

NO. 16-4234

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

DELORES HENRY, PATRICIA PHILLIPS, JACQUELINE HEGWOOD,
SANDRA BROWN, and IESHIA BROWN, on behalf of themselves and a class of
persons similarly situated,

Plaintiffs-Appellants,

v.

MELODY HULETT, RUSSELL REYNOLDS, ABRAHAM ANDERSON,
BENNY DALLAS, CARLITA EDMONSON, KIM JOHNSON, PETER
LEONETTI, TROY DAWDY, PAUL PFEIFFER, RUSSELL CRAIG, MONICA
SLATER, DOMINIQUE CRUDUP, COURTNEY KRULL, ANDREA BUTLER,
STEPHANIE SPANIOL, RENEE HATFIELD, ALAN PASLEY, CHRISTINE
BRANNON, in her official capacity as Warden of Logan Correctional Center,
FELIPE ZALAVA, in his official capacity as Manager of Staff Development and
Training, and MICHAEL ATCHINSON, in his official capacity as Chief of
Operations,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

**BRIEF OF *AMICI CURIAE* MUSLIM ADVOCATES, PRECIOUS BLOOD
MINISTRY OF RECONCILIATION, THE RECONSTRUCTIONIST
RABBINICAL ASSOCIATION, RECONSTRUCTING JUDAISM, AND
INTERFAITH ALLIANCE FOUNDATION IN SUPPORT OF PLAINTIFFS-
APPELLANTS' PETITION FOR REHEARING *EN BANC***

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

IDENTITY AND INTERESTS OF *AMICI CURIAE*1

INTRODUCTION AND SUMMARY OF ARGUMENT.....4

ARGUMENT4

 I. Religious practice—including that of prisoners—enjoys great protection under US law.4

 II. Strip searches create spiritual harm for prisoners whose religious beliefs place great importance on modesty.6

 III. By refusing to hold prison officials accountable for their egregious actions in this case, the panel opinion gives a green light to similar actions that will disproportionately harm prisoners with strong religious beliefs.8

CONCLUSION.....10

CERTIFICATE OF COMPLIANCE.....12

CERTIFICATE OF SERVICE.....13

TABLE OF AUTHORITIES

CASES

<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682 (2014)	4
<i>Cantwell v. Connecticut</i> , 310 U.S. 296 (1940).....	4
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997).....	5
<i>Henry v. Hulett</i> , 930 F.3d 836 (7th Cir. 2019)	8
<i>Holt v. Hobbs</i> , 574 U.S. 352 (2015).....	8
<i>Kent v. Johnson</i> , 821 F.2d 1220 (6th Cir. 1987)	7
<i>Malloy v. Hogan</i> , 378 U.S. 1 (1964)	3
<i>Martin v. City of Struthers</i> , 319 U.S. 141 (1943).....	4
<i>Pell v. Procunier</i> , 417 U.S. 817 (1974).....	4
<i>Ramon v. Daniel</i> , 533 F. App'x 433 (5th Cir. 2013).....	7
<i>Sandin v. Conner</i> , 515 U.S. 472 (1995)	4

STATUTES

42 U.S.C. § 2000bb-1(b)	5
42 U.S.C. § 2000cc-1(a).....	5

OTHER AUTHORITIES

146 Cong. Rec. S7774-01 (2000).....	5
Derek S. Jeffreys, <i>Spirituality and the Ethics of Torture</i> (Palgrave Macmillan 2009)	6
Fiona Ni Aolain, <i>Sex-Based Violence and the Holocaust – A Reevaluation of Harms and Rights in International Law</i> , 1 Yale J.L. & Feminism 43 (2000)	6
Jude McCulloch & Amanda George, <i>Naked Power: Strip Searching in Women’s Prisons</i> , in <i>The Violence of Incarceration</i> (Phil Scraton & Jude McCulloch eds., Routledge 2009).....	6
Larissa Peltota, <i>Rape and Sexual Violence Used as a Weapon of War and Genocide</i> , CMC Senior Theses 1965 (2018)	7
Yudit Kornberg Greenberg, <i>The Body in Religion: Cross-Cultural Perspectives (Bloomsbury 2018)</i>	5

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amicus curiae **Muslim Advocates**, a national legal advocacy and educational organization formed in 2005, works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. The issues at stake in this case relate directly to Muslim Advocates' work fighting religious discrimination against vulnerable communities.

Amicus curiae **Precious Blood Ministry of Reconciliation** ("PBMR") is a community faith-based organization founded in 2002. PBMR's religious and community values uphold the human dignity of all people and its responsibility to address injustice done to the most vulnerable populations. PBMR's commitment to serving people in the criminal justice system and maintaining their human rights, no matter the denomination, is at the core of its work and belief.

Amicus curiae **the Reconstructionist Rabbinical Association** (the "RRA"), established in 1974, is the professional association of the nearly 350 Reconstructionist rabbis who serve in a variety of leadership roles in North America, Israel, and around the world. As Jews, who have historically suffered from the results of intolerance and discrimination, and consistent with its resolutions, the RRA affirms the basic rights of freedom of religion, the ideals of a pluralistic society, and understands that that threats to religious freedom are unconscionable. Consistent with its members' values, the RRA joins this brief.

Amicus curiae **Reconstructing Judaism** is the central organization of the Reconstructionist movement, which includes over 100 communities in the United States committed to Jewish learning, ethics, and social justice. Reconstructing Judaism trains the next generation of rabbis, uplifts congregations and *havurot*, and fosters emerging expressions of Jewish life—helping to shape what it means to be Jewish today and to imagine the Jewish future. Based on Jewish teachings that every human being is created in the divine image and a commitment to the dignity of every human being, Reconstructing Judaism has long advocated for public policies supporting the individual’s right to privacy, freedom of religious practice, and the equal application of the Fourth Amendment.

Amicus curiae **Interfaith Alliance Foundation** is a national non-profit organization committed to promoting true religious freedom and strengthening the separation between religion and government. With members from over 75 faith traditions and of no faith, Interfaith Alliance promotes policies that protect personal belief, combat extremism, and ensure that all Americans receive equal treatment under law.

RULE 29(a)(4)(E) STATEMENT

This Brief was drafted in whole by *amicus curiae* Muslim Advocates; no counsel to any party to the present case contributed to the drafting of this Brief. No party to the present case, nor any counsel to any party to the present case, contributed money to fund the preparation and submission of this Brief. No person, other than *amicus curiae* Muslim Advocates, contributed money intended to fund the preparation and submission of this Brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Most people would be horrified if they were handcuffed, stripped naked, and forced to manipulate their genitals in the view of both men and women for an optional training exercise—as the plaintiffs in this case were. However, the degradation and humiliation of this experience is even more painful for adherents of religions with a strong tradition of modesty about one’s body. For those adherents, a strip search like the one in this case is not only a violation of the private bodily person but also of the right to practice one’s religion.

The panel opinion holds that strip searches like the one in this case require no justification at all under the Fourth Amendment. This holding not only deprives prisoners of a significant protection for their right to privacy in their body but also opens the door for prison officials to trample on the religious modesty of prisoners. Such a holding is incompatible with the high regard for religious practice in the law of the United States. For that reason, this Court should grant rehearing *en banc* for the purpose of vacating the panel opinion and reversing the district court.

ARGUMENT

I. Religious practice—including that of prisoners—enjoys great protection under US law.

The freedom to practice one’s religion is among “the cherished rights of mind and spirit” protected by the Constitution. *Malloy v. Hogan*, 378 U.S. 1, 5 (1964). As Justice Murphy noted, “nothing enjoys a higher estate in our society

than the right given by the First and Fourteenth Amendments freely to practice and proclaim one's religious convictions." *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943) (Murphy, J., concurring). For many Americans, "free exercise [of their religious beliefs] is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014) (Kennedy, J., concurring). By including protection for the free exercise of religion in the First Amendment to the Constitution, "the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

This protection for religion extends to prisoners. "[P]risoners do not shed all constitutional rights at the prison gate," *Sandin v. Conner*, 515 U.S. 472, 485 (1995), and the Free Exercise Clause requires that prison officials respect a prisoner's religious practice unless it is "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Finding even the protections of the Constitution to be too weak, Congress strengthened them by passing the Religious Freedom Restoration Act ("RFRA") and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), each of which place the burden on the

government to show that a substantial burden on a prisoner's religious exercise is the "least restrictive means of furthering a compelling government interest." 42 U.S.C. § 2000bb-1(b) (RFRA); 42 U.S.C. § 2000cc-1(a) (RLUIPA). This standard—also known as "strict scrutiny"—is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

Such strong protections are necessary because prisoners are especially vulnerable to the deprivation of their rights to religion. RLUIPA's bipartisan co-sponsors noted that "[f]ar more than any other Americans, persons residing in institutions are subject to the authority of one or a few local officials. Institutional residents' right to practice their faith is at the mercy of those running the institution[.]" 146 Cong. Rec. S7774-01, S7775 (2000) (joint statement of RLUIPA co-sponsors Sen. Orrin Hatch and Sen. Edward Kennedy).

II. Strip searches create spiritual harm for prisoners whose religious beliefs place great importance on modesty.

Modesty—and the shielding of one's body—is an important part of many religious traditions. See Yudit Kornberg Greenberg, *The Body in Religion: Cross-Cultural Perspectives* 166-170 (Bloomsbury 2018). "Modesty is one of the highest virtues and often one of the most rigidly enforced practices in religion." *Id.* at 166. Adherents of these religions, which include Christianity, Judaism, and Islam, reserve some portion of their body for viewing only by God or a limited set of people (often, a spouse). *Id.* at 166-170. While religious traditions vary as to which

parts of the body are to be covered, they all share the notion that there is a sacred, religious dimension to the privacy of the body. *See id.*

When religious adherents are forced to act in contradiction to their religious beliefs, the experience is deeply painful. The feelings of humiliation and shame that are experienced by most or all of those who are forced to strip naked without their consent is compounded by the feeling that the prisoner is now violating something sacred. *See, e.g.,* Fiona Ni Aolain, *Sex-Based Violence and the Holocaust – A Reevaluation of Harms and Rights in International Law*, 1 Yale J.L. & Feminism 43, 63 & n.60 (2000) (discussing how a religious tradition of modesty compounded the emotional harm for Jews subjected to forced nudity during the Holocaust). For this very reason, forced nudity and other forms of sexual violence have been used to attack adherents of certain religious traditions. *See, e.g.,* Derek S. Jeffreys, *Spirituality and the Ethics of Torture* 70 (Palgrave Macmillan 2009) (noting how cultural sensitivity training that Muslims were averse to forced nudity led to the use of cross-gender interrogators and forced nudity for detainees at Guantanamo); Jude McCulloch & Amanda George, *Naked Power: Strip Searching in Women's Prisons*, in *The Violence of Incarceration* (Phil Scraton & Jude McCulloch eds., Routledge 2009) (noting that Catholics in Northern Ireland were subjected to strip searches because such searches offended their notions of modesty); Larissa Peltota, *Rape and Sexual Violence Used as a Weapon of War*

and Genocide 52-53, CMC Senior Theses 1965 (2018) (noting that Cham women in Cambodia were disproportionately singled out for forced nudity by the Khmer Rouge because of their religious and cultural beliefs in modesty).

Religious modesty is such an important part of religious practice that impairing it, even in the prison environment, risks violating the law. For example, the Sixth Circuit has held that a prisoner's allegation that unrestricted observation of him by opposite-sex guards violated his sincerely-held religious belief in Christian modesty. *See Kent v. Johnson*, 821 F.2d 1220, 1224–25 (6th Cir. 1987). Similarly, the Fifth Circuit has held that a prisoner who adhered to Yahwehist Messianic Judaism alleged a substantial burden on his religious practice where a prison subjected him to strip searches in the presence of opposite-sex guards in violation of his religion's tradition of modesty. *See Ramon v. Daniel*, 533 F. App'x 433, 436 (5th Cir. 2013). These cases and others make clear that, when prisoners are not provided protection against unreasonable intrusions into their religious modesty, their ability to exercise their religious beliefs is at risk.

III. By refusing to hold prison officials accountable for their egregious actions in this case, the panel opinion gives a green light to similar actions that will disproportionately harm prisoners with strong religious beliefs.

While the harms to religious practice of unnecessary strip searches are clear, Defendants' purported justification for the strip search here falls far short of an acceptable burden on religious practice. The kinds of governmental interests that

are sufficiently compelling to justify restricting a prisoner's religious practice include matters of prison security, such as stemming the flow of contraband in prisons. *See Holt v. Hobbs*, 574 U.S. 352 (2015). No such interest was implicated here, either individually or collectively. As the appellants' opening brief describes in detail, the strip search in this case was conducted as a training exercise for cadets in a prison guard training program—an exercise that prison officials admitted was not required for graduation and was duplicative of other training the cadets were given. (ECF No. 21 at 7-24.) The women in this case were subjected to forced nudity, visual body cavity searches, and unclean conditions merely so they could serve as instructional tools for the convenience of an optional training exercise. This is far short of the kind of justification that justifies the infringement of religious exercise.

By categorically refusing to find a violation of the Fourth Amendment under these circumstances, the panel opinion has opened the door to further invasions of prisoners' religious modesty. The panel majority declined to examine the reasonableness of Defendants' justification for the strip search because it held that the Fourth Amendment did not apply. *See Henry v. Hulett*, 930 F.3d 836, 838–39 (7th Cir. 2019). If a prison official's decision to perform a strip search—especially under these degrading conditions—need not be justified in any way under the Fourth Amendment, the effect will inevitably be to increase the number and extent

of such strip searches. All prisoners will experience more humiliation and degradation under such a rule, but prisoners with traditions of religious modesty will suffer disproportionately because the forced nudity will deprive them of their ability to live modestly in accordance with their religious beliefs. Interpreting the Fourth Amendment to permit such a disproportionate punishment is inconsistent with this country's long-standing respect for the freedom of religion.

Prisoners deserve—and our national history demands—greater protection for the bodily privacy of prisoners than is offered by the panel opinion. Permitting the panel opinion to stand will visit harm not only on all prisoners, but especially on prisoners who adhere to traditions of religious modesty. It is not too late for the Court to correct this error, vindicate the rights of prisoners, and hold prison officials accountable.

CONCLUSION

This court should grant rehearing, vacate the panel opinion, and reverse the district court.

Dated: August 20, 2019

Respectfully submitted,

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