NO. 19-6871

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DEVION GENTRY,
Plaintiff - Appellant

v.

A. DAVID ROBINSON, individually and in his official capacity; HENRY J. PONTON, individually and in his official capacity; MAJOR BATEMAN; CAPTAIN D. H. ANDERSON; LT. WILLIAMS, individually and in his official capacity; SGT. SWANN, individually and in his official capacity; JOHN DOE, individually and in his official capacity,
Defendants - Appellees

and

VIRGINIA DEPARTMENT OF CORRECTIONS; NOTTOWAY CORRECTIONAL CENTER,
Defendants.

On appeal from the United States District Court
for the Eastern District of Virginia
No. 1:17-cv-766-LO-IDD (Hon. Liam O'Grady)

BRIEF OF *AMICUS CURIAE* MUSLIM ADVOCATES IN SUPPORT OF PLAINTIFF-APPELLANT AND FOR REVERSAL OF THE DISTRICT COURT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 19-6871 Caption: Devion Gentry v. A. David Robinson, et al.

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(name of party/amicus)

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Counsel for: amicus curiae

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IDENTITY AND INTERESTS OF *AMICUS 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.

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

Federal law guarantees the right to practice religion without undue interference from the government. Devion Gentry, as for many thousands of Muslims worldwide, is required by his religion to grow a beard. Yet when he entered a Virginia prison, prison officials required him to shave his beard and, when Mr. Gentry resisted, they knocked him to the ground, shackled him, and forcibly shaved him. Prison officials did all this pursuant to a policy so unimportant to prison operations that the prison never applied it to non-religious objectors and has since abandoned it entirely.

Federal law demands that courts and prison officials afford the highest respect to the religious practice of prisoners, permitting only those restrictions absolutely necessary to the functioning of the prison. By granting summary judgment to Defendants in the case below, the district court improperly denied Plaintiff and his religious practice the dignity to which they were entitled under the law.

ARGUMENT

I. Federal Law Has Long Recognized the Vitally Important Role Religion Plays in the Lives of Many Americans, Including Prisoners.

A. Religious liberty is among the most important freedoms guaranteed by the Constitution.

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.,* 134 S. Ct. 2751, 2785 (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).

Nor is the Free Exercise Clause the only constitutional protection available for religion. The First Amendment's Free Speech Clause prevents the government from permitting speech in public forums to all viewpoints "except those dealing with the subject matter from a religious viewpoint." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (quoting *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-34 (1993)). The First Amendment's right to freedom of association, derived from the Free Assembly Clause, "is a right enjoyed by religious and secular groups alike." *Hosanna-Tabor Evangelical*

Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 189 (2012). And under the Equal Protection Clauses of the Fifth and Fourteenth Amendments, religion is an "inherently suspect distinction" requiring courts to refuse the presumption of regularity that attaches to most government action. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

The Constitution's protections for religious liberty extend to those incarcerated in America's prisons as well. "There is no iron curtain drawn between the Constitution and the prisons of this country," *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974), and "prisoners do not shed all constitutional rights at the prison gate." *Sandin v. Conner*, 515 U.S. 472, 485 (1995). The Free Exercise Clause, "including its directive that no law shall prohibit the free exercise of religion, extends to the prison environment." *Morrison v. Garraghty*, 239 F.3d 648, 656 (4th Cir. 2001) (citing *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 348 (1987)).[1] Because of the strong protections of the First Amendment, prison officials may not "demand from inmates the same obeisance in the religious sphere that more rightfully they may require in other aspects of prison life." *Barnett v. Rodgers*, 410 F.2d 995, 1002 (D.C.

[1] *See also Turner v. Safley*, 482 U.S. 78, 84 (1987) ("[F]ederal courts must take cognizance of the valid constitutional claims of prison inmates."); *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972) ("[R]easonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty.").

Cir. 1969). The Supreme Court has referred to prisons as among those state-run institutions "in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise." *Cutter v. Wilkinson*, 544 U.S. 709, 720–21 (2005). But because of the strong protections of the First Amendment, prison officials may not "demand from inmates the same obeisance in the religious sphere that more rightfully they may require in other aspects of prison life." *Barnett v. Rodgers*, 410 F.2d 995, 1002 (D.C. Cir. 1969).

B. RLUIPA was designed specifically to expand legal protections for the religious liberty of prisoners.

Congress vindicated and expanded this federal commitment to religious freedom when it unanimously passed RLUIPA in 2000.[2] The Act'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).

RLUIPA's legislative history is replete with discussion of—and evidence for—the compelling need for religious protection among prisoners in state institutions. Some of these "inadequately formulated prison regulations and policies

[2] Pub. L. 106-274, 114 Stat. 803 (2000), *codified at* 42 U.S.C. § 2000cc et seq.

grounded on mere speculation, exaggerated fears, or post hoc rationalizations"[3] included Michigan prisons prohibiting Chanukah candles,[4] Oklahoma prisons restricting the Catholic use of sacramental wine for celebration of Mass,[5] and prison policies banning jewelry that prevented prisoners from wearing a cross or Star of David.[6]

In RLUIPA, Congress addressed this threat to religious freedom by requiring that any substantial burden on a prisoner's religious exercise be the "least restrictive means of furthering [a] compelling government interest." 42 U.S.C. § 2000cc-1(a). 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). By extending the protection of strict scrutiny to state prisoners, Congress clearly indicated an intent to go beyond the more permissive constitutional standard governing prisoner claims under the First Amendment.

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[3] 146 Cong. Rec. S7774-01, S7775 (statement of Sens. Hatch & Kennedy) (quoting S. Rep. No. 103-111, at 10 (1993)).

[4] *Hearing on Protecting Religious Freedom After* Boerne v. Flores *before the Subcomm. on the Constitution of the H. Committee on the Judiciary*, 105th Cong., 2d Sess., Pt. 3, at 41 (1998) (statement of Isaac M. Jaroslawicz).

[5] *See id.*, Pt. 2, at 58-59 (statement of Donald W. Brooks).

[6] z *Hearing before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 105th Congress, 1st Session 86 (July 14, 1997) (testimony of Prof. Douglas Laycock).

All three branches of government have recognized RLUIPA's purpose is to protect the freedom of religion to the greatest extent possible. RLUIPA itself directs that its provisions "shall 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). RLUIPA's sponsors noted that the bill was part of a tradition of Congressional action "to protect the civil rights of institutionalized persons." 146 Cong. Rec. S7774-01, S7775 (statement of Sens. Hatch & Kennedy).[7] In signing the Act, President Clinton issued a signing statement saying that "[r]eligious liberty is a constitutional value of the highest order" and that RLUIPA "recognizes the importance the free exercise of religion plays in our democratic society." Presidential Statement on Signing The Religious Land Use and Institutionalized Persons Act of 2000, 36 Comp. Pres. Doc. 2168 (September 22, 2000). A unanimous Supreme Court acknowledged RLUIPA as "the latest of long-

[7] RLUIPA's legislative record reflects that religious accommodation can be not only workable but even helpful to prison officials' rehabilitative goals by decreasing recidivism. *See Issues Relating to Religious Liberty Protection and Focusing on the Constitutionality of a Religious Protection Measure: Hearing Before the S. Comm. on the Judiciary*, 106 Cong. 14 (1999) (statement of Steven T. McFarland) (noting that "[r]eligion changes prisoners, cutting their recidivism rate by two-thirds"); 146 Cong. Rec. S7991-02 (statement of Sen. Strom Thurmond) ("[I]t is clear that religion benefits prisoners. It helps rehabilitate them, making them less likely to commit crime after they are released.").

running congressional efforts to accord religious exercise heightened protection from government-imposed burdens." *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005).

Accordingly, federal courts have recognized the deep and searching nature of the inquiry that Congress mandated. *See Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015) (unanimous) (deference to prison officials "does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard."); *Lovelace v. Lee*, 472 F.3d 174, 193 (4th Cir. 2006) ("The Act's laudable goal of providing greater religious liberty for prisoners will be thwarted unless those who run state prisons—wardens and superintendents acting in their official capacities—satisfy their statutory duty."). Because of the searching nature of this inquiry, it is error for a court "to assume that prison officials were justified in limiting appellant's free exercise rights simply because [a plaintiff] was in disciplinary confinement." *Young v. Coughlin*, 866 F.2d 567, 570 (2d Cir. 1989) (citing *LaReau v. MacDougall,* 473 F.2d 974, 979 n.9 (2d Cir. 1972)).

II. The District Court Failed to Correctly Apply Federal Law by Granting Summary Judgment to Defendants Below.

This framework of federal law placed a burden on the district court to protect Mr. Gentry's religious expression through the growing of his beard. By granting summary judgment to Defendants, the district court ignored this law and failed to fulfill its duty.

A. Mr. Gentry's grooming practices are the kind of religious exercise that federal law seeks to protect.

The prison's forcible shaving of Mr. Gentry's beard offends exactly the kind of sincere religious practice that federal law is designed to protect. Mr. Gentry has introduced uncontested evidence that he is an observant Muslim whose sincere religious beliefs require him to maintain a beard. Mr. Gentry's religious beliefs would be protected by federal law even if his beliefs were idiosyncratically his own, for "it is not within the judicial function and judicial competence to inquire whether the [plaintiff] . . . correctly perceived the commands of [his] faith." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981); *see also Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 834 (1989) ("[T]he Free Exercise Clause does not demand adherence to a tenet or dogma of an established religious sect."). However, his belief is also shared by thousands of other Muslims, and derives directly from teachings of the Prophet Muhammad. *See generally* Br. of Islamic Law Scholars as Amici Curiae in Supp. of Pet'r, *Holt v. Hobbs*, No. 13-6827, 2014 WL 2465964 (U.S. May 29, 2014) (discussing history of religious requirement for men to wear beards in Islam). In fact, this exact practice was before the Supreme Court in *Holt v. Hobbs*, where the Court held that a prison policy "grooming policy [that] requires [plaintiff] to shave his beard" or face discipline "easily satisfied" the standard for a substantial burden on the exercise of religion. 135 S. Ct. at 862. Not only was Mr. Gentry faced with a *choice* between discipline and the practice of his

religion, he experienced that discipline in brutal form when he was knocked to the ground, shackled, and forcibly shaved. *See* (Opening Brief at 18). For this kind of stark restriction on religious expression, courts must be

B. Federal law requires the reversal of the district court's grant of summary judgment here.

The district court's opinion makes two things clear: first, that Mr. Gentry's beard was forcibly shaved when the prison's asserted interests did not require it; and second, that Mr. Gentry's beard was shaved because he objected on religious grounds, while it would not have been if he had objected on non-religious grounds. Granting summary judgment to Defendants in the face of either of these findings offends the high regard that federal law has for religion.

As noted above, the Constitution's high bar for the protection of prisoners' religious freedom require that prisons undertake even difficult accommodations of prisoners; RLUIPA affirmatively requires that restrictions on religious freedom meet strict scrutiny. Yet the district court's own opinion noted that, since the prison accommodated beards after the intake process and has subsequently stopped forcible shaving altogether, the record "tend[s] to establish that there was an obvious or easy alternative to the use of force to bring plaintiff into compliance." (Dist. Ct. Op. at 5). To ignore an "obvious or easy alternative" to a restriction on a prisoner's religious expression—particularly a restriction that, as here, is enforced with violence against

a defenseless subject—is a flagrant disregard for the court's sacred duty to protect those rights.

Not only have prison officials failed to show that the policy was justified under federal law, the district court inconceivably ignored Mr. Gentry's evidence of religious discrimination. The district court concedes that "Plaintiff claims that he was treated differently from nonreligious inmates . . . because the only inmates who were forced to cut their hair during the intake process were 'religious people.'" (Dist. Ct. Op. at 8). Yet the court bizarrely drew the conclusion that "Plaintiff has pled himself out of stating a due process claim. By alleging that all other inmates who were similarly situated to him—were treated the same—they were forced to cut their hair—plaintiff has failed to establish a due process claim." (*Id.*)

The district court's conclusion that the Constitution is unconcerned with discrimination against religious adherents is unsupportable under any of Mr. Gentry's legal theories. Federal law is deeply concerned not only with discrimination *among* religions but with discrimination *against* religion. The Supreme Court considered laws restricting all religious practice to be so obviously unconstitutional that it used them as an example in a Takings Clause case, noting that "a regulation *specifically directed to land use* no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions." *Lucas v. S.C. Coastal Council*, 505

U.S. 1003, 1028 n.14 (1992) (emphasis in original). The Supreme Court recently held that a subsidy program could not exclude religious organizations because, under the Free Exercise Clause, "[a] law . . . may not discriminate against 'some *or all* religious beliefs.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (quoting *Lukumi*, 508 U.S. at 532) (emphasis added). Regardless of the legal theory one adopts, it is clear that "the Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet,* 512 U.S. 687, 715 (1994) (O'Connor, J., concurring). The district court found no such unusual circumstances here and the record makes clear that none exist. Far from "pleading himself out of court," Mr. Gentry has provided direct evidence of the kind of discrimination that federal law seeks to protect.

The same is true for RLUIPA. In a RLUIPA opinion by then-Judge Gorsuch, the Tenth Circuit reversed a grant of summary judgment to prison officials in a case where they refused to lock down a prison to transport a Native American inmate to a sweat lodge for his religious services, but routinely locked down the prison for secular reasons. 741 F.3d 48 (10th Cir. 2014) (Gorsuch, J.). The reversal hinged in part on the record's inability to answer the question: "why is this religious exemption

offensive to the prison's putatively compelling no-lock-down interest when other secular exemptions are not?" *Id*. at 60. The record here is similarly devoid of evidence supporting a finding that the policy of forcible shaving served any interest, let alone a compelling one—and the record similarly shows that non-religious objectors were granted a secular exemption from the policy. In passing RLUIPA, Congress was concerned with prison officials needlessly restricting the religious practices of prisoners. Granting summary judgment to Defendants here betrays both Congress's clear mandate and the proud tradition of religious freedom on which the United States is built. Accordingly, this Court must act to reverse the district court's grant of summary judgment.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of summary judgment.

Dated: September 18, 2019

Respectfully submitted,

/s/ Matthew W. Callahan

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No. 19-6871 **Caption:** Devion Gentry v. A. David Robinson, et al.

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