Record No. 06-7548

In the
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALLEN McRAE, et al.,

Plaintiffs-Appellants,

v.

GENE M. JOHNSON,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

BRIEF OF APPELLANT

Steven Rosenfield
Cooperating Attorney for the American
Civil Liberties Union of Virginia
913 E. Jefferson St.
Charlottesville, VA 22902
(434) 984-0300

Rebecca K. Glenberg
American Civil Liberties Union
Foundation of Virginia
530 E. Main St., Suite 310
Richmond, VA 23219
(804) 644-8080

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES. iii

JURISDICTIONAL STATEMENT. 1

ISSUES PRESENTED FOR REVIEW. 1

STATEMENT OF THE CASE. 1

STATEMENT OF FACTS. 2

SUMMARY OF ARGUMENT. 5

STANDARD OF REVIEW. 6

ARGUMENT. 7

I. STATUTORY BACKGROUND. 7

II. UNDER FOURTH CIRCUIT CASE LAW, THE GROOMING POLICY IS NOT THE LEAST RESTRICTIVE MEANS TO FURTHER A COMPELLING GOVERNMENTAL INTEREST. 8

III. VDOC FAILED TO PROVE THAT THE GROOMING POLICY IS THE LEAST RESTRICTIVE MEANS TO FURTHER A COMPELLING GOVERNMENTAL INTEREST. 10

A. The Only Evidence That the Grooming Policy Furthers Any Governmental Interest is the Conclusory Testimony of the VDOC Director, Which was Rebutted by Expert Testimony. 10

B. The Fact that Most Prison Systems do not Regulate Hair Length or Beards Demonstrates that Such Regulations do not Further a Compelling Governmental Interest. 13

C. VDOC Failed to Prove that the Grooming Policy is the Least Restrictive Means to Serve Its Interests. 14

IV. THE DISTRICT COURT ERRED BY ACCEPTING THE DEFENDANT'S UNSUPPORTED, CONCLUSORY STATEMENTS REGARDING THE NECESSITY OF THE GROOMING POLICY. 17

CONCLUSION. 20

REQUEST FOR ORAL ARGUMENT. 20

TABLE OF AUTHORITIES

Cases:

Bell v. Wolfish, 441 U.S. 520, 562 (1979). 18

City of Boerne v. Flores, 521 U.S. 507 (1997) 17

Cutter v. Wilkinson, 544 U.S. 709 (2005) 2,7,18

Diaz v. Collins, 114 F.3d 69 (5th Cir. 1997) 19

Gallahan v. Hollyfield, 670 F.2d 1345 (4th Cir. 1982) 9,10

Gartrell v. Ashcroft, 191 F.Supp.2d 23 (D.D.C. 2002) 8,16

Hamilton v. Schiro, 74 F.3d 1545 (8th Cir. 1996) 19

Harris v. Chapman, 97 F.3d 499 (8th Cir. 1996) 19

Hines v. South Carolina Dept. of Corrections,
148 F.3d 353 (4th Cir. 1998) 9

Hoevenaar v. Lazaroff, 422 F.3d 366 (6th Cir. 2006) 6,19

Jackson v. District of Columbia, 89 F.Supp.2d 48 (D.D.C. 2000) 19

Madison v. Riter, 355 F.3d 310 (4th Cir. 2003) 2

O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) 6,9,10,17

Turner v. Safley, 482 U.S. 78 (1987) 7,9,10,17

U.S. v. Smith, 396 F.3d 579 (4th Cir. 2005) 6

Warsoldier v. Woodford, 418 F.3d 989 (9th Cir. 2005) 13

<u>Statutes and Constitutional Provisions:</u>

28 U.S.C. § 1331. 1

28 U.S.C. § 1291. 1

42 U.S.C. §§ 2000bb, *et seq*. 17

42 U.S.C. § 2000cc, *et seq*. . . . . *passim*

U.S. Const. Am. 1. 6,9,17,18

JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction over this case under 28 U.S.C. § 1331. This is an appeal from a final order, dated August 16, 2006, which disposed of all issues and parties in this case. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1) Whether the district court erred in holding that the Virginia Department of Corrections Grooming Policy is in furtherance of a compelling government interest.

2) Whether the district court erred in holding that the Virginia Department of Corrections Policy is the least restrictive means to further a compelling government interest.

STATEMENT OF THE CASE

On February 19, 2003, the Plaintiffs, inmates in the custody of the Virginia Department of Corrections (VDOC), filed this action against VDOC director Gene Johnson ("Johnson") in the U.S. District Court for the Eastern District of Virginia challenging VDOC's grooming policy under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc, *et seq*. The case was twice stayed while the this Court and the Supreme Court considered the

constitutionality of RLUIPA in *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003) and *Cutter v. Wilkinson*, 441 U.S. 520 (2005).

The parties filed cross-motions for summary judgment on February 6, 2006. By Memorandum and Order entered May 30, 2005, the district court found that the Grooming Policy substantially burdened plaintiffs' exercise of religion, and granted them partial summary judgment on that issue. The court ordered an evidentiary hearing to be held regarding whether the Grooming Policy "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000cc-1(a) (2000). The evidentiary hearing took place on July 12, 2006.

On August 16, 2006, the court entered a Memorandum and Final Order in favor of the defendant finding that the VDOC Grooming Policy is the least restrictive means to further a compelling government interest and therefore did not violate RLUIPA. Plaintiffs filed their notice of appeal on August 31, 2006.

STATEMENT OF FACTS

The VDOC Grooming Policy

The Virginia Department of Corrections enacted its grooming policy, DOP 864, in 1999. The policy applies to all inmates in Virginia's prison system, regardless of security level. (J.A. 111.) Male inmates must wear their hair cut above their shirt collars, and cannot grow sideburns below the middle of their ears.

They are specifically prohibited from wearing their hair styled in "braids, plaits, dreadlocks, cornrows, ponytails, buns, mohawks, partially shaved heads, [and] designs cut into the hair." *Id.* Beards and goatees are prohibited, and a mustache is only allowed if it is neatly trimmed and extends no further than beyond the corner of the mouth or over the prisoner's lip. *Id.* Female inmates are permitted to grow their hair to shoulder-length, grow bangs, and style their hair into "one or two ponytails or multiple neat, tight braids…." *Id.*

Any inmate who fails to comply with the grooming policy is initially charged with failure to follow posted rules. (J.A. 113.) If an inmate continues to fail to comply with the grooming policy, he is given a direct order to do so. *Id.* If he still fails to comply, he is charged with disobeying a direct order and placed in segregated housing. *Id.* Inmates who continue to fail to comply with the grooming policy also face possible reclassification to a higher security level institution. (J.A. 114.) They are not released from segregated housing until they comply with the policy. *Id.* There are no exceptions for inmates who grow long hair or beards for religious reasons.

Inmates in segregated housing are highly restricted compared to those in both general population and protective custody. In contrast to those in protective custody, inmates in segregated housing may not mingle with other prisoners, may not leave their cells to sit at the table and watch television, may not earn money,

may not pray together with other religious people, may not eat outside their cells, and must remain in a small confining cell. (Johnson, J.A. 81-82; photographs of segregation cell, J.A. 212-213.) Segregation is meant for the most intractable of inmates, those who "once they come into the institution can not or will not abide by rules and regulations and either can not or will not participate in as other people do in the general population setting." (Johnson, J.A. 55.)

While VDOC does not keep statistics on the number of inmates who refuse to comply with the grooming policy, defendant Johnson estimates that when it was first adopted, less than 100 inmates (of a population of approximately 30,000) refused to comply. (Johnson, J.A. 48.) It is not known how many of these inmates refused to comply due to sincere religious beliefs. Currently, the number is in the thirties. *Id.* It is not known how many of the noncompliant inmates do so for religious reasons. *Id.*

When the department decided to adopt a new grooming policy, it reviewed grooming policies from South Carolina and Texas. (J.A. 50.) It did not review the policy of the BOP or any states that did not regulate hair length or beards. (J.A. 51.) At no point did VDOC consider including a religious exemption in to the policy. (J.A. 52.)

The Plaintiffs

The plaintiffs are all inmates in VDOC custody whose sincere religious belief requires them to grow long hair or beards. Plaintiffs Allen McRae and Dennis Blyden are Rastafarian, and their faith prohibits them from cutting their hair. Because of their faith, they have refused to comply with the grooming policy. As a result, Mr. McRae has been held in segregation since 1999, and Mr. Blyden since 2001. Plaintiffs Rashid Al-Amin, Patrick Lahens, and David Evick, Jr. are Muslims. Their religious prohibits them from shaving a beard. They nonetheless have complied with the policy because they fear the punitive consequences of noncompliance. (J.A. 20-21.) The district court found that the grooming policy substantially burdens the plaintiffs' religious exercise. (J.A. 23-25.)

SUMMARY OF ARGUMENT

Under RLUIPA, once a plaintiff has shown that a prison regulation substantially burdens his free exercise of religion, the defendant has the burden of proving that the restriction is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that interest. The sole evidence produced by VDOC to meet their burden was the testimony of the defendant, director Gene Johnson. But Johnson did not provide any evidence that the grooming policy, which has been in effect since 1999, has in any way improved the health, safety, or security of VDOC institutions. Instead, his testimony

consisted mainly of conclusory statements about how the grooming policy serves VDOC's needs.

Such testimony may have been sufficient if this were a First Amendment, case, where the defendant need only *assert* a rational basis for infringing on an inmate's religious exercise. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). But Congress enacted RLUIPA in order to provide greater protection for prisoners' freedom of religion than existed under the First Amendment.

The district court erred in accepting Johnson's conclusory statements about the need for the grooming policy as proof of that need. This is particularly true because those statements were rebutted by an expert witness with as much experience in running prisons and prison systems as did Johnson.

STANDARD OF REVIEW

The issues of whether the VDOC grooming policy is in furtherance of a compelling governmental interest, and whether the grooming policy is the least restrictive means to achieve that interest, are mixed questions of law and fact and are reviewed *de novo*. *See U.S. v. Smith*, 396 F.3d 579, 582 -583 (4th Cir. 2005) (mixed questions of law and fact are reviewed *de novo*); *Hoevenaar v. Lazaroff*, 422 F.3d 366 (6th Cir. 2006) (applying *de novo* review to question of whether prison regulations were the list restrictive means under RLUIPA)

ARGUMENT

I. STATUTORY BACKGROUND

Congress enacted the Religious Land Use and Institutionalized Persons Act, 42 U.S.C.A. § 2000cc-1, et seq. (RLUIPA), in 2000 in order to ameliorate the burdens placed on the religious exercise of inmates and other institutionalized persons. "Before enacting [RLUIPA], Congress documented, in hearings spanning three years, that 'frivolous or arbitrary' barriers impeded institutionalized persons' religious exercise." *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005) (citing 146 Cong. Rec. S7774, S7775 (July 27, 2000) (joint statement of Senator Hatch and Senator Kennedy on RLUIPA)).

In enacting the statute, Congress recognized that the standard set forth in *Turner v. Safley*, 482 U.S. 78, 89 (1987) – "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests" – is inadequate to protect inmates' free exercise of religion. Accordingly, RLUIPA provides that a governmental entity receiving federal funds may not "impose a substantial burn on the religious exercise of a person residing in or confined to an institution unless the restriction unless the *government demonstrates* that the imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive

means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a) (emphasis added).

Notably, if the plaintiff demonstrates that a restriction substantially burdens his free exercise of religion, the government bears the burden of showing that the restriction is the least restrictive means of furthering a compelling governmental interest. *See* 42 U.S.C. § 2000cc-2 (b); *Gartrell v. Ashcroft,* 191 F.Supp.2d 23, 38 (D.D.C. 2002) ("Because plaintiffs have demonstrated that the VDOC grooming policy substantially burdens their sincerely held religious beliefs, the burden shifts to defendants to prove that subjecting plaintiffs to the grooming policy is the least restrictive means of achieving a compelling interest.") Moreover, the statute is to be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g)

II. UNDER FOURTH CIRCUIT CASE LAW, THE GROOMING POLICY IS NOT THE LEAST RESTRICTIVE MEANS TO FURTHER A COMPELLING GOVERNMENTAL INTEREST.

This Court has twice considered grooming policies similar to the one at issue here. While the Fourth Circuit has upheld such policies under a rational basis test, it has struck them down under a least restrictive means test—which is, of course, the appropriate standard under the RLUIPA.

In *Gallahan v. Hollyfield*, 670 F.2d 1345 (4th Cir. 1982), the Fourth Circuit invalidated a prison grooming policy. As in this case, the defendant argued that the policy was needed to prevent inmates from changing their appearance, to eliminate a potential hiding place for contraband, and for hygiene reasons. 670 F.2d at 1346. The court found these explanations "either overly broad or lacking in substance," and observed that "[e]ven if the justifications were legitimate, they are not warranted in this case because less restrictive alternatives are available." *Id.* Specifically, the court noted that prison officials could search inmates' hair for contraband and require them to keep their hair neat and clean. *Id.* at 1347. Because less restrictive means were available, the regulation violated the First Amendment.

Several years after the *Gallahan* case, the Supreme Court decided the cases of *Turner v. Safley*, 482 U.S. 78 (1987) and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), which held that infringements on inmates' constitutional rights need only be "reasonably related to legitimate penological interests." When the Fourth Circuit decided *Hines v. South Carolina Dept. of Corrections*, 148 F.3d 353 (4th Cir. 1998), it used the "reasonable relationship" standard, which is far more deferential to prison officials than a least restrictive means test. Holding that the grooming policy was indeed reasonably related to legitimate penological interests, the court held that the policy did not violate the First Amendment.

But under RLUIPA, the deferential *Turner/O'Lone* standard is out the window. Instead, the Court is to invalidate any substantial burden on plaintiffs' religious exercise unless it is the least restrictive means to serve a compelling state interest. As *Gallahan* demonstrates, the grooming policy fails this stricter test.

III. VDOC FAILED TO PROVE THAT THE GROOMING POLICY IS THE LEAST RESTRICTIVE MEANS TO FURTHER A COMPELLING GOVERNMENTAL INTEREST.

A. The Only Evidence That the Grooming Policy Furthers Any Governmental Interest is the Conclusory Testimony of the VDOC Director, Which was Rebutted by Expert Testimony.

VDOC claims that the grooming policy furthers their interests in (1) preventing contraband; (2) identifying inmates within the prison and in the event of an escape; and (3) hygiene. Although the policy has been in effect for seven years, however, VDOC failed to present any evidence that the grooming policy has actually had an effect in any of those areas. The department's only evidence that the grooming policy furthers these interest was the conclusory statements of the defendant. Moreover, these statements were fully rebutted by the inmates' expert, who has thirty-five years experience in running prisons and prison systems. This includes fifteen years as warden or assistant warden in prisons in South Carolina and eight years as director or deputy director of the prison systems of Indiana and The U.S. Virgin Islands. (J.A. 241-42.) In the Virgin Islands, a large fraction of the inmates were Rastafarians, who wore long dreadlocks. (J.A. 90-91.) Aiken

testified that in all his years as a corrections professional,, he has never found it necessary to regulate hair or beard length. (J.A. 92-93, 95; 230).

1. Contraband

Although Johnson testified that there had been an unspecified "number of cases where hair or beards to hide contraband," (J.A. 59), he was only able to identify one such instance, which had occurred *after* the grooming policy was implemented. (J.A. 61.) He did not testify at all as to the frequency of such incidents, or how they compared to other methods of hiding contraband. Nor did testify as to any reduction in contraband after the grooming policy was adopted.

Aiken testified that issues with contraband hidden in hair could be addressed through inmate searches. (J.A. 100.) Moreover, in Aiken's experience, female inmates are no less likely to use their hair to hide contraband than male inmates. (J.A. 94.) Thus, "[t]he fact that women are allowed to have braids and other hairstyles in which they may hide contraband belies the defendant's argument relative to men." (J.A. 231.) Similarly, VDOC allows inmates to have religious headwear, even though it also could be used to hide contraband. (J.A. 76.)

2. Hygiene

Although Johnson testified that there were "numerous cases" lice among inmates with long hair (J.A. 32), he gave no indication of the frequency of this problem, or whether inmates with short hair had any less of a problem with lice.

Nor was he able to say whether the lice problem had improved in the seven years since the policy had been in place. Aiken testified that Rastafarians and Muslims who keep their hair long for religious reasons also keep it scrupulously clean. (J.A. 235.) Moreover, simple medical solutions generally remedy any hygiene problems associated with hair. *Id.*

3. Escape

Finally, Johnson testified that the grooming policy was necessary to identify inmates who have escaped (J.A. 57) , but he failed to account for the fact that the escape rate in Virginia is exceedingly low. (J.A. 159.) Moreover, as Aiken testified, inmates can change their appearance in nearly infinite ways. As easily as a long-haired inmate could shave his beard or cut his beard, a short-haired inmate could make it appear long. (J.A. 99, 100.) Accordingly, any reliance on superficial characteristics such as hair to identify inmates is counterproductive. "What you need to concentrate on is the physical features of the living, breathing body, and know who that person is." (J.A. 96.) "When you start identifying inmates by the length of hair or facial hair, you are asking for trouble. You better know who that person is other than using those types of identification marker."

B. <u>The Fact that Most Prison Systems do not Regulate Hair Length or Beards Demonstrates that Such Regulations do not Further a Compelling Governmental Interest.</u>

As noted above, Aiken testified that in all his years as a corrections professional,, he has never found it necessary to regulate hair or beard length. (J.A. 92-93, 95; 230). His experience in this regard is similar to that of most other prison systems, including the Federal Bureau of Prisons (BOP), which do not have such regulations. (J.A. 90, 146, 230.) Indeed, the BOP regulation expressly *prohibits* wardens from "restrict[ing] hair length if the inmate keeps it neat and clean." (J.A. 146.) As Aiken explained "if a grooming policy was as essential as the defendant claims, no correctional system would be without it. . . . No correctional system wants to accept significant risks that can be easily addressed by the issuance of a grooming policy." (J.A. 230.)

As at least one court of appeals has noted, the absence of a grooming policy in other prison systems goes a long way to demonstrating that the policy is *not*, in fact, the least restrictive means to address VDOC's concerns:

> Equally problematic for [VDOC] is that other prison systems, including the Federal Bureau of Prisons, do not have such hair length policies or, if they do, provide religious exemptions. Surely these other state and federal prison systems have the same compelling interest in maintaining prison security, ensuring public safety, and protecting inmate health as [VDOC]. Nevertheless, [VDOC] offers no explanation why these prison systems are able to meet their indistinguishable interests without infringing on their inmates' right to freely exercise their religious beliefs.

Warsoldier v. Woodford, 418 F.3d 989, 1000 (9th Cir. 2005).

Equally compelling is VDOC's own experiences regarding grooming policies. VDOC director Johnson recollected that at some point prior to the current grooming policy, an earlier policy had been effect that regulated hair length and beards. (J.A. 44-45.) At some point, however, it simply ceased to be enforced, even though approximately 80% of inmates had hairstyles that would not have been in compliance with the current grooming policy. (J.A. 45, 49.) While the prior policy was in effect, wardens and superintendents could have, if they wanted, followed the dictates of the policy, but chose not to. (J.A. 74.) As Aiken explained, "This would not have happened if he policy was actually necessary for security, health and safety reasons . . . . [P]olices and procedures that are essential to prison security are not simply allowed to fall into disuse." (J.A. 231.) That VDOC felt it could afford to ignore such a policy further demonstrate that it does not further any compelling governmental interests.

C. VDOC Failed to Prove that the Grooming Policy is the Least Restrictive Means to Serve Its Interests.

Since VDOC failed to prove that the grooming policy furthers its compelling interests in health, safety and security, it should not be necessary to proceed to RLUIPA's last prong, that the policy is the least restrictive means to serve those interests. Nonetheless, assuming that the policy does, in fact, further some of those interests, less restrictive means do exist.

Special Housing Unit

As Aiken testified, it would be a simple matter to assign inmates who have a sincere religious objection to the grooming policy to a separate, non-punitive living space or pod. (J.A. 68, 73, 233-34.) Such inmates could be closely monitored to ensure that no issues relating to contraband or escape arise. (J.A. 102.) Any inmate who was found with contraband or who presented an escape risk could be swiftly removed from the special unit.

Johnson claimed that this solution would be unworkable because it would be too difficult to evaluate an inmate's religious sincerity. But the evaluation of inmates' religious sincerity is a standard feature of prison management. As Johnson admitted, this takes place all the time when determining whether inmates are eligible for such religious exemptions as a common fare diet.. (J.A. 71.) A person's religious sincerity can also be continually re-assessed by monitoring the consistency of his religious practices. (J.A. 67.) For example, if an inmate claiming to be an observant Muslim refuses to wake up at 4:00 a.m. to observe Ramadan, or repeatedly eats pork for dinner, these may be indications that he is not a sincere practitioner of the religion. *Id.*

Moreover, the entire premise of RLUIPA is that inmates whose religious exercise is substantially burdened by prison policies must be accommodated when possible. The statute itself assumes that prison officials can and will evaluate the

sincerity of inmates' religious beliefs. *See Gartrell v. Ashcroft*, 191 F.Supp.2d 23, 39 (2002) (holding that "BOP officials not only are permitted to assess [religious] bona fides but are required to so where defendants' actions impose a substantial burden on plaintiffs' sincere religious beliefs regarding hair and beards.")

Interstate Transfer

Virginia is a part of the Interstate Corrections Compact, Va. Code § 53.1-216, under which inmates may be transferred from one prison system to another. The Federal Bureau of Prisons also contracts with state prisons to take custody of state prisoners. 18 U.S.C. § 5003. Aiken testified that in his many years in correction, he has often had to transfer inmates to systems that can better accommodate them, and that other states are typically helpful in this regard. While Johnson claimed that it would be too difficult to get other prison systems to accept Virginia inmates who have religious objections to the grooming policy, he admitted that he had never actually looked into the possibility. (J.A. 83.)

The notion of transferring inmates to another prison system as a religious accommodation is not a novel one. *Gartrell v. Ashcroft*, 191 F.Supp.2d 23 (D.D.C. 2002), involved a group of Rastafarian and Muslim inmates from the District of Columbia, who had been placed in Virginia prisons by the Federal Bureau of Prisons. The prisoners sued the BOP, claiming that the VDOC grooming policy violated their rights under the Religious Freedom Restoration Act, 42 U.S.C. §§

2000bb, *et seq*. (RFRA).[1] The court ruled in favor of the plaintiffs, ordering BOP to transfer all inmates whose religious exercise was burdened by the VDOC grooming policy to be transferred to institutions outside of Virginia. *Id.* at 40-41.

IV. THE DISTRICT COURT ERRED BY ACCEPTING THE DEFENDANT'S UNSUPPORTED, CONCLUSORY STATEMENTS REGARDING THE NECESSITY OF THE GROOMING POLICY.

As noted earlier, VDOC's only evidence that the grooming policy was the least restrictive means to further a compelling governmental interest was Johnson's own conclusory statements that this was the case. The district court simply accepted these statements as true, despite the fact that the VDOC had the burden of proof and the existence of expert testimony.

The standard for establishing a violation of an inmate's First Amendment rights encompasses a wide degree of deference for the opinions of prison officials. Under the First Amendment, a "regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). Under this standard "evaluation of penological objectives is committed to the considered judgment of prison administrators, 'who are actually charged with and trained in the running of the particular institution under examination.'" *O'Lone v. Estate of*

[1] RFRA is the precursor statute to RLUIPA, and contains nearly identical language concerning the requirements of a compelling interest and least restrictive means. RLUIPA was enacted when RFRA was struck down as applied to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Thus, legislative history and case law under RFRA is highly relevant in interpreting RLUIPA.

Shabazz, 482 U.S. 342 (1987) (quoting *Bell v. Wolfish*, 441 U.S. 520, 562 (1979). Thus, if this were a First Amendment case, the district court's blind acceptance of Johnson's statements might be appropriate.

But RLUIPA was enacted precisely because Congress determined that the First Amendment standards applied by the courts did not provide sufficient protection for inmates' free exercise of religion. Congress deliberately put the burden on prison officials to prove that restrictions on religious exercise are the least restrictive means to further a compelling governmental interest. To give prison officials just as much deference in RLUIPA cases as they receive in the First Amendment context would render RLUIPA a nullity.

Granted, "[l]awmakers anticipated . . . that courts entertaining complaints under [RLUIPA] would accord "due deference to the experience and expertise of prison and jail administrators." *Cutter v. Wilkinson*, 544 U.S. 709, 717 (2005) (quoting 146 Cong. Rec. S7774 (July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA)). Just as important, however, is Congress's recognition that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements." 146 Cong. Rec. at S7775 (2000). Aiken's expert testimony shows that the grooming policy is based on just such rationales.

Moreover, Aiken's testimony undermines the rationale for deference to prison administrators' experience and expertise. Such deference makes sense when the court, having no experience in running a prison itself, has no source of information about the necessity for a particular policy other than the defendant's own testimony. Here, however, Aiken has decades of experience running prisons and prison systems. He is fully aware of the dangers and challenges posed by such things as inmate identification and contraband. To ignore his testimony, and blindly accept the assertions of the defendant, is to go beyond deference to abject submission.[2]

[2] Aiken's testimony also distinguishes this case from those that have upheld similar grooming policies under RLUIPA or RFRA. In none of those cases was there any rebuttal to the defendants' assertions regarding the necessity of the policy. *See Jackson v. District of Columbia*, 89 F.Supp.2d 48 (D.D.C. 2000) (upholding policy under RFRA where "[p]laintiffs did not present any evidence regarding the 'least restrictive means' issue, choosing instead to rely on cross examination of defendants' witnesses . . ."); *Hoevenaar v. Lazaroff*, 422 F.3d 366 (6th Cir. 2005) (criticizing district court from failing to give due deference to prison officials in the absence of rebuttal evidence); *Diaz v. Collins*, 114 F.3d 69 (5th Cir. 1997); *Harris v. Chapman*, 97 F.3d 499 (8th Cir. 1996); *Hamilton v. Schiro*, 74 F.3d 1545 (8th Cir. 1996).

CONCLUSION

For the reasons set forth above, the Plaintiffs respectfully request that the judgment of the district court be reversed.

REQUEST FOR ORAL ARGUMENT

Plaintiffs request oral argument.

Respectfully submitted,

Steven D. Rosenfield, VSB #16539
913 East Jefferson Street
Charlottesville, VA 22902
(434) 984-0300
Cooperating Attorney for the
A.C.L.U. of Virginia

____

Rebecca K. Glenberg, VSB No. 44099
American Civil Liberties Union
Foundation of Virginia
530 E. Main St., Suite 310
Richmond, VA 23219
(804) 644-8080

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2007, pursuant to Local Rules 30(b) and 31(c) and (d), I sent two copies of the foregoing brief and one copy of the Joint Appendix by United States mail, postage prepaid, to the following:

Mark Davis
Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

____
Rebecca K. Glenberg