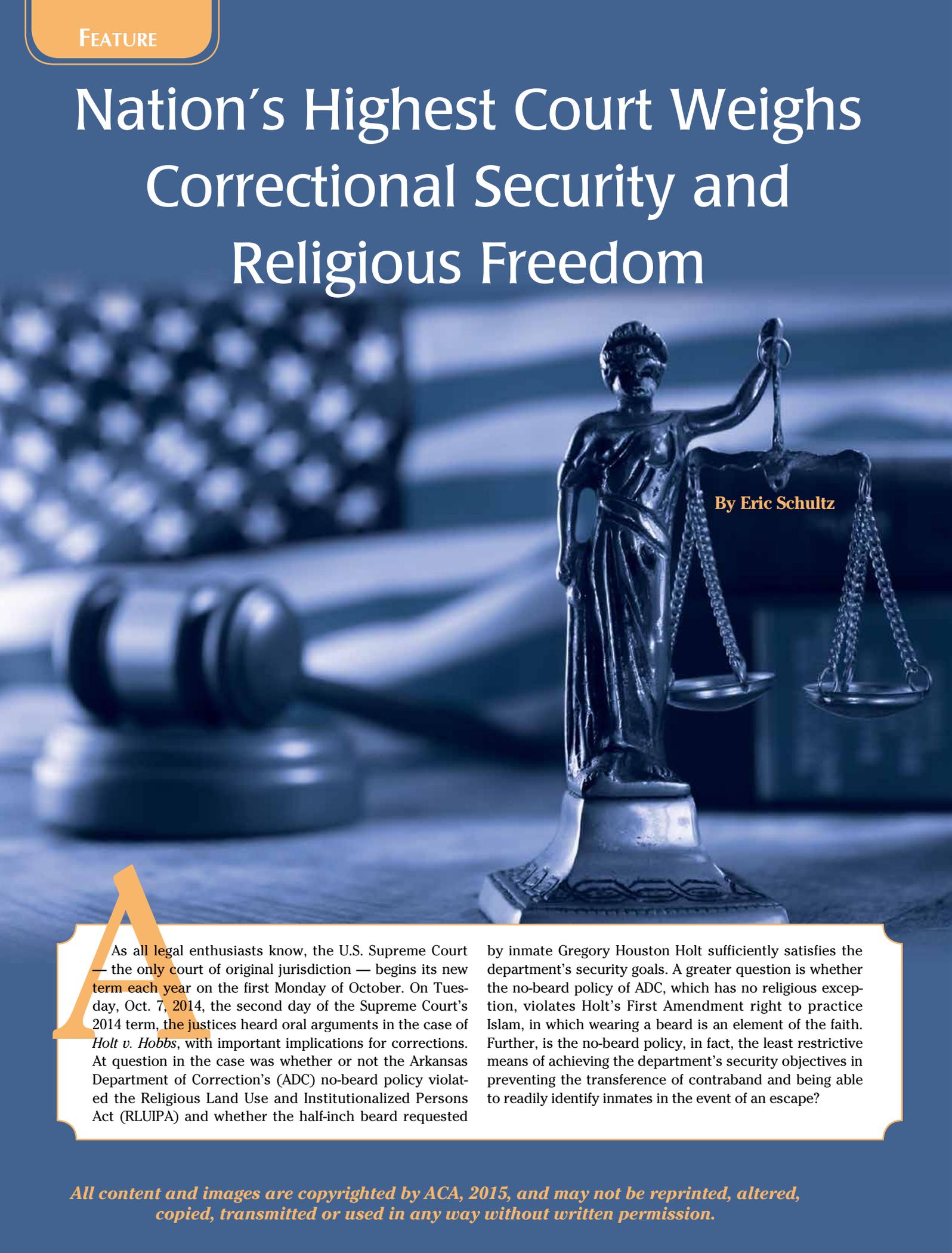


# Nation's Highest Court Weighs Correctional Security and Religious Freedom

A blue-tinted photograph of a justice scale and a gavel on a desk. The scale is in the foreground, and the gavel is in the background. The text "By Eric Schultz" is overlaid on the right side of the image.

By Eric Schultz

As all legal enthusiasts know, the U.S. Supreme Court — the only court of original jurisdiction — begins its new term each year on the first Monday of October. On Tuesday, Oct. 7, 2014, the second day of the Supreme Court's 2014 term, the justices heard oral arguments in the case of *Holt v. Hobbs*, with important implications for corrections. At question in the case was whether or not the Arkansas Department of Correction's (ADC) no-beard policy violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) and whether the half-inch beard requested

by inmate Gregory Houston Holt sufficiently satisfies the department's security goals. A greater question is whether the no-beard policy of ADC, which has no religious exception, violates Holt's First Amendment right to practice Islam, in which wearing a beard is an element of the faith. Further, is the no-beard policy, in fact, the least restrictive means of achieving the department's security objectives in preventing the transference of contraband and being able to readily identify inmates in the event of an escape?

## Establishing the Precedent for Holt's Case

Last year, the Eighth Circuit Court of Appeals decided that the ADC's policy does not violate RLUIPA. In his petition, Holt, also known as Abdul Maalik Muhammad, argued that RLUIPA provides that no government shall impose a substantial burden on the religious exercise of a person confined to an institution unless the government demonstrates the restriction is for a compelling governmental interest and the least restrictive means possible. He argued that ADC's claim that allowing an exception would compromise security is indefensible given that 44 other states and the federal prison system, all with the same security concerns, currently allow beards while ADC does not.

Holt is a devout Muslim. ADC does not refute the sincerity of his religious faith or of Holt's belief that he must grow a beard based on the teachings on hadith, which says, "cut the moustaches short and leave the beard as it is."<sup>1</sup> ADC's policy 98-04, meanwhile, prohibits beards except for those a quarter-inch long for medical purposes. When in violation of the beard grooming policy, inmates are subjected to progressively escalating disciplinary actions. Per policy, all inmates are photographed at intake and then again, as needed, if there is a change in hair, mustache, sideburns or beard that significantly alters the inmate's appearance. Holt sought permission to grow his beard through the proper grievance process and properly exhausted his remedies. Although he understands hadith to require a full beard, he only ever sought permission to grow a beard with a half-inch length as a compromise. He was denied and thus filed suit for an injunction the magistrate denied, but which was overturned by the district court. As petitioner, he testified in his original hearing that it would be impossible to hide anything in his beard. ADC officials argued against his point and added that prisoners who escape could very easily change their appearance by simply shaving their beard, but with both claims, ADC officials could not cite examples. Warden Gaylon Lay was in charge of the unit where Holt was held. He testified to the magistrate that homemade darts, bits of razor and other weapons could, in fact, fit into a half-inch beard. However, Lay also testified that contraband could also be concealed in the mouth, and a beard helps to alter one's facial appearance.

Most systems, including ADC's, will take multiple photos of inmates. Prison officials also argue that it would be burdensome to continually monitor the length of Holt's beard. They insisted that an exception for Holt, and any exception of policy on behalf of any inmate, would invoke resentment between inmates, endanger the inmate or place him in a position of leadership within the population, although at the time of the hearing, Holt had maintained his beard because of the injunction, and there were neither hostilities nor elevation of his status among the inmates.

Of the 44 states that allow inmates to grow at least a half-inch beard, 42 actually have no restrictions on facial hair length whatsoever. In 2008, the Eighth Circuit Court rejected a previous challenge to RLUIPA regarding a grooming policy in the case of *Fegans v. Norris*. However, in that case, the petitioner wished to have hair and/or beard of unlimited length, whereas, Holt was only petitioning for a half-inch beard. In his ruling, the magistrate cited *Fegans v. Norris* as giving, "deference to prison officials if they're able to state legitimate penological needs," and thus recommended the injunction be lifted. The magistrate concluded that the state had demonstrated compelling interest and the least restrictive means. He further concluded that Holt had not proved that his religious exercise had been substantially burdened because he was still allowed to practice all other elements of Islam. Finally, the magistrate recommended the complaint be dismissed because of his failure to state a claim on which relief could be granted. The district court adopted the recommendations, but later stayed the order, pending appeal. The Eighth Circuit Court affirmed the ruling and released its opinion that the state should be granted deference, while once again relying on the ruling in *Fegans v. Norris*.

## Holt's Attorneys Build a Case

Legally, the case of *Holt v. Hobbs* questions the strict scrutiny standard of RLUIPA and the burden of proving a compelling interest and least restrictive means. The Eighth Circuit Court seemingly places this burden on the inmate, while RLUIPA and the Religious Freedom Restoration Act (RFRA) actually places burden on the government. Holt's attorneys claimed that the state has not come close to demonstrating either the compelling interest or the least restrictive means. Holt's attorneys argued that "less restrictive means" are readily available but are ignored by ADC, such as searching the beard itself, like with other searches. Officials could comb the beard, ask the inmate to run fingers through it and/or they could require inmates to shave clean if they are ever caught with contraband. Photos of the inmate with and without the beard resolve the identification question, and, the attorneys added, monitoring a quarter-inch beard is no more or less burdensome than monitoring a half-inch beard. Holt's attorneys believe the lower courts incorrectly applied the rational-basis standard applicable to certain categories of inmate constitutional rights under *Turner v. Safley*, thereby shifting burden of proof from the respondents, ADC, to the petitioner, Holt. RLUIPA, Holt's attorneys claimed, was enacted to provide an alternative to the Turner standard.



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### ADC's Defense of the "No Beard" Policy

ADC explains that Holt is not an exception to the typical inmate housed at ADC's maximum-security prisons. He is violent, having been convicted of first-degree murder and killing a correctional officer with a shank while incarcerated. He has made regular threats of violence against state officials, witnesses, police and others. ADC, like other systems, takes religious freedoms seriously, but must also weigh them against the interests of safety and security, say their attorneys. ADC's attorneys also argue that "courts have consistently taken a pragmatic and deferential approach in what it means to enjoy a constitutional right to freely exercise one's religion within the confines of prison walls." They cite *O'Lone v. Estate of Shabazz*, which offered, "Lawful incarceration brings about the necessary withdrawal of limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system, and that appropriate balance of the relevant factors requires courts to give appropriate deference to prison officials who are actually charged with and trained in the running of the particular institution."<sup>2</sup>

Beyond the question of allowable beard length and such matters as "least restrictive means," the court, in this case, had the opportunity to establish a definitive legal framework for deciding all RLUIPA claims, argued the attorneys for ADC. In its brief to the court, ADC listed the following pertinent questions to be resolved:<sup>3</sup>

- Must a violent offender, who has not been caught hiding contraband or harming others, be allowed to possess metal balls and wands, which could be crafted into weapons, such as in the case of *Levie v. Ward*?;

- Should an inmate be allowed to fulfill his religious obligation to perform yoga next to a cellmate outside of recreation time, absent an individualized feasibility study, and thus placed him/her in a vulnerable position?;
- To what extent must prison officials allow Sikh inmates to possess kirpans or functional knives, which are required by the religion, such as in the case of *Cheema v. Thompson*?; and
- Must prisons allow Tulukeesh inmates to comply with their religious duty to spar with other inmates, such as in the case of *Jova v. Smith*?

The respondents (ADC) also posed the questions, "What if no multivariate regression study bears out the prison's fears? What if no such statistical study is even possible, under the rigorous standards of social science, given the absence of complete data on the origins of contraband and the means by which it is smuggled into the prison? And at what point are the administrative and cost considerations of the legal regime relevant?" ADC officials added to their argument the fact that the Cummins Unit, where Holt was housed, has a barracks-type structure, whereas most high-security units in other states have one- or two-person cells as part of a larger cellblock. The cellblock arrangement greatly restricts the flow of contraband, as physical access is much more restricted. Regarding contraband and beard length, Larry May, ADC's assistant director of institutions, testified during the preliminary injunction hearing that one of the department's biggest problems regarding contraband is cell phones. He points out that the subscriber identity module, also known as the SIM card, for a cell phone is typically three-eighths of an inch by three-eighths of an inch, small enough to be concealed by a half-inch beard. "Deference" within the strict scrutiny standard, as applicable to prisons and RLUIPA was characterized by ADC in its brief in the following four ways:

- Prisons must devise prophylactic rules before an escape or violent incident occurs, so courts should not require data, studies or examples;
- Courts should respect the fact that running prisons involves complicated trade-offs between competing interests;
- Prison administrators must devise rules that are suitable to their particular prison environments, and the law does not compel them to accept the heightened risks that other jurisdictions have chosen to accept; and
- Courts should not invent administrative requirements that are not a part of RLUIPA.

## Oral Arguments of *Holt v. Hobbs*

During oral arguments, Justice Antonin Scalia and Chief Justice John Roberts questioned Douglas Laycock, counsel for Holt, about the request for only a half-inch of beard growth. Scalia said, “Well, religious beliefs aren’t reasonable. I mean, religious beliefs are categorical. ... It’s not a matter of being reasonable.”<sup>4</sup> Roberts followed up the line of questioning with a similar challenge. He said, “It seems [that] one of the difficult issues in a case like this is where to draw the line. And you just say, ‘Well, we want to draw the line at a half inch because that lets us win.’ And the next day someone’s going to be here with one inch ... It seems to me you can’t avoid the legal difficulty just by saying, ‘All we want is half an inch.’” He argued that the Supreme Court must “decide this case pursuant to a generally applicable legal principle, and that legal principle ... demands some sort of a limit. And if you’re unwilling to articulate a limit to the principle itself, it becomes a little bit difficult to apply it.”

Justice Anthony Kennedy pressed the issue, asking what the standard should be — one established in RLUIPA, the Turner standard (due deference) or another? Laycock argued, “The test is compelling interests and least restrictive means, and deference must be administered in the context of that standard, not instead of that standard. So if it’s a close case on compelling interest, they may well get deference. If they give a reasoned and well-considered and informed explanation, they deserve more deference.” The actual administration or enforcement of the beard length was questioned as well. Laycock challenged the validity of ADC’s claims that it would be difficult to monitor on the basis that ADC already has an exception to the policy.

Compelling interest, Laycock believed, should be established in order to make the case for deference, but ADC had not sufficiently made that case. Laycock argued, “They offer so little evidence and no examples and no consideration of solutions elsewhere. They haven’t done anything to deserve deference. They haven’t shown expertise, and even with deference ... it doesn’t make out a compelling interest.”

Anthony Yang, counsel for the respondent, pressed upon the justices saying, “You’re talking about deference to the predictive judgments of officials based on their experience and expertise, based on the fact that they are, in fact, charged with protecting the public and administering these prisons. And so, when they provide a reasoned explanation based on experience and expertise, they don’t have to point to a specific example.” Roberts seemed to concur with the rationale, but he pressed Yang on the legal principles. Roberts said, “If there is no direct legal principle, then isn’t it a situation in which you would employ deference to the administrative judgment?” Yang summed up ADC’s arguments simply by saying, “I think that’s exactly right. That there is going to be a bound, a range of reasonableness that courts will find appropriate to defer to predictive judgments by expert officials in various contexts.”



**The court released its opinion on Jan. 20, 2015 and held that ADC’s grooming policy did, in fact, violate RLUIPA.**



When challenged on the “compelling state interest” versus “reasonableness” claim by Scalia, Yang argued, “The court actually recognized in *Cutter v. Wilkinson*, ‘The Act needs to be applied in an appropriately balanced way, with particular sensitivity to security concerns, and that accommodation must be measured so it does not override other significant interests.’”<sup>5</sup>

### Ruling

The court released its opinion on Jan. 20, 2015 and held that ADC’s grooming policy did, in fact, violate RLUIPA. ADC, it said, failed to show a “compelling interest” in preventing inmates from hiding contraband or disguising their identities. The court further stated that ADC failed to meet the “least restrictive means” standard, and security concerns could be satisfied by other means. Justice Samuel Alito wrote the opinion of the court, which ruled unanimously, and overturned the decision of the U.S. Court of Appeals for the Eighth Circuit in favor of Holt. In short, the court held that RLUIPA and RFRA were passed by Congress “in order to provide very broad protection for religious liberty.”<sup>6</sup>

The Supreme Court ruled that the lower court erred in three ways. First, the district court incorrectly concluded “that the grooming policy did not substantially burden Holt’s religious exercise because he could still practice his religion in other ways.” This reasoning, they said, “is based on prior First Amendment claims, wherein alternate means of practicing religion is a relevant consideration, but RLUIPA provides greater protection.” Second, the district court erroneously suggested that the burden on the petitioner’s religious exercise was slight because the petitioner testified that his religion would “‘credit’ him for attempting to follow religious beliefs.” However, the court clarified, “RLUIPA applies to an exercise of religion regardless of whether it is ‘compelled.’” Finally, the district court improperly relied on the petitioner’s testimony that not all Muslims

believe that men must grow beards. The court held that “RLUIPA’s guarantees are not limited to beliefs which are shared by all of the members of a religious sect.”<sup>7</sup>

Alito wrote that the court, “agrees that prisons have a compelling interest in the quick and reliable identification of prisoners,” but that the ADC policy still violates RLUIPA because of the circumstances in this case. The court was unpersuaded by ADC’s arguments that its prison system is so different from the many other institutions that allow facial hair or that half-inch of beard growth is a greater risk than a quarter-inch of growth.

The court went on to say that RLUIPA does not require a prison to grant a particular religious exemption as soon as a few other jurisdictions do so, and although it provides substantial protection for the expression of religious exercise of institutionalized persons, it also gives corrections officials ample ability to maintain security. First, in applying RLUIPA’s statutory standard, courts should not blind themselves to the fact that the analysis is conducted in the prison setting. Second, if an institution suspects that an inmate is using religious activity to cloak illicit conduct, “prison officials may appropriately question whether a prisoner’s religiosity, asserted as the basis for a requested accommodation, is authentic.”<sup>8</sup> Third, even if a claimant’s religious belief is sincere, an institution might be entitled to withdraw an accommodation if the claimant abuses the exemption in a manner that undermines the prison’s compelling interests.

## ENDNOTES

<sup>1</sup> Laycock, D. and E.C. Rassbatch et al. Brief for the petitioner. Case no. 13-6827. Washington, D.C.: American Bar Association. Retrieved from [www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/BriefsV4/13-6827\\_pet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-6827_pet.authcheckdam.pdf).

<sup>2</sup> O’Lone v. Estate of Shabazz. 1987. 482 U.S. 342.

<sup>3</sup> Curran, D.A. and D. McDaniel. Brief for the respondents. Case no. 13-6827. Washington, D.C.: American Bar Association. Retrieved from [www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/BriefsV4/13-6827\\_resp.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-6827_resp.authcheckdam.pdf).

<sup>4</sup> U.S. Supreme Court. 2014. Gregory Houston Holt, aka Abdul Maalik Muhammad, petitioner, v. Ray Hobbs, director, Arkansas department of correction, et al., respondents, case no. 13-6827. Washington, D.C.: Alderson Reporting Company. Retrieved from [www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/13-6827\\_48c4.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-6827_48c4.pdf).

<sup>5</sup> Cutter v. Wilkinson. 2005. 544 U.S. 709.

<sup>6</sup> Burnell v. Hobby Lobby Stores Inc. 2014. 573 U.S. 354.

<sup>7</sup> Thomas v. Review Board of Indiana Employment Security Division. 450 U.S. 707.

<sup>8</sup> Cutter v. Wilkinson. 2005.



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