

1 Rock, Ark.; on behalf of Respondent.
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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 13-6827, Holt versus Hobbs.
5 Mr. Laycock.

6 ORAL ARGUMENT OF DOUGLAS LAYCOCK

7 ON BEHALF OF PETITIONER

8 MR. LAYCOCK: Mr. Chief Justice, and may it
9 please the Court:

10 40 other prison systems permit beards
11 without a length limit, yet Arkansas prohibits even half
12 an inch. And in their brief, they reject every means
13 that courts have devised to evaluate their testimony.

14 So what they really seek is absolute
15 deference to anything they say just because they say it.
16 And that would be to repeal this statute de facto.

17 There may be deference to prison officials,
18 but there must be concrete limits to that deference.

19 JUSTICE GINSBURG: If this prisoner wanted
20 to have a full beard, would RLUIPA require that the
21 prison administration allow him to do that?

22 MR. LAYCOCK: Well, some courts have said
23 yes. There's very little in this record about full
24 beards and whether they're safe or whether they're
25 dangerous, but the 40 States that permit them suggest

1 that the State would have a difficult burden of proof.

2 But that question is not presented here.

3 JUSTICE SCALIA: Mr. Laycock, the problem I
4 have with -- with your client's claim of -- of religious
5 requirement is the religious requirement is to grow a
6 full beard, isn't it? Now, let's assume in the religion
7 that requires polygamy.

8 I mean, could -- could I say to the prison,
9 well, you know, okay, I won't have three wives; just let
10 me have two wives. I mean, you're still violating your
11 religion, it seems to me, if he allows his beard to be
12 clipped to one -- one inch, isn't he?

13 MR. LAYCOCK: Well, the religious teaching
14 is a full beard. He testified that religiously half an
15 inch is better than nothing, and he explained that in
16 terms of Hadith that he referenced.

17 He's in a very difficult situation. I don't
18 think he should be penalized for being reasonable here.
19 He offered an extremely conservative compromise to the
20 prison --

21 JUSTICE SCALIA: Well, religious beliefs
22 aren't reasonable. I mean, religious beliefs are
23 categorical. You know, it's God tells you. It's not a
24 matter of being reasonable. God be reasonable? He's
25 supposed to have a full beard.

1 MR. LAYCOCK: He's -- he's supposed to have
2 a full beard, but a partial beard is better than none.
3 And that's not just in secular terms. That's also in
4 religious terms, which he explained on the record.

5 JUSTICE SCALIA: Okay. You think on the
6 record that's what his religion would require if he
7 can't have a full beard.

8 MR. LAYCOCK: That's correct, Your Honor.

9 CHIEF JUSTICE ROBERTS: But I -- I mean,
10 you're really just making your case too easy. I mean,
11 one of the difficult issues in a case like this is where
12 to draw the line. And you just say, well, we want to
13 draw the line at half inch because that lets us win.
14 And the next day someone's going to be here with one
15 inch. And maybe it'll be you. And then, you know, two
16 inches.

17 It seems to me you can't avoid the legal
18 difficulty just by saying, all we want is half an inch.

19 MR. LAYCOCK: Well, most of the cases seek a
20 full beard or full hair. And sooner or later, you will
21 have to decide one of those cases. But this case, he
22 made a pro se decision to limit his request. The Court
23 expressly limited the question presented. So this case
24 is only about half an inch.

25 CHIEF JUSTICE ROBERTS: Well, but we have to

1 decide this case pursuant to a generally applicable
2 legal principle, and that legal principle is one, it
3 seems to me, that demands some sort of a limit. And if
4 you're unwilling to articulate a limit to the principle
5 itself, it becomes a little bit difficult to apply it,
6 say, well, we don't know what the limit is because
7 you're only asking a half inch. We'll apply a -- a
8 theoretical legal structure and -- and say you fall
9 within it.

10 MR. LAYCOCK: Well, I think, you know, the
11 limit has to be determined on a record in a case that is
12 seeking a -- a longer beard. I think, you know, what --
13 the larger issue than just half an inch that this case
14 presents is how do you administer -- the legislative
15 history suggests deference to prison officials in the
16 context of a compelling interest standard.

17 JUSTICE SCALIA: Yes. So maybe we should --
18 maybe this was improvidently granted. I don't want to
19 do these cases half inch by half inch. Let's -- let's
20 take a case that involves a full beard. I mean, the
21 next -- the next case will be one inch, then one and a
22 half inches, two inches.

23 MR. LAYCOCK: They're not going to come in
24 that order. The next case is going to be -- most
25 likely, the next case is going to be a full beard

1 because that's the great bulk of the cases. This case
2 has a limited question presented and has a serious
3 question of statutory interpretation.

4 The courts below essentially applied the
5 pre-removed but constitutional standard that you have
6 essentially unlimited deference to the prison officials.

7 JUSTICE KENNEDY: And then what has this
8 Court said about the standard under RLUIPA with
9 reference to prisons? That the -- that the prison has
10 to show that its least -- least restrictive alternative
11 in order to meet the requirements of strict scrutiny,
12 and that's the prison's burden? Is that proposition
13 established?

14 MR. LAYCOCK: Well, your only prison RLUIPA
15 case is Cutter and that was a constitutional challenge.

16 JUSTICE KENNEDY: Yes. All right. Do
17 you -- do you think RLUIPA displaces Turner as the right
18 standard?

19 MR. LAYCOCK: It was clearly intended to
20 replace Turner. It textually replaces Turner.

21 JUSTICE KENNEDY: And what is the test
22 insofar as you're concerned?

23 MR. LAYCOCK: The test is compelling
24 interests and least restrictive means and deference must
25 be administered in the context of that standard, not

1 instead of that standard.

2 So if it's a close case on compelling
3 interest, they may well get deference. If they give a
4 reasoned and well-considered and informed explanation,
5 they deserve more deference. More deference would be
6 due.

7 Cutter says some -- Cutter says they get due
8 deference, but Cutter had no occasion to decide how much
9 deference is due or -- or how that -- how that should be
10 administered.

11 The textual standard is clearly compelling
12 interest and least restrictive means.

13 JUSTICE SOTOMAYOR: Could you put your
14 answer in practical terms. The Chief Justice asks you
15 what's the legal principle that you want us to apply,
16 and you announce it as give them the right deference.
17 It's a little bit circular, the answer, in my mind.

18 Looking at what the circuits have been
19 doing, which one do you think articulates the best
20 approach to RLUIPA and what courts should be doing?

21 MR. LAYCOCK: Well, maybe Judge Gorsuch's
22 opinion in the -- in the Tenth Circuit. But I'm not
23 sure any circuit has given a fully elaborated account of
24 deference in the context of a compelling interest test.

25 We think the more reasoned and informed

1 their explanation, the more deference is due. So do
2 they give concrete examples of specific harms? Do they
3 treat similar risks the same way? Do they -- do they
4 take account of solutions that have been found to work
5 in other jurisdictions? Do they take account of the
6 religious needs of prisoners at any point, or do they
7 just reflexively say no?

8 JUSTICE GINSBURG: And the standard is other
9 similar risks. The same way, then, what about a
10 1/4-inch rule? Because that's what they allowed for
11 people who have dermatological problems.

12 MR. LAYCOCK: They allow -- they allow a
13 quarter inch for medical beards. They don't allow even
14 a quarter inch for religious beards. But the quarter
15 inch, I think, for medical beards, I think, fatally
16 undermines their claim that they can't administer a
17 length limit. And it -- and it somewhat undermines all
18 their other claims about -- about a 1/2-inch beard, that
19 this is in some ways like the case Justice Alito wrote
20 in Newark in the Third Circuit. The medical exception
21 undermines all the alleged reasons for not allowing a
22 religious exception.

23 JUSTICE GINSBURG: There are -- there are
24 some religious practices -- I think that the Sikh
25 practice of not cutting hair ranks as a religious

1 practice. So not cutting hair and wearing a turban,
2 consistent with what you say is the standard, could a
3 prison say, we won't allow that because it is too easy
4 to hide contraband?

5 MR. LAYCOCK: Yeah, that may be. I don't
6 know what the evidence would show about Sikh hair
7 wrapped in a -- in a turban. But that's clearly a much
8 more serious issue than -- than what's presented in this
9 case. You know, Sikh hair wrapped in a turban may well
10 be different, but we don't have any evidence about in
11 this case. We don't really have a way to know on the
12 record in this case.

13 JUSTICE KAGAN: Mr. Laycock, you're relying
14 on this case really on -- on felt intuitions that this
15 couldn't possibly advance the State's interest. But for
16 the most part in these cases, there will be some
17 incremental gain with respect to the interests that this
18 State has.

19 So whether it's a full beard or whether it's
20 long hair or whether it's a turban, there will be some
21 ability to say, even though it's just teeny tiny, there
22 is some increase in prison security that results from
23 disallowing this practice.

24 And I guess I want to know, and this really
25 fits in with several of the other questions that have

1 been asked here, is how do we think about that question
2 in the context of this statute?

3 MR. LAYCOCK: I think they have to show
4 material -- this is a phrase in the government's brief,
5 and I think it's helpful -- a material effect on their
6 security situation. Any teeny tiny risk, however small,
7 is another way of de facto repealing the statute,
8 because you can always imagine some teeny tiny risk.

9 And even internally, under the rational
10 basis standard, the Court said the test isn't zero risk.
11 Even in Turner, the Court said you have to incur --

12 JUSTICE KAGAN: Teeny tiny isn't enough.
13 But how about, you know, measurable, although small?
14 Or, you know, at what point does it become something
15 that we say, yes, we have to take that into account?

16 MR. LAYCOCK: Well, I think material or
17 significant may be the best we can do. They say, for
18 example, that in 2011, they confiscated a thousand
19 cellphones. I don't think a 1/2-inch beard would change
20 that number. But if it went to 1,001 or 1,010, I don't
21 think that's material.

22 But if it goes to 1,100, that's a
23 significant increment. But they have to show some
24 material effect on their security situation. And here,
25 where they allowed beards for many years, where 43

1 States allowed beards, there should be plenty of
2 examples if it were a problem. And this is not
3 something that's so dangerous no one has tried it. So
4 there should be plenty of examples. And in fact, they
5 have no examples of anything hidden in beards, and
6 certainly not in a very short beard, such as half an
7 inch.

8 This -- this idea of deference comes from
9 legislative history, and that very same legislative
10 history said post hoc rationalizations, exaggerated
11 fears, mere speculation are not enough. And it's for
12 the judiciary to distinguish the two.

13 And I think what we have in this case is
14 exaggerated fears and post hoc rationalization.

15 CHIEF JUSTICE ROBERTS: Well, the -- the
16 problem with deference, I think, is that if you accept
17 the fact that there is a point at which it does become a
18 problem, the full beard, Sikh with the -- the turban,
19 then you -- then there's the question of how you draw
20 the line.

21 And drawing the line, it strikes me, may be
22 the point at which you will consider deference to the
23 prison administrators. You take deference entirely out
24 of the equation by saying, look, we're only asking for
25 half an inch.

1 MR. LAYCOCK: Well, we haven't taken
2 deference out of the equation, but when we only ask for
3 half an inch and when they offer so little evidence and
4 no -- no examples and no consideration of solutions
5 elsewhere, they haven't done anything to deserve
6 deference. They haven't shown expertise. And -- and
7 even with deference, you know -- even with some degree
8 of deference, it doesn't make out a compelling interest
9 on these facts and that's the question presented.

10 JUSTICE SOTOMAYOR: Could you -- you know,
11 we seem to be arguing rules. They say no beards. You
12 say half-inch is okay. And then the question begs
13 itself, if -- how about three-quarters of an inch, how
14 about an inch, and what about full beard? What are we
15 measuring this against? Are you seeking to establish a
16 rule that every prisoner has to be permitted to grow a
17 1/2-inch beard and no more, or are you asking for a rule
18 that applies just to your client and then articulate why
19 for your client?

20 MR. LAYCOCK: No. We think, you know,
21 reversal here would establish a right to a 1/2-inch
22 beard for all prisoners on this record and, you know,
23 unless some other State made a very different showing,
24 all prisoners more generally.

25 JUSTICE SOTOMAYOR: So what happens -- I

1 know the magistrate judge or the judge below here said
2 that it was preposterous to think that this prisoner
3 could hide anything in his 1/2-inch beard. Assuming
4 that his 1/2-inch beard was not thickly grown, but some
5 are, and some you can't see the skin. Should that
6 1/2-inch issue be applied to that prisoner? Wouldn't it
7 be a different set of facts in that case to consider?

8 MR. LAYCOCK: Well, the State might be able
9 to show that's a different set of facts, you know.
10 But -- but the question is not just, is it conceivably
11 imaginable that some prisoner somewhere could hide
12 something in a 1/2-inch beard, but could he hide
13 something there that he couldn't much more easily and
14 more securely hide in the hair on top of his head, in
15 his shoe, in the lining of his clothes, you know --

16 JUSTICE SCALIA: You're arguing for all
17 1/2-inch beards, right? I mean, I --

18 MR. LAYCOCK: Yes.

19 JUSTICE SCALIA: We've got to assume all
20 1/2-inch beards are -- are okay if -- if God tells you
21 to grow them, right?

22 MR. LAYCOCK: Well, you know, I think that's
23 right. And again, subject to somebody producing
24 evidence that we're wrong about some 1/2-inch beards,
25 but I think yes.

1 JUSTICE SCALIA: Well, really subject -- I
2 mean, whose -- whose burden is that? I mean --

3 MR. LAYCOCK: It is the State's burden that
4 is explicit in the statute. This is an affirmative
5 defense we're talking about of compelling interest in
6 least restrictive means. You know, the -- the only
7 limit to -- they impose on the hair on the top of your
8 head is it can't extend below the middle of the neck.
9 So you can have long hair, curly hair, Afros on top of
10 your head without a length limit. The difference
11 between hair on top of your head and hair in the front
12 of your head is -- is not even rational. They could
13 hide more and the -- and the prison warden testified to
14 this. Yeah, you could hide things in the hair on top of
15 your head, but that's not against the rules. So they
16 have singled out the beard that is preserved for -- that
17 is more to religious reasons and -- and not treated
18 other things that are really indistinguishable.

19 If there are no further questions, I'll
20 reserve the remaining time.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Professor. Mr. Yang?

23 ORAL ARGUMENT OF ANTHONY A. YANG

24 ON BEHALF OF THE UNITED STATES

25 AS AMICUS CURIAE, SUPPORTING PETITIONER

1 MR. YANG: Mr. Chief Justice, and may it
2 please the Court:

3 This case involves the religious
4 accommodation of 1/2-inch long beard that BOP in over 40
5 states would allow a prisoner to wear. The State failed
6 its burden of proving that denying a 1/2-inch religious
7 beard would be the least restrictive means to further a
8 compelling interest.

9 JUSTICE SCALIA: Is it your position that
10 if, what, 90 percent of other -- of other institutions
11 similar to the one at issue in the case permit the
12 practice that is challenged, it cannot be a compelling
13 interest? Is that your position?

14 MR. YANG: No. In fact, I think our
15 position is that security interests in prisons are
16 compelling, but the burden that RLUIPA imposes upon the
17 State is a burden to show that the means selected, that
18 is, the denial of a 1/2-inch beard is the least
19 restrictive means to further that interest. And in this
20 case, that is a showing that has to be made in court.
21 It is something that Congress specifically recognized
22 would be showing --

23 JUSTICE SCALIA: I understand that. But I'm
24 asking what is the relevance of the fact that other
25 instances --

1 MR. YANG: Well, the relevance is that --

2 JUSTICE SCALIA: Are we going to say
3 whenever an institution comes up here that has a
4 restriction which other institutions of the same type do
5 not have, or at least a large majority of them, it's
6 ipso facto bad?

7 MR. YANG: No. I don't think it's a
8 dispositive factor. However, it significantly
9 undermines the State showing that a similar restriction
10 could not be had in this context. And the State, in the
11 face of that example if raised in litigation, would have
12 to provide a reasonable basis for explaining why there
13 might be a distinction between what's going on in other
14 States in BOP and what's going on in this State. And
15 the showing in this case is exceptionally near. I
16 mean --

17 JUSTICE SCALIA: Well, why does it have to
18 show a distinction? It can just say the other States
19 are wrong. We -- we think this is dangerous. I don't
20 care what other States think.

21 MR. YANG: I think a little more will be
22 required under the compelling interest test. Now, this
23 Court in Cutter recognized --

24 JUSTICE KAGAN: Well, suppose a State just
25 simply says this: You know, actually, there's nothing

1 special about our prison. We can't show you some
2 special circumstance, but what we can show you is that
3 prisons are in the business of making tradeoffs between
4 security and other values, they do that every single
5 day, and our State just thinks that the tradeoff should
6 be more security oriented, so we insist on a greater
7 level of security than our peer institutions do. And --
8 and are you saying that the statute prevents a State
9 from doing that?

10 MR. YANG: No. I don't think that the
11 statute imposes a least common denominator amongst State
12 prison systems. However, I think there is some bounds
13 to the State's judgment that needs to be -- there are
14 some limits and the State needs to provide a reasoned
15 explanation in order to get deference to its -- its
16 predictive judgment in this context.

17 JUSTICE ALITO: Where are you -- how do
18 you --

19 CHIEF JUSTICE ROBERTS: Go ahead.

20 JUSTICE ALITO: How do you reconcile
21 deference with the strict scrutiny that the statute
22 requires?

23 MR. YANG: Well, this Court in Cutter, for
24 instance, explained that the strict scrutiny -- when
25 deciding what was required by strict scrutiny, context

1 matters.

2 JUSTICE ALITO: Well, there are -- there are
3 two questions there. One is, which you've -- is a good
4 question. Where does this idea of deference come from
5 in this context? But the question I was asking was:
6 How do you think, assuming that there is a role for
7 deference, how does it fit together with what the
8 statute expressly requires?

9 MR. YANG: I don't think there's any
10 dissonance between the idea of strict scrutiny, which is
11 not a degree of proof required, it is a question about
12 whether you've identified a compelling interest and
13 shown that what the -- the burden is the least
14 restrictive means, that can be shown by preponderance of
15 the evidence.

16 And so when you're talking about deference
17 in this context, you're talking about deference to the
18 predictive judgments of officials based on their
19 experience and expertise, based on the fact that they
20 are, in fact, charged with protecting the public and
21 administering these prisons. And so when they provide a
22 reasoned explanation based on experience and expertise,
23 they can -- don't have to point to a specific example of
24 a 1/2-inch beard in the past resulting in something
25 horrible, but --

1 JUSTICE KAGAN: But I do share Justice
2 Alito's confusion on this point, because all the things
3 that you're talking about are things that we would never
4 allow in the typical strict scrutiny context. You know,
5 all this kind of well, as long as they say something,
6 they don't really have to prove it and it just has to
7 sound kind of reasonable. And that's the very opposite
8 of strict scrutiny generally.

9 MR. YANG: Well, in this context, remember,
10 the statute doesn't say strict scrutiny. It shows --
11 says that the State has to identify a compelling
12 interest and show that the burden that it is imposing is
13 the least restrictive means.

14 JUSTICE GINSBURG: Didn't this Court
15 establish --

16 CHIEF JUSTICE ROBERTS: It sounds like
17 statute.

18 MR. YANG: It's -- it's similar. But
19 remember, this Court in -- in Grutter and in Cutter has
20 recognized that the application of strict -- what you
21 might broadly label strict scrutiny depends on context.
22 And Congress, when they enacted both RFRA and RLUIPA,
23 understood that these two concepts could be administered
24 together.

25 JUSTICE KAGAN: Do you think it's the same

1 standard in both of those statutes?

2 MR. YANG: For the large part, yes. I want
3 to caveat that because --

4 JUSTICE KAGAN: The language is completely
5 the same.

6 MR. YANG: Yes. But in -- most of the
7 language is completely the same. The standard is the
8 same, but in RLUIPA, RLUIPA has this additional
9 provision that requires that the terms of the statute be
10 broadly construed to the maximum extent possible to
11 protect religious exercise.

12 JUSTICE KAGAN: But I thought we actually
13 used that in the recent RFRA case to suggest something
14 about RFRA as well. Is that right?

15 MR. YANG: That's because RFRA's definition
16 of religious exercise incorporates the RLUIPA
17 definition. But beyond that context, it's at least
18 conceivable that the Court might have a broader
19 interpretation of the protections in RLUIPA than in
20 RFRA.

21 JUSTICE GINSBURG: Mr. Yang, before you sit
22 down, your brief lists a whole series of cases on page
23 14 that were decided before RLUIPA. Safley and a bunch
24 of others. Are all those practices which we approved up
25 for grabs now under RLUIPA? There -- there were

1 restrictions on receipt of publications was one.

2 MR. YANG: I think the analysis is different
3 now. It has -- it could be litigated. Any of these
4 claims could be litigated. The State would then have
5 the burden of coming forward to show that the
6 restriction would, in fact, be a least restrictive means
7 of --

8 JUSTICE GINSBURG: So they would -- all
9 those that we approved, correspondence limitations, all
10 those would have to be looked at anew under the RLUIPA
11 standard.

12 MR. YANG: I think that's right, because if
13 you were to go back to pre-RLUIPA case law, no one would
14 doubt that a State could, in fact, prohibit a 1/2-inch
15 beard under the prior constitutional standards. But
16 Congress has set a higher bar and it imposes upon States
17 the obligation to come forward to explain and justify
18 it. Now --

19 CHIEF JUSTICE ROBERTS: Where -- where are
20 you on the full beard?

21 MR. YANG: On the full beard, I think there
22 might well be a difference. But again, RLUIPA depends
23 on a showing in litigation by the State that the means
24 selected is the least restrictive means. A State may
25 well be able to show that a full beard would run real

1 risks that are just not present in the 1/2-inch beard
2 that we have here.

3 CHIEF JUSTICE ROBERTS: Well, assuming
4 that's the case, assuming they have some evidence of
5 concealment or whatever in -- in a full beard, what do
6 we do? Just litigate a dozen cases till we settle on
7 one and three quarters inches, or what?

8 MR. YANG: Well, I think --

9 CHIEF JUSTICE ROBERTS: What I'm doing, it's
10 the same question I asked your friend --

11 MR. YANG: Yes. There's going to be a --

12 CHIEF JUSTICE ROBERTS: -- which is what's
13 the legal principle? And if there is no direct legal
14 principle, then isn't it a situation in which you would
15 employ deference to the administrative judgment?

16 MR. YANG: I think that's exactly right,
17 that there is going to be a bound, a range of
18 reasonableness that courts will find appropriate to
19 defer to predictive judgments by expert officials in
20 various contexts. Now --

21 JUSTICE KAGAN: Can I ask a similar
22 question? But, you know, lots of religions, including
23 lots of religions of one, have dietary codes of various
24 kinds. So suppose a lot of prisoners say, here's my
25 dietary code personal to me, and all of that costs

1 money, and let's just stipulate that as prisoner --
2 prisons have to spend money on that, they have less
3 money to spend on things relating to internal security.

4 How is somebody supposed to think about
5 those kinds of questions, where it's just every time
6 somebody makes a religious claim, the costs to the
7 institution goes up and the ability of the institution
8 to deal with security issues goes down?

9 MR. YANG: Well, maybe not necessarily
10 always the second. Certainly, you can have costs going
11 up. It may not necessarily affect the -- the security
12 in an institution.

13 JUSTICE KAGAN: But I'm suggesting the costs
14 are going -- you know, they come out of someplace.

15 MR. YANG: At some limit, that -- that's
16 true. I mean, we all operate under a real world with
17 limited costs. And as the Court recognized in Cutter,
18 the deference --

19 JUSTICE KAGAN: So how do we do that?

20 MR. YANG: Excuse me?

21 JUSTICE KAGAN: So how do we do that?

22 MR. YANG: Well, I think, again, it's going
23 to depend. If, for instance -- the factors that would
24 be relevant is the context. Does the increased cost
25 prejudice other types of interests in operating the

1 prison? That would have to be articulated by a --

2 JUSTICE SCALIA: Well, wait a minute. So
3 vote more money. All you have to do is raise taxes.
4 We're talking here about a compelling State interest.
5 Bear in mind I would not have enacted this statute, but
6 there it is. It says there has to be a compelling State
7 interest. And you're -- you're asking, well, let's
8 balance things; let's be reasonable. Compelling State
9 interest is not a reasonableness test at all.

10 MR. YANG: It's not me, Your Honor. I think
11 it's what the Court actually recognized in Cutter. The
12 Court, and I'll quote, said that "The Act needs to be
13 applied in an appropriately balanced way, with
14 particular sensitivity to security concerns, and that
15 accommodation must be measured so that it does not
16 override other significant interests."

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 MR. YANG: Thank you, Your Honor.

19 CHIEF JUSTICE ROBERTS: Mr. Curran.

20 ORAL ARGUMENT OF DAVID A. CURRAN

21 ON BEHALF OF THE RESPONDENTS

22 MR. CURRAN: Mr. Chief Justice, and may it
23 please the Court:

24 Arkansas' security objectives are undermined
25 by the Petitioner's 1/2-inch beard because he could use

1 it to alter his appearance, thwart identification, and
2 conceal contraband in our maximum security prisons'
3 unique environment.

4 JUSTICE GINSBURG: On altered appearance, I
5 thought it was conceded that at intake, the prison could
6 take a photograph clean -- clean shaven?

7 MR. CURRAN: Your Honor, that -- that is not
8 on the record. I concede that that was not sufficiently
9 addressed to withstand the summary judgment posture in
10 this case. The -- the record testimony was just -- I
11 agree with Professor Laycock that it wasn't
12 satisfactory.

13 But let me get to what I mean --

14 JUSTICE SCALIA: I don't understand what you
15 just said.

16 MR. CURRAN: Well, there -- there is two
17 points in altered appearance. One is identification
18 within the prison itself, and I want to get that in a
19 one second. One is a post-escape scenario, where you're
20 looking for the inmate.

21 JUSTICE SCALIA: Right, right.

22 MR. CURRAN: Our testimony on that was --
23 was not engaging in the question. There's no record
24 testimony regarding that.

25 So let me get to identification within --

1 JUSTICE SCALIA: Why do you need record
2 testimony on -- on a question such as that? If -- if
3 you're claiming if he escapes, he can shave off his
4 1/2-inch beard and thereby alter his appearance, and
5 the -- the response is, well, just take a photograph of
6 him before he grows his 1/2-inch beard, why do you need
7 that evidence on that point? It seems to me it's --
8 it's obvious.

9 What prevents you from taking a photograph
10 before he grows the 1/2-inch beard, which can then be
11 distributed to police departments if he escapes?

12 MR. CURRAN: You know, I agree, Your Honor.
13 I mean, there -- there are scenarios --

14 JUSTICE SCALIA: This is not an evidentiary
15 matter at all.

16 MR. CURRAN: The -- the point of
17 identification within the prison, though, is an
18 evidentiary matter on this record, and let me get to
19 that, because it's very important to understand this in
20 our prison's unique environment. Morton Lay testified
21 that shaving a beard can enable an inmate to get into an
22 area where he's not supposed to be in -- that's at Joint
23 Appendix page 104 -- and that a beard can enable an
24 inmate to deviate from an inmate's appearance on an ID
25 badge. That's at Joint Appendix 100. And, of course, a

1 beard is one of the quickest and easiest ways to change
2 one's appearance. That's on page 97 of the Joint
3 Appendix.

4 And, of course, the grooming policy itself
5 speaks in terms of maintaining the standard appearance
6 throughout the period of incarceration, minimizing
7 opportunities for disguise. And let me explain a minute
8 why this matters in our prison's unique environment and
9 why we're different, because it's a very important point
10 here.

11 The testimony on the record on page 101 of
12 the Joint Appendix was that we have a very different
13 situation with barracks housing and inmates going
14 outside the fence in large groups of 30 to 60 per
15 barracks unit every day. It's a very high-traffic,
16 maximum security facility where they come out of a large
17 barracks holding 30 or 60 inmates, go out, and then come
18 back.

19 And there's a lot of traffic there, and in
20 that environment rapid and accurate identification of
21 the inmate by his face, his -- his ID badge and the
22 like, but also general familiarity with the inmate and
23 who the guards are dealing with is very important in
24 that process. And if a mistake is made, an inmate could
25 get into the barracks where he is not supposed to be in

1 and an assault could occur. And these are separated by
2 enemies and the like. And that is very serious in our
3 environment. It was made on the record, and it
4 differentiates Arkansas from every State mentioned by
5 the Petitioner in the United States.

6 CHIEF JUSTICE ROBERTS: But you have no
7 example of that ever happening.

8 MR. CURRAN: I have no example of a -- well,
9 let me say this. In our brief, on footnote 13 and on
10 page 26 of the 18 States amicus briefs, there are
11 examples. There are no record -- there are no record
12 examples here.

13 CHIEF JUSTICE ROBERTS: Examples -- examples
14 of what?

15 MR. CURRAN: Of interprison identification
16 problems, of -- of -- with an escape type; you know, in
17 the prison, a beard being used to thwart identification.
18 And --

19 JUSTICE ALITO: Do you have that same
20 concern with the prisoners who have a very short beard
21 for medical reasons?

22 MR. CURRAN: No. And let me explain why.
23 There is confusion here as to what this so-called
24 medical beard is. There is no exception in practice of
25 a quantitative matter for medical beards. It is a

1 means-of-shaving exception. In fact, our policy changed
2 to reflect our actual practice about a year ago.

3 What the -- what the practice is is that
4 when a doctor's order says the person has a
5 dermatological condition or some other scarring or skin
6 condition that needs a shave, they use barber-style
7 clippers, electric clippers without a guard, and they're
8 used directly on the skin. And the result is a very
9 clean-shaven look, not quite as close as using a
10 tamper-resistant safety razor that other inmates use.
11 But it is a very clean-shaven face. The clippers are
12 kept in the barber facility and a couple of days will go
13 by --

14 JUSTICE ALITO: How long is -- how long are
15 the whiskers when that is done?

16 MR. CURRAN: So -- so they may take barber
17 call maybe twice a week. So they'll have a clean-shaven
18 face and then go a couple days, three days, and then go
19 back to the barber facility.

20 JUSTICE ALITO: You're saying that they're
21 completely clean-shaven?

22 MR. CURRAN: I'm saying that they are clean
23 -- I mean, what is clean-shaven? Some would say a razor
24 shave looks slightly --

25 JUSTICE ALITO: Clean-shaven is somebody

1 like you, all right?

2 MR. CURRAN: Right. I would say that's -- I
3 would say that's fair. I've got a -- I've got fairly,
4 fairly dense hair. But that's -- but that's the
5 appearance immediately after --

6 JUSTICE ALITO: And that's how they -- and
7 that would satisfy the medical problem?

8 MR. CURRAN: That's correct.

9 JUSTICE ALITO: To be shaved that closely?

10 MR. CURRAN: That's right. The doctor's
11 prescriptions invariably are get a clipper shave. And
12 that brings a second point up, Your Honor, is that the
13 policy's rationale was follow doctor's orders. And we
14 think that is fundamentally of a different nature than a
15 religious reason, because the Eighth Amendment law of
16 deliberate indifference and the like admits a no
17 countervailing security interest that come into play.
18 Our policy is we follow doctor's orders and that's the
19 end of the matter. Under the medical --

20 JUSTICE GINSBURG: So are you telling us
21 that the quarter inch is wrong? I thought that that was
22 in the record as a given, that a quarter inch is allowed
23 for medical reasons.

24 MR. CURRAN: The policy states that, Your
25 Honor, and it's confusing. In practice there is no

1 quantitative quarter inch rule for beards. There is a
2 clean-shaven rule that's allowed some length to go to
3 the next barber call a few days later. You can still
4 see the skin the entire time in that scenario. And if
5 the Petitioner wanted to avail himself of that
6 accommodation, we would let him do that.

7 JUSTICE GINSBERG: What about the argument
8 that it's -- never mind the least restrictive means, you
9 have no comparable rule about hair on one's head, where
10 it seems more could be hidden than in the beard, where
11 hide something in a beard and it might drop out.

12 MR. CURRAN: Yes, Justice Ginsberg. The
13 material difference there is our professional judgment
14 is the disguise-related component of a beard and shaving
15 that beard is more profound than one on the head. So
16 your point speaks to one of contraband and I agree as a
17 matter of common sense and logic there is a length and
18 gravity component to a head that's different than a
19 beard, for sure. But the risk is still there none the
20 same. I mean, there is an interest in regulating the
21 contraband element, but the head hair doesn't propose
22 the same disguise-related problem as a beard.

23 JUSTICE ALITO: Why is that? Why is that
24 so? Are you saying that somebody with or without a half
25 inch beard -- that's a bigger difference than somebody

1 who has longish hair versus the same person with a
2 shaved head?

3 MR. CURRAN: In our professional judgment,
4 it is, yes, that's correct. Because you're looking at
5 the essential features of a person's face, their
6 jawline, their chin and the like, and that's the means
7 by which we identify each other. And so that is a
8 significant difference in our view. And really the
9 head-hair policy complements the facial identification
10 policy because it's not allowed to get to a length that
11 could obscure the hair and that's the rationale for
12 that.

13 JUSTICE KAGAN: Mr. Laycock characterizes
14 your position as being essentially all deference all the
15 time. So I'll give you an opportunity to say when would
16 deference be inappropriate?

17 MR. CURRAN: Deference would be
18 inappropriate when the explanation offered on the
19 witness stand in the record of compelling interest and
20 the least restrictive means is -- neither comports with
21 logic or common sense.

22 I mean, I think -- I think it sounds like we
23 are all in agreement on that. And Justice Sotomayor
24 asked what lower court decision would maybe lend the
25 most guidance. I think a rather straightforward but apt

1 analysis is in the Couch case in the Fourth Circuit,
2 where Judge Draxler, joined by Justice O'Connor and
3 Judge Shedd, sort of went through -- the initial
4 obligation is to explain the reason and common sense why
5 that approach furthers a compelling interest in the
6 least restrictive means. And once that happens,
7 deference attaches, but that doesn't mean either that
8 you win the case. It just means that you have
9 substantial weight. There's sort of a thumb on the
10 scale, so to speak, and more evidence can come into play
11 and you could still lose.

12 JUSTICE SOTOMAYOR: Can I go back to -- just
13 so I'm clear in my head -- to two compelling, two
14 compelling interests, one in identification, one in
15 contraband.

16 MR. CURRAN: That's right, Justice
17 Sotomayor.

18 JUSTICE SOTOMAYOR: Is there a third or a
19 fourth or are those the only two?

20 MR. CURRAN: Those are the only two we are
21 talking about here.

22 JUSTICE SOTOMAYOR: And in this case, the
23 magistrate judge has said it's preposterous to think
24 that you could hide something. You don't have a
25 security -- contraband --

1 MR. CURRAN: Let me take on the
2 "preposterous," if I might. If you look at the written
3 findings, there is no such finding. In fact, the
4 finding was to the contrary. I believe it's on page 167
5 of the Joint Appendix. The magistrate judge says: "The
6 testimony about small bits of dangerous contraband is
7 indeed the most compelling in the entire case."

8 Then if you go back and look at the verbal
9 musings from the bench, the judge sort of reflects a
10 layman's view of, well, the idea of contraband in a half
11 inch beard seems almost preposterous. And then he jumps
12 down in the next paragraph, the immediate paragraph
13 after that, and said: Well, then I heard the testimony
14 of experienced, highly experienced correction
15 professionals, and they made me change my mind. He
16 didn't say "change my mind." He used the word
17 "impressed." The word "impressed" is at 155 of the
18 Joint Appendix.

19 So I think what you see here is a judge
20 doing what judges ought to do, which is come to court
21 with their layman's understanding of how things work and
22 then hearing this testimony and thinking, oh --

23 JUSTICE SOTOMAYOR: It is somewhat hard for
24 me, given what you just said, to figure this out,
25 because there may be in my mind some situations with

1 some prisoners where a half inch beard won't hide
2 anything, and with others that it will. Doesn't this
3 law require you to consider the individual before you
4 and to accommodate them in the least restrictive way?

5 MR. CURRAN: I think --

6 JUSTICE SOTOMAYOR: So let's assume that
7 what the magistrate judge meant -- which is what I
8 assumed; you have a different read -- that it's
9 preposterous to think this prisoner could hide something
10 in his beard, but not preposterous to think that others
11 might not be able to do so.

12 MR. CURRAN: The --

13 JUSTICE SOTOMAYOR: Assume my hypothetical.

14 MR. CURRAN: Right. The question -- you're
15 posing a question, I think, Justice Sotomayor as to
16 whether the warden, I guess, needs to do some sort of
17 hair analysis --

18 JUSTICE SOTOMAYOR: No. No. No. No. My
19 question is one of whether you're obligated under this
20 statute --

21 MR. CURRAN: Right.

22 JUSTICE SOTOMAYOR: -- to look at the
23 request of the individual and assume that the
24 application of whatever rule you create can't have an
25 exception as to that individual.

1 MR. CURRAN: On this testimony, Your Honor,
2 you pointed out that the testimony was a half inch
3 beard, you can't see the skin. And I think that's a
4 functional difference. And we've got to think of how to
5 administer a rule where to the person that that level of
6 granularity is just not functional --

7 JUSTICE SOTOMAYOR: Yes. But I don't know.
8 Given the deference that was given here, the question
9 is, was it applied too broadly? What I'm getting at is
10 does the Court have to look at the individual request
11 and figure out whether it can be accommodated in the
12 least restrictive way?

13 MR. CURRAN: Yes. I think it's fair to say
14 that if the Court actually did say it was preposterous,
15 in other words saying that defies common sense.

16 JUSTICE SOTOMAYOR: In this case.

17 MR. CURRAN: In this case, yes. I think
18 that's right. But I don't think that's an accurate
19 finding of what the magistrate judge says, and I do
20 think that's a problem and that rule is not
21 administrable.

22 It's far easier to say how about an eighth
23 inch beard where in all scenarios you can't see the
24 skin. I mean, you can imagine a warden running that
25 kind of rule much better than what can we show as to

1 each person's hair type. And if he asked for that kind
2 of accommodation, we would grant it. But he has not
3 offered that. He has offered a half an inch, and he has
4 got a very complex lesser-of-the-evils type of
5 principle.

6 JUSTICE SOTOMAYOR: Now, on the change of
7 looks, I'm still not sure. Could you describe it in
8 more detail? I obviously missed it in the record. What
9 is this barracks situation?

10 MR. CURRAN: Sure.

11 JUSTICE SOTOMAYOR: They leave the compound.
12 Where do they go when they leave the compound?

13 MR. CURRAN: So they're in a barracks
14 situation, they've got 30 to 50 or so in a room, and
15 there are four barracks on each side of a common roof.
16 They go out and they get in a line in different shifts,
17 so to speak, and they go out and they will go to chow
18 and they will do their business and they will go out and
19 work outside the prison fence in fields, and they will
20 come back again. And it's a very high traffic
21 environment that's --

22 JUSTICE SOTOMAYOR: Are these unprotected
23 fields?

24 MR. CURRAN: There is guards there watching
25 them. You're not just out working alone, but there is

1 no prison fence there. I mean, it's up to the guard to
2 keep up with them. So what you have is an environment
3 which on this record on page 101 of the Joint Appendix
4 was we are not like California. We are not like New
5 York. They have cell block housing. And there is no
6 instance in which the government or the Petitioner has
7 said to challenge that as to maximum security
8 facilities. That's a very big difference in the nature
9 of how our institution runs.

10 And we think if deference means anything, it
11 means you don't have to copy the prison policies of
12 other States who don't even have the similar security
13 concerns that we do.

14 JUSTICE GINSBURG: Did you establish that
15 Arkansas is unlike all these other States, that the
16 other States don't have barracks, they don't have people
17 going out to work in the field? I thought that that was
18 not so, that there are other prisons that operate
19 similarly with housing and having the prisoners work on
20 a farm.

21 MR. CURRAN: Two things in response to that,
22 Justice Ginsburg. First is on this record there was
23 only two States offered, California and New York, and
24 the undisputed testimony on this record at page 101 is
25 they are different. And that stands undisputed.

1 Now, your question as to what about all the
2 footnotes in the briefs to this Court. If you look
3 behind all of the sources cited on those Internet sites,
4 which that's what Petitioner mostly uses, and the
5 government uses Internet sites and also some case law
6 examples, each one of those is referring to a minimum
7 security institution. They have not offered any
8 institutions like ours. As far as I can tell, the only
9 institutions that have something similar to ours have
10 clean-shaven rules.

11 JUSTICE GINSBURG: What about the Federal
12 prison system? I thought the rule was throughout the
13 prison system.

14 MR. CURRAN: Both the Government and the
15 Petitioner cite a link to the regulation in their briefs
16 and that is to minimum security status inmates.

17 JUSTICE ALITO: When a prisoner goes out in
18 the field and then wants to come back to the barracks,
19 are the prisoners wearing an ID; is that correct.

20 MR. CURRAN: That's correct.

21 JUSTICE ALITO: And does it say which
22 barracks that prisoner is supposed to go to?

23 MR. CURRAN: Yes. And what happens is they
24 trade ID's and they trade shirts. That happens even
25 now.

1 JUSTICE ALITO: Does the ID have a picture
2 on it?

3 MR. CURRAN: Yes. So -- so the person
4 guarding the barracks, so to speak, the -- the flow to
5 and from the barracks, relies on the ID and the face,
6 but also general familiarity with who he's working with
7 because that's sort of the -- I mean, that happens, that
8 general familiarity --

9 JUSTICE ALITO: I'm just trying -- I'm
10 having difficulty envisioning what you're -- the
11 scenario that you're -- you're suggesting. So a
12 prisoner who's supposed to be in barracks A has a
13 1/2-inch beard, has an ID that says barracks A, has that
14 person's picture on it, goes out in the field, brings a
15 razor with him?

16 MR. CURRAN: Shaves --

17 JUSTICE ALITO: While he's out there, he
18 shaves, then he wants to come back and go into barracks
19 B. And how's he going to get into barracks B if he has
20 an ID that says barracks A? Now you say he's going to
21 trade with another prisoner? Then he will have a
22 different picture on the ID, he's going to alter --
23 they're going to alter the IDs also while they're out
24 there in the fields?

25 MR. CURRAN: No. They -- they alter the --

1 they would alter the ID. I mean, they -- what happens
2 is you've got very fast recognition and if they favor
3 each other at all -- I mean, this happens now, Your
4 Honor. I mean, so -- and the shave would take place
5 probably in the barracks in the morning. But when they
6 come back, the person monitoring the flow of 60 inmates
7 through there gets beaten, and that happens. And the
8 concern is the --

9 JUSTICE ALITO: So he has to find somebody
10 who also looks like him from barracks B.

11 MR. CURRAN: I would think that's how that
12 scenario would work, but that's -- that happens. And
13 that's -- I mean, prisoners are capable of doing a lot
14 of mischief in prison, as you understand, I think,
15 and -- and that kind of thing happens even now. I mean,
16 we have assaults in the wrong barracks because
17 correctional officers get beaten.

18 JUSTICE GINSBURG: One of the hazards is
19 razors. You just said that they can shave themselves in
20 the barracks. Where do they get those razors and what
21 happens to them?

22 MR. CURRAN: The -- we have tamper-resistant
23 safety razors that are issued and they keep them in
24 their personal possession, and then they -- when they're
25 through with them, they can turn them back in on a

1 one-to-one basis and get a new one if they exchange an
2 old one.

3 JUSTICE GINSBURG: Does your standard --
4 how, if at all, does your standard differ from what it
5 would be if we had no RLUIPA? Is there any case -- now
6 we have RLUIPA -- any case that would come up
7 differently in Arkansas under RLUIPA than under the
8 preexisting law?

9 MR. CURRAN: Well, I have to kind of get to
10 the different elements. I think, O'Lone -- I mean, I'll
11 talk first about maybe compelling interest. O'Lone
12 credited prison officials' testimony that Muslim inmates
13 are sort of getting a good rehabilitative event by not
14 having to go back into the prison for Friday prayer
15 because they might as well get used to an intolerant
16 employer when they're out in the free world. That won't
17 pass muster under compelling interest anymore. I mean,
18 that just -- that was the old standard and the interest
19 has to be truly compelling.

20 On least-restrictive means, we think that
21 interest grounded mostly in cost and hassle would have
22 survived under the old regime which had a lot of, say,
23 dietary cases and the like. Those probably will -- will
24 fail a lot more often under RLUIPA than under the
25 previous standard. So if an incremental, like the

1 Yellowbear case, maybe an incremental increase in more
2 staffing, ever so slight, might say, okay, that -- that
3 is required to pass least restrictive means, but it
4 wasn't under -- under the prior standard.

5 So I think even under a deferential approach
6 to RLUIPA, grounded in logic and common sense, you'll
7 still have more vigor under the RLUIPA standard and
8 cases will go the other way more often than under the
9 prior standard.

10 JUSTICE SOTOMAYOR: What about this whole
11 issue about cost in the statute 2000-cc-3(c) that says,
12 "This chapter may require a government to incur expenses
13 in its own operations to avoid imposing a substantial
14 burden on religious exercise."

15 MR. CURRAN: Yes, Your Honor.

16 JUSTICE SOTOMAYOR: So isn't -- it's
17 anticipating --

18 MR. CURRAN: It is.

19 JUSTICE SOTOMAYOR: -- that there might be
20 expense.

21 MR. CURRAN: That's exactly right. And so
22 that's, you know, even within a least restrictive means
23 analysis, there's a particular statutory command. Now,
24 I think courts are going to have to manage that with
25 reason, right? We can't have each inmate has his own

1 facility with 10 guards around it. There's going to
2 have to be some limit on cost, but I don't know that
3 this case really implicates --

4 JUSTICE SOTOMAYOR: Cost.

5 MR. CURRAN: -- much of a cost issue, right.

6 JUSTICE SOTOMAYOR: It -- it doesn't
7 implicate the cost issue.

8 MR. CURRAN: Right.

9 JUSTICE SCALIA: Mr. Curran, I'm not sure
10 what your position is. I -- I thought earlier that you
11 had pretty much abandoned the concealment justification
12 for the policy. Do you -- do you still -- and were
13 relying upon the identification justification.

14 MR. CURRAN: No. We think each
15 justification stands on its own weight and we're --

16 JUSTICE SCALIA: You think something can be
17 concealed within a 1/2-inch beard.

18 MR. CURRAN: I think that on this record
19 that something as small as a SIM card, which the Court
20 found compelling, could. I do think that the
21 identification within the prison is more weighty here.

22 JUSTICE ALITO: As far as concealment is
23 concerned, what -- what is the difference between a
24 1/2-inch beard and hair on the head that's much longer?

25 MR. CURRAN: Well, the testimony on the

1 record was that your common sense view that longer hair
2 is a better way to conceal contraband, I think, is a
3 right one. The question really is: Is a beard an
4 unlikely place? Well, the testimony here is not only
5 can something fit in -- in a beard, but correctional
6 officers very likely will be somewhat reluctant to do a
7 full search of the beard like they would with, say, head
8 hair.

9 JUSTICE BREYER: I take it there's no
10 example, not a single example in any State, that allows
11 beard policies where somebody did hide something in his
12 beard.

13 MR. CURRAN: I think that's mostly right,
14 Your Honor. I think there's an affidavit --

15 JUSTICE BREYER: So we have no example.

16 MR. CURRAN: There is no example.

17 JUSTICE BREYER: So there is no such
18 examples. Then do you think it might fit within the
19 language of that report which says that the fear of
20 people hiding things in their beards is, to use their
21 language -- what was it -- grossly exaggerated? I mean
22 42 States. You know where I'm quoting from. I'm
23 quoting from the report there. The exact words are what
24 they are trying to get at is "exaggerated fears." It
25 doesn't even say gross there. Would you say it's an

1 exaggerated fear that people would hide something in
2 their beards when, in a country of a very high prison
3 population, not one example has ever been found of
4 anybody hiding anything in his beard, as far as you can
5 tell and as far as I can tell.

6 MR. CURRAN: As far as --

7 JUSTICE BREYER: Do I have that right?

8 MR. CURRAN: As far as I can tell. But let
9 me make a caveat there that I think is important, which
10 is that just because we haven't found the example
11 doesn't mean they aren't there. And the courts --

12 JUSTICE BREYER: No. There are a lot of
13 things we've never found that might be there and I'll
14 refrained from mentioning them. You see them on
15 television, a lot of weird programs from time to time.

16 (Laughter.)

17 MR. CURRAN: The problem, Your Honor --
18 Justice Breyer, with -- with this scenario is these kind
19 of things are buried in incident reports among thousands
20 of other things. And this Court, in the Florence case,
21 Justice Kennedy asked the assistant to the Solicitor
22 General, I thought the evidence here of contraband was
23 rather skimpy. I was surprised to see that there
24 weren't more of this. And the -- the attorney's
25 response was these things are buried in incident

1 reports. We can't find all of these examples. It's the
2 nature of prisons, but take my newspaper articles.
3 And -- and the Court actually, you know, took note of
4 that as confirming its common sense intuition there in
5 part 3 of its opinion. And I think that's just a
6 problem of empiricism in the -- in the prison
7 environment.

8 JUSTICE ALITO: Well, as far as searching a
9 beard is concerned, why can't the prison just give the
10 inmate a comb, you could develop whatever kind of comb
11 you want, and say comb your beard, and if there's
12 anything in there, if there's a SIM card in there or a
13 revolver or anything else you think --

14 (Laughter.)

15 JUSTICE ALITO: -- can be hidden in a
16 1/2-inch beard, a tiny revolver, it'll fall out.

17 MR. CURRAN: You know, I suppose that's a
18 possible alternative. I think the concern there is
19 there's no perfect way of searching and -- and there's a
20 lot of area there and you're going to have to really
21 monitor to make sure they get all the spots. But --

22 JUSTICE ALITO: Do you really think that
23 would be difficult, to say here's a comb, comb your
24 beard?

25 MR. CURRAN: I don't think it would be that

1 difficult. I mean, I'm not in the prison environment.
2 It really wasn't raised on this record. My clients
3 might think that it is, but based on the information I
4 have, I would agree that sounds like that would be
5 something that could be done.

6 And I do think it's important to distinguish
7 sort of the rule that I would propose and that's in the
8 Couch case, and that is -- what I think is very similar
9 to what the government's offering here, is really an
10 effort to marry strict scrutiny with deference in a way
11 that doesn't invite empiricism. This Court's strict
12 scrutiny jurisprudence hadn't always demanded examples,
13 especially in the prison context. And I think that it's
14 important that we do be allowed to have prophylactic
15 rules in some settings.

16 Justice Ginsburg asked, well, what about
17 literature? We have a rule that says racially
18 inflammatory literature of a religious nature that
19 incites violence isn't allowed in the prison.

20 And Justice Ginsburg in the footnote in the
21 Cutter opinion seemed to think that of course that's a
22 concern that prisons ought to be worried about. That's
23 not susceptible to any kind of empirical proof, I don't
24 think.

25 And as I understand my friend's

1 understanding of the rule, we are in a land of strict
2 scrutiny really that's akin to content-based speech
3 restriction analysis, where prophylaxis is to be
4 condemned, we ought to really be using after-the-fact
5 deterrent measures against maximum security inmates,
6 that have already shown themselves not to sort of
7 comport with that view of how to behave. And I think
8 that's particularly dangerous in the prison setting,
9 particularly in our prison's environment.

10 Thank you, Your Honor.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Professor Laycock, you have five minutes
13 left.

14 REBUTTAL ARGUMENT ON BEHALF OF

15 THE PETITIONER

16 MR. LAYCOCK: On the issue of the written
17 findings, THE magistrate said it's almost preposterous
18 to believe he can hide anything in his beard, and then
19 he immediately said: But there's a larger principle
20 here, which is I have to defer to these people. And the
21 subsequent written findings are based on that mistaken
22 level of deference. He said three times: I'm
23 constrained by the Fegans case.

24 The Eighth Circuit precedent essentially
25 applied the pre-RLUIPA constitutional rule, the

1 magistrate was bound by that, and he gave that level of
2 deference and he made written findings apart from what
3 he had actually seen.

4 On the issue of identification inside the
5 prison, prisoners can shave their heads, shave their
6 mustache, shave their medical beards. They don't claim
7 that's a significant problem. The other 43 States do
8 not appear to have found this to be a significant
9 problem. It is -- it is a small and manageable problem.

10 The -- on the question of the quarter inch
11 medical beard, the policy is in the appendix to our
12 brief at page 11A. This morning is the first time we've
13 heard, well, it's really not a quarter-inch rule, it's
14 really some other kind of rule. It's the first time
15 we've heard we had a religious claim to have a medical
16 beard. They never said that before. And, you know,
17 they have not been able to justify their policy.

18 They do have to prove it, Justice Kagan, and
19 if the proof comes close they get deference. If they
20 offer serious evidence they get deference. But here
21 they offered very limited conclusory testimony, no
22 examples, in a situation where there should be plenty of
23 examples. You can't administer a prison and maintain
24 any kind of safety and security if you don't have some
25 sense of where prisoners hide things.

1 They don't have to dig out the data from the
2 files. If prisoners were routinely hiding things in
3 beards these two witnesses would have known that, would
4 have remembered it from the earlier rule in Arkansas and
5 it would be easy to get examples to that from other
6 States.

7 There's simply no evidence in this record
8 that it's a significant problem.

9 JUSTICE GINSBURG: What about the argument
10 that there's no comparison, that Arkansas is unique in
11 the way it houses its prisoners, and that the rules that
12 were cited elsewhere have to do with minimum security
13 facilities?

14 MR. LAYCOCK: Arkansas may be somewhat
15 different in how it -- in the number of maximum security
16 prisoners working outside in the fields, but that does
17 not make the half-inch beard any more attractive of a
18 hiding place.

19 If I'm out in -- if I'm out in the fields
20 and I'm trying to smuggle something back in, I've still
21 got lots of better places to smuggle it, including my
22 shoes and my pockets and the lining of my clothes and,
23 as Mr. Curran just agreed, the hair on top of my head.

24 Again, there's just not a rational
25 difference between where on the head the hair is

1 located.

2 JUSTICE KAGAN: You made a statement just
3 then, Mr. Laycock, about how to think about deference in
4 the context of this statute and it's something that
5 still troubles me, so I'm going to ask you to expand on
6 that. To say -- it just seems like a contradiction in
7 terms, so I want to understand how it's not a
8 contradiction in terms.

9 MR. LAYCOCK: Well, it -- there's obviously
10 some tension here, but the legislative history says due
11 deference. The Cutter opinion quotes that legislative
12 history and says due deference to expertise. It doesn't
13 say how much deference is due. That's the question to
14 be decided here.

15 You know, we think the more informed and
16 considered and well-explained their decision, the more
17 deference it naturally deserves, the more deference is
18 due. But they have to take some account of the
19 prisoner's religious needs. They have to take some
20 account of solutions that have been found to work in
21 other States.

22 If it's something so dangerous no one would
23 ever try it like the Sickerpan, then of course you
24 wouldn't expect examples. But here 43 States have tried
25 it, Arkansas tried it for years throughout -- in a

1 situation like that, where there ought to be plenty of
2 examples if there's a problem, they ought to have to
3 produce some of those examples.

4 So the degree of deference it is due depends
5 on the quality of their explanation, the quality of
6 their consideration of the issue, and here there's no
7 indication they ever considered the religious needs of
8 the prisoners in the adoption of this rule, or if they
9 ever took a second look at it after RLUIPA was adopted.
10 And the testimony is very conclusory, devoid of
11 examples, devoid of attention to other jurisdictions.

12 The level of deference cannot be so great as
13 to negate the statutory standard. You have to
14 administer deference within that standard, not
15 substitute deference for the standard, and the statutory
16 standard is still compelling interest and least
17 restrictive means.

18 Thank you, Your Honors.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 The case is submitted.

21 (Whereupon, at 11:03 a.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

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