair on their bodies; Sikhs have chosen death rather than cut their hair.

Despite the significance of grooming practices for devout women, prisons can impose strict limitations. These limits may be justified in certain circumstances, but prisons too often rely on speculative or exaggerated concerns to justify unduly restrictive rules.

Congress sought to forbid arbitrary burdens on religious exercise by passing RLUIPA, which requires prisons to show that challenged policies are the *least* restrictive way to further a compelling interest. And although this Court observed in *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005), that “due deference” should be given to prison officials, two circuits effectively ig-

nore the “due” modifier—allowing prisons to do almost anything they want in the name of safety, regardless of whether prisons elsewhere have successfully accommodated the religious practice at issue. This is not what Congress intended.

Female inmates of faith—particularly of minority faiths—face unique harm from such undue deference. Because women are a small percentage of the prison population, and women of minority faiths an even smaller portion, prison officials have limited exposure to their religious practices. As a result, officials’ consideration of other states’ policies—a key issue in this case—is perhaps more important for devout female inmates than their male counterparts. Prisons that refuse religious accommodations while ignoring successful approaches elsewhere flout RLUIPA’s “least restrictive means” test to the detriment of women.

Unless the Eighth and Eleventh Circuit’s approach is rejected, prison officials there and elsewhere will be emboldened to deny women the ability to practice their faith in a time of their greatest need. In the humbling environment of prison, religion is a font of identity, community, and healing. It deserves greater weight in prison officials’ calculations and should not be brushed aside in ignorance.

ARGUMENT

I. Women In Prison Have A Heightened Need For Religious Accommodation.

A. Past Abuse Leaves Women In Prison Especially Vulnerable.

Women comprise a small but significant portion of the national correctional population. More than 200,000 are incarcerated; one million more are on probation or parole. E. Ann Carson & Daniela Golinelli, U.S. Dep't of Justice, *Prisoners in 2012—Advance Counts* 2 tbl.1 (2013), available at <http://bit.ly/bjsprisons>; Laura M. Maruschak & Thomas P. Bonczar, U.S. Dep't of Justice, *Probation and Parole in the United States, 2012*, at 17 tbl.2, 18 tbl.3, 19 tbl.4, 21 tbl.6 (2014), available at <http://bit.ly/bjsprobation>; Todd D. Minton & Daniela Golinelli, U.S. Dep't of Justice, *Jail Inmates at Midyear 2013—Statistical Tables* 6 tbl.2 (2014), available at <http://bit.ly/bjsjails>. And although women make up only seven percent of the incarcerated population, their numbers grew six-fold between 1980 and 2010. Carson & Golinelli, *supra*, at 2 tbl.1; The Sentencing Project, *Incarcerated Women* 1 (2012), available at <http://bit.ly/sentencingproject>.

Women tend to commit less serious crimes, often motivated more by social pressure than aggression. Only about a third of women incarcerated for over a year were convicted of violent offenses, compared to more than half of similarly situated men. Carson & Golinelli, *supra*, at 11 tbl.10. They are more likely to have been drawn into crime by their social connections, especially their romantic partners. Brent B.

Benda, *Gender Differences in Life-Course Theory of Recidivism: A Survival Analysis*, 49 *Int'l J. Offender Therapy & Comp. Criminology* 325, 339 (2005). And they are less likely to commit new crimes after serving their time. Fla. Dep't of Corr., *2011 Florida Prison Recidivism Report* 8 (2012), available at <http://bit.ly/floridadoc>. Female inmates are not usually hardened criminals; they typically erred at moments when they were susceptible to negative influences in their lives.

Women's life experiences *before* turning to crime also often make them especially vulnerable in prison. Histories of physical and sexual abuse are nearly ubiquitous. In surveys of incarcerated women, the vast majority attest to having suffered some form of sexual abuse; approximately a third encountered this abuse as children. Cathy McDaniels–Wilson & Judson L. Jeffries, *Women Behind Bars: An Illuminating Portrait*, 2011 *J. Inst. Just. Int'l Stud.* 129, 134 (2011). Over ninety percent have experienced domestic violence. Sarah Wynn, *Mean Women and Misplaced Priorities: Incarcerated Women in Oklahoma*, 27 *Wis. J.L. Gender & Soc'y* 281, 287 (2012). And by the time they enter prison, more than seventy percent suffer from mental illness. Doris J. James & Lauren E. Glaze, U.S. Dep't of Justice, *Mental Health Problems of Prison and Jail Inmates* 4 (2006), available at <http://bit.ly/bjsmentalhealth>. Male prisoners do not suffer from such prevalent abuse or mental illness. *Id.*; Zina T. McGee et al., *From the Inside: Patterns of Coping and Adjustment Among Women in Prison, in It's a Crime: Women & Justice* 507, 511 (Roslyn Muraskin ed., 4th ed. 2007).

Once in prison, women are watched in their most intimate moments by guards who are predominantly male. Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 Marq. L. Rev. 751, 753 (2005) (seventy percent of women's prison guards are men). Guards watch the inmates as they change clothes, shower, use the toilet, and receive medical treatment. Samiera Saliba, *Rape by the System: The Existence and Effects of Sexual Abuse of Women in United States Prisons*, 10 Hastings Race & Poverty L.J. 293, 296 (2013). They often refer to the women with gender-based slurs like "bitch" and "whore." *Id.* at 297. The overall effect is "a general atmosphere of fear, male domination, and submission," *id.*, especially for women with histories of sexual abuse, Buchanan, *supra*, at 754–55.

B. When Barred From Honoring Religious Grooming Customs, Devout Women Lose A Critical Source Of Strength.

For such a vulnerable population trapped in a degrading environment, religion is powerful: it affords dignity, modesty, and personal identity. This is especially true for women, who tend to be more religious than men and enter prison with stronger religious ties. Moira De Nike, *The Penitent: The Myths and Realities of Religious Rehabilitation Among California Prisoners* 167 (May 2005) (unpublished Ph.D. dissertation, University of Hawaii at Manoa), *available at* <http://bit.ly/mdenike>. Their commitment to religion can serve as a link to the outside world and engender a sense of perspective that makes prison life bearable.

It is a marker of humanity in an otherwise dehumanizing environment. *Id.* at 190.

But prison policies can limit women's religious practice. Religious traditions such as covering hair or dressing modestly, for example, often conflict with one-size-fits-all prison policies. Even in secular society, hair matters: from the sexual objectification of blondness to the radical power of short hair, a woman's hair, for better or for worse, says something about who she is. Rose Weitz, *Rapunzel's Daughters: What Women's Hair Tells Us About Women's Lives*, at xii–xv (2004). For the devout, this statement is more than a stylistic preference: it is a declaration of devotion to God. Conflicts between prison regulations and religious commandments cause problems for female inmates of many faiths.

Many Sikh and Native American women keep their hair long as a religious commandment. For Sikhs, unshorn hair is one of the five central obligations of the faith. The Sikh Coalition, *FAQ*, <http://bit.ly/sikhcoalition> (last visited May 14, 2014). Similarly, Native American religions teach that hair is a gift from a higher power that should be cut only to mark solemn events like the death of a relative. *Iron Eyes v. Henry*, 907 F.2d 810, 811 (8th Cir. 1990).

Likewise, headscarves play an important role in Muslim and Orthodox Jewish religious identity. Rhys H. Williams & Gira Vashi, *Hijab and American Muslim Women: Creating the Space for Autonomous Selves*, 68 Soc. Religion 269, 281 (2007); Valeria Seigelshifer & Tova Hartman, *From Tichels to Hair Bands: Modern Orthodox Women and the Practice of Hair Covering*, 34 Women's Stud. Int'l F. 349, 351

(2011). Many Muslim women believe they have a religious obligation to cover the hair and neck. Williams & Vashi, *supra*, at 281–82. And many Orthodox Jewish women also cover their hair, both as a form of modesty and as a public marker of marriage status akin to a wedding band. Seigelshifer & Hartman, *supra*, at 351.

When prisons limit women’s ability to follow the dictates of their faiths, devout women are forced to violate their most sincere religious beliefs—a deeply traumatic experience. Jameelah Medina’s story is typical. Ms. Medina, a Muslim woman, was arrested in California for riding a train without a valid pass. After being taken to a detention center, she was forced to remove her hijab. Jameelah Medina, *My Hijab, My Right*, in *ACLU Women’s Rights Project 2008 Report* 89, 89 (Aliya Hana Hussain & Lenora M. Lapidus eds., 2009), available at <http://bit.ly/womensrightsproject>. She vividly describes the humiliation she felt during this experience, analogizing it to how a non-Muslim woman would feel naked in public: “[f]or me, wearing clothes without my hijab is just as meaningless as wearing a hijab without any clothes on—either way, I feel exposed.” *Id.* Without the ability to wear a headscarf, Ms. Medina felt she was no longer “the gatekeeper of [her] own body.” *Id.* “I did not want to be sensualized and eroticized,” she said. “I just wanted to be human.” *Id.*

Elizabeth Zargary, an Orthodox Jew, endured a similar trauma in New York. *Zargary v. City of New York*, 607 F. Supp. 2d 609, 611–12 (S.D.N.Y. 2009), *aff’d*, 412 F. App’x 339 (2d Cir. 2011). During the

prison intake process, Ms. Zargary was ordered to remove her headscarf for photographs. *Id.* After four hours of prison guards’ pressuring her to remove her scarf, she asked to speak with a rabbi. *Id.* This request was denied, and a male guard forcibly removed her scarf. *Id.* Traumatized, Ms. Zargary repeatedly “bang[ed] her head against the wall.” *Id.*

When women like Ms. Zargary and Ms. Medina are denied religious accommodation in prisons, they lose an important affirmation of their dignity, modesty, and sense of self. The legal system should offer as much protection as possible for that small sanctuary, ensuring that any denials are not the result of mere ignorance or capriciousness.

II. Congress Passed RLUIPA To Protect The Religious Practices Of Men *And* Women.

A. Some States Protect Female Inmates’ Religious Freedoms More Than Others.²

Congress passed RLUIPA in 2000 to protect the religious rights of every prisoner everywhere—including people like Ms. Medina and Ms. Zargary. Senators Orrin Hatch and Edward Kennedy, the statute’s sponsors, realized prisoners often face difficulties convincing unsympathetic prison officials to accommodate

² For ease of reading, the footnotes in Subsection A.1 reference only state names. The sources for this information are states’ publicly posted policies and inmate handbooks—available from counsel—or phone calls with state correctional officials conducted in the past month. Subsection A.2 relies on the Appendix, which contains more detailed citations on states’ headscarf policies.

their religious practices: “[Prisoners’] right to practice their faith is at the mercy of those running the institution[s], . . . [and] prison officials sometimes impose frivolous or arbitrary rules. Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.” 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy).

RLUIPA protects all inmates—men and women alike. But states vary widely in their approaches to accommodating the religious practices of incarcerated women, especially women of minority faiths. This accommodation gap often correlates with prison officials’ exposure to the beliefs in question: female inmates are more likely to face restrictions when their practices are unusual. Requiring prison officials to consider the prison policies of other jurisdictions, as urged by Petitioner, would level the playing field and ensure female inmates’ religious practices are protected in every state, as RLUIPA guarantees.

1. Head Coverings. Despite the significance of head coverings for many women of faith, many states forbid female inmates from wearing them. At least sixteen states explicitly prohibit head coverings in prison common areas.³ *See, e.g.*, Ark. Dep’t of Corr., Policy No. 625, *Religious Articles 1–2* (1998), available at <http://bit.ly/arpolicy>; Or. Dep’t of Corr., Policy No. 90.2.4 attach. 1, *Spiritual Property Items for General*

³ Alabama, Arizona, Arkansas, Colorado, Idaho, Illinois, Iowa, Massachusetts, Minnesota, Missouri, Montana, New Mexico, Oregon, Rhode Island, South Carolina, and West Virginia.

Population Inmates 1–2 (2012), available at <http://bit.ly/orpolicy>. Some of these states make nods toward accommodation by allowing female inmates to cover their heads during religious ceremonies or in their cells. See, e.g., Idaho Dep’t of Corr., Control No. 320.02.01.002, *Property: Religious* 4 (2010), available at <http://bit.ly/idpolicy>. But such an approach still fails to accommodate women whose religious beliefs require them to cover their hair whenever they are in the presence of men.

In contrast, at least twenty-seven states and the federal government have adopted policies allowing religious women to wear head coverings throughout their institutions.⁴ See, e.g., Fed. Bureau of Prisons, U.S. Dep’t of Justice, Program Statement No. P5360.09, *Religious Beliefs and Practices* 13 (2004), available at <http://bit.ly/fedpolicy>; Tex. Dep’t of Criminal Justice, *Offender Orientation Handbook* 15 (2004), available at http://bit.ly/tx_policy.

2. Hair Length. Although most states allow female inmates to maintain long hair as a religious practice, several impose specific hair length requirements on female inmates. Arkansas and Virginia, for instance, limit female inmates’ hair to shoulder length. Ark. Dep’t of Corr., *Inmate Handbook* 8 (18th ed. 2013), available at <http://bit.ly/arhairpolicy>; Va. Dep’t of Corr., Operating Procedure No. 864.1, *Offender Grooming and Hygiene* 2 (2013), available at

⁴ Alaska, California, Connecticut, Florida, Indiana, Kansas, Kentucky, Maryland, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

<http://bit.ly/vahairpolicy>. Alabama is even more restrictive, forcing female inmates to cut their hair if it falls below the collar. Ala. Dep't of Corr., *Female Inmate Handbook* 10 (2013), available at <http://bit.ly/alhairpolicy>. These limits on hair length conflict with religious decrees that forbid any cutting of hair.

Such restrictions are also at odds with most states' more accommodating approaches. At least thirty states and the federal government exempt devout female inmates from their hair length policies or place no explicit restrictions on hair length.⁵ See, e.g., Fed. Bureau of Prisons, U.S. Dep't of Justice, Program Statement No. 5230.05, *Grooming 2* (1996), available at <http://bit.ly/fedhairpolicy>; Or. Admin. R. 291-123-0015(2) (2014). Eleven of these thirty states expressly allow female inmates to wear hair of any length.⁶ See, e.g., Cal. Code Regs. tit. 15, § 3062(e) (2011). Others, however, have adopted seemingly accommodating but potentially ambiguous grooming policies, such as requiring inmates to keep their hair "neat and clean."⁷

⁵ Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Washington, and Wyoming.

⁶ California, Colorado, Idaho, Illinois, Kentucky, Michigan, Nevada, New Jersey, New Mexico, New York, and Ohio.

⁷ Alaska, Connecticut, Delaware, Indiana, Iowa, Kansas, North Dakota, Oklahoma, Oregon, Pennsylvania, and Washington.

See, e.g., Iowa Dep't of Corr., Policy No. IS-SH-01, *Offender Hygiene/Grooming 3* (2013), available at <http://bit.ly/iahairpolicy>. Unsympathetic prison officials may interpret such policies narrowly, forcing devout women to cut their hair or live in fear at the prospect.

B. States With More Religious Minorities Adopt More Accommodating Policies.⁸

On its face, RLUIPA provides the same religious freedom protections to all prisoners in all states, no matter their sex—as it should. While true differences in prisoner populations and dissimilar requests for religious accommodation may justify disparate policies, prison officials' coincidental familiarity (or lack thereof) with prisoners' religious practices should not factor into their decisionmaking under RLUIPA. Unfortunately, there is evidence to suggest it does.

An analysis of headscarf policies in state prisons serves as a case study in the relationship between a minority religion's visibility and a prison's willingness to accommodate its practices. States with more Muslims are more likely to accommodate female inmates who wish to wear headscarves for religious reasons.

Of the ten states with the largest Muslim populations, eight explicitly allow head coverings for female inmates in common areas while only one prohibits

⁸ The information summarized in this section is cited and documented in more detail in the Appendix.

them—an 8:1 ratio of acceptance versus prohibition.⁹ Among the other forty states, however, only nineteen explicitly allow head coverings, while fifteen explicitly forbid them—a 1.26:1 ratio. This correlation between Muslim population and accommodating policies cuts across geographic regions; whether in the Northeast or the South, states with larger Muslim populations are more likely to accommodate headscarves in prison.

These data support reasonable inferences that prison officials in states with significant populations of religious minorities are (a) more exposed to those religions' practices and better able to understand the significance of those practices to their adherents, and (b) challenged to accommodate those religious practices more frequently. States with smaller populations of religious minorities would benefit greatly from considering other states' policies when crafting their own.

C. Considering Alternative Policies Prevents Arbitrary Restrictions On Women's Religious Practices.

This case concerns the amount of deference due to prison officials under RLUIPA's strict scrutiny test, as construed by *Cutter*. The majority approach—adopted

⁹ The ten states with the largest Muslim populations are (in order from highest to lowest) Texas, New York, Illinois, California, Virginia, Florida, New Jersey, Michigan, Pennsylvania, and Georgia. Ihsan Bagby, *The American Mosque 2011*, at 8 (2012), available at <http://bit.ly/americanmosque>. Because the 2010 census did not include a question about religion, this measurement is based on mosques' self-reported levels of attendance during Muslim holy days.

by the First, Second, Third, Fifth, and Ninth Circuits—forbids prison officials from blindly rejecting less restrictive policies (including the proven policies of other states) without actually considering them. *See, e.g., Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005). The Eighth and Eleventh Circuits’ approach, on the other hand, all but removes the “due” in “due deference,” allowing prison officials’ conclusory assertions to justify stripping inmates of their right to religious practice.¹⁰ In this case, for example, the Magistrate felt “constrained” by the Eighth Circuit’s holding in *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008), and forced to defer to officials’ reasoning he found “almost preposterous.” J.A. 155–56. Because states have wildly inconsistent (and often insufficient) approaches to accommodating minority religious practices despite their importance to many female inmates, WPA supports the majority approach.

Preventing prison officials from rejecting other states’ less restrictive policies out of hand is especially critical for female inmates because it would increase the likelihood that female inmates of minority religions can practice their faith in prison. Women constitute a significant but still modest portion of the overall prison population, and female inmates of minority faiths make up an even smaller subpopulation. Female inmates’ requests for religious accommodations

¹⁰ While the Eighth Circuit recently applied RLUIPA less deferentially in *Native American Council of Tribes v. Weber*, No. 13-1401, 2014 WL 1644130 (8th Cir. Apr. 25, 2014), that case appears to be an outlier and is inconsistent with the Circuit’s approach in the case below. *See* Pet’r’s Br. 53–54.

are thus particularly likely to be novel to prison officials. These officials often do not appreciate the significance of religious practices to the inmates, and they sometimes fail to adequately consider feasible, less restrictive approaches to accommodation. Requiring prison officials to actually consider other jurisdictions' approaches—especially when the inmate provides the information about those approaches—would ensure that female inmates' requests for religious accommodations are not summarily rejected merely because prison officials lack familiarity with the prisoners' beliefs.

CONCLUSION

Religious grooming practices are important for many women, yet these practices are often foreign to prison officials. Requiring those officials to actually consider other states' proven methods of accommodation before approving or denying prisoners' requests would ensure that RLUIPA is applied fairly to all prisoners, everywhere, as Congress intended. The judgment of the court of appeals should be reversed.

Respectfully submitted,

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