

**In The
Supreme Court of the United States**

GREGORY HOUSTON HOLT a/k/a
ABDUL MAALIK MUHAMMAD,

Petitioner,

v.

RAY HOBBS, DIRECTOR, ARKANSAS
DEPARTMENT OF CORRECTIONS, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit**

**BRIEF *AMICUS CURIAE* OF THE
NATIONAL JEWISH COMMISSION ON
LAW AND PUBLIC AFFAIRS (“COLPA”),
ET AL., IN SUPPORT OF PETITIONER**

Of Counsel

DENNIS RAPPS

NATIONAL JEWISH COMMISSION
ON LAW AND PUBLIC AFFAIRS

450 Seventh Avenue

44th Floor

New York, NY 10123

(718) 715-3124

NATHAN LEWIN

Counsel of Record

ALYZA D. LEWIN

LEWIN & LEWIN, LLP

1775 Eye Street NW

Suite 850

Washington, DC 20006

(202) 828-1000

nat@lewinlewin.com

Attorneys for Amici Curiae

[Additional *Amici* Listed On Inside Cover]

ADDITIONAL *AMICI*

Agudath Harabbanim of United States
and Canada

Agudath Israel of America

Aleph Institute

Rabbinical Alliance of America

Rabbinical Council of America

National Council of Young Israel

Union of Orthodox Jewish Congregations
of America

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	ii
INTEREST OF THE <i>AMICI CURIAE</i>	1
STATEMENT	6
SUMMARY OF ARGUMENT.....	9
ARGUMENT	11
I. THE RESPONDENTS' JUSTIFICATIONS FOR PROHIBITING A HALF-INCH BEARD ARE FULLY REFUTED BY PETITIONER'S BRIEF	11
II. THIS COURT'S RULING SHOULD GO BEYOND THE NARROW QUESTION PRESENTED	11
III. UNLESS THIS COURT ISSUES A BROAD PROPHYLACTIC RULING, CONSTITUTIONALLY PROTECTED RIGHTS OF RELIGIOUS OBSERVANCE WILL BE DENIED	13
IV. LITIGATION TO PERMIT OBSERVANT JEWS TO WEAR RELIGIOUSLY MANDATED BEARDS HAS BEEN HARD-FOUGHT	15

TABLE OF CONTENTS

	<i>Page</i>
V. THE DECISION IN THIS CASE SHOULD ENCOMPASS A RELATED ISSUE CONCERNING FACIAL HAIR IN STATE PRISONS.....	17
CONCLUSION.....	18
APPENDIX I	
Maimonides, <i>Sefer Ha-Mitzvoth</i> (“The Book of Commandments”) (Negative commandment 44, shaving the beard).....	a1
APPENDIX II	
3 <i>Encyclopedia Judaica</i> (“ <i>Beard and Shaving</i> ”) (2d ed. 2007)	a3

TABLE OF AUTHORITIES

Cases

<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	13
<i>Geller v. Secretary of Defense</i> , 423 F. Supp. 16 (D.D.C. 1976)	15
<i>Litzman v. New York City Police Department</i> , 2013 WL 6049066 (S.D.N.Y. 2013)	16

TABLE OF AUTHORITIES

Cases	<i>Page</i>
<i>Moussazadeh v. Texas Department of Criminal Justice</i> , 703 F.3d 781 (5th Cir. 2012)	13
<i>New York Times Co. v. United States</i> , 403 U.S. 713 (1971)	10
<i>Rich v. Florida Dep’t of Corrections</i> , 716 F.3d 525 (11th Cir. 2013)	14
<i>Willis v. Commissioner, Indiana Dep’t of Correction</i> , 753 F. Supp. 2d 768 (S.D. Ind. 2010)	13
Statutes	
42 U.S.C. § 1983	16
Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. § 2000cc, <i>et seq</i>	<i>passim</i>
Other Authorities	
3 <i>Encyclopedia Judaica</i> (“ <i>Beard and Shaving</i> ”) (2d ed. 2007)	7

TABLE OF AUTHORITIES

Other Authorities	<i>Page</i>
Leviticus	2, 6
Maimonides, <i>Sefer Ha-Mitzvoth</i> (“The Book of Commandments”).....	6
Moshe Weiner, <i>Hadras Ponim-Zaken, The Cutting and Growth of the Beard in Halachic Perspective</i> (1977)	9
<i>Responsa of the Tzemach Tzedek</i> (1789-1865)	9
<i>The Holocaust Chronicle</i> (Legacy 2009).....	8
Eliyahu Touger, <i>The Beard in Jewish Law: Halachic Imperative or Kabbalistic Stringency?</i> (Ktav 2010)	6, 7, 8

Nos. 13-6827

IN THE
Supreme Court of the United States

GREGORY HOUSTON HOLT
a/k/a ABDUL MAALIK MUHAMMAD,
Petitioner

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTIONS, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of
Appeals for the Eighth Circuit

**BRIEF *AMICUS CURIAE* OF THE
NATIONAL JEWISH COMMISSION ON LAW AND
PUBLIC AFFAIRS (“COLPA”), ET AL., IN SUPPORT
OF PETITIONER**

INTEREST OF THE AMICI¹

¹ Pursuant to Supreme Court Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or party other than the *amici* has made a monetary contribution to this brief's preparation or submission. All parties have consented in writing to the filing of this *amicus* brief.

Petitioner brought this lawsuit because the Arkansas prison authorities have a “no beard grooming policy” that compels him to violate “his beliefs that all Muslim males are not to shave their beards.” Although he understood his religious obligation was to leave his beard entirely uncut, he requested permission, as a “compromise,” to grow a beard to a length of one-half inch. The district court granted that requested relief, and this case, in its present posture, concerns the right under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) to wear a one-half-inch beard in a state prison.

These *amici* represent the Orthodox Jewish community and submit this brief on behalf of adherents to the Jewish faith who are religiously observant. Male facial hair is a subject of Jewish ritual law derived from the Biblical commandment in *Vayikra* (Leviticus) 19:27: “You shall not round off the edge of your scalp and you shall not destroy the edge of your beard.” As described summarily in this brief, this directive prohibits shaving facial hair with a razor and, in the view of a significant component of the Orthodox Jewish community, requires men never to trim their facial hair or, at least, to wear a beard.

Jewish plaintiffs have initiated and prevailed in lawsuits in lower courts that sought exceptions for religious facial hair from no-beard rules announced by federal and local government agencies. We are filing this *amicus* brief to alert the Court to concerns of the Orthodox Jewish community regarding

governmental grooming restrictions and limitations on the growth of male facial hair.

We ask that the Court's decision in this case not imply that a prison regulation may prohibit beards longer than one-half inch. The Court's decision should follow the rule in the 41 jurisdictions that impose no limitation whatever on male facial hair in prison and permit beards to be grown in prison to any length. Such an interpretation of RLUIPA would foreclose any future attempt to deny to Jewish inmates or to others observing faith-based rules the right to follow their faith's command with regard to facial hair.

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has filed *amicus* briefs in this Court in 29 cases since 1968, usually on behalf of major Orthodox Jewish organizations. It has also supported laws protecting the right of observant Jews -- and that of their non-Jewish co-religionists -- to the reasonable accommodation of their religious observances when they conflict with governmental regulation or with societal practices.

Agudas Harabbanim of the United States and Canada is the oldest Jewish Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

Agudath Israel of America (“Agudath Israel”), founded in 1922, is a national grassroots Orthodox Jewish organization. Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel intervenes at all levels of government -- federal, state, and local; legislative, administrative, and judicial -- to advocate and protect the interests of the Orthodox Jewish community in the United States in particular, and religious liberty in general. Agudath Israel played a very active role in lobbying for the passage of the Religious Freedom Restoration Act (“RFRA”) and the Religious Land Use and Institutionalized Persons Act (“RLUIPA”).

Aleph Institute (“Aleph”) is a national, not-for-profit 501(c)(3), publicly-supported charitable institution founded in 1982 by Rabbi Sholom D. Lipskar under the direction of the Lubavitcher Rebbe, Rabbi Menachem M. Schneerson. For over thirty years, Aleph has been serving society by: (1) providing critical social services to families in crisis; (2) addressing the pressing religious, educational, humanitarian and advocacy needs of individuals in the military and institutional environments; and (3) implementing solutions to significant issues relating to our criminal justice system, with an emphasis on families, faith-based rehabilitation and preventive ethics education.

National Council of Young Israel (“NCYI”) is the umbrella organization for over 200 Young Israel branch synagogues with over 25,000 families within

its membership. It is one of the premier organizations representing the Orthodox Jewish community, its challenges and needs, and is involved in issues that face the greater Jewish community in North America and Israel.

Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social and educational causes affecting Orthodox Jews.

Rabbinical Council of America (“RCA”) is the largest Orthodox rabbinical organization in the world with a membership that exceeds 1,000 rabbis. RCA is deeply involved in issues related to religious freedom.

The Union of Orthodox Jewish Congregations of America (“Orthodox Union”) is the nation’s largest Orthodox Jewish umbrella organization, representing nearly 1,000 congregations coast to coast. The Orthodox Union has participated in many cases before this Court which have raised issues of importance to the Orthodox Jewish community. Among those issues, of paramount importance is the constitutional guarantee of religious freedom. Because of our community’s stake in the most expansive protection of this “first freedom,” the Orthodox Union was an active member of the coalition that advocated for the enactment of RFRA.

STATEMENT

Negative Commandment No. 44 in Maimonides' historic treatise *Sefer Ha-Mitzvoth* ("The Book of Commandments"), written in the Twelfth Century, cites Leviticus 19:27 as the source for the rule that a male Jew may not shave any of five corners of his beard. (See Appendix I to this Brief.) A second verse in *Vayikra* (Leviticus) 21:5 directs priests "not [to] shave the edge of their beard." For many observant Jews, the Biblical prohibition does not prevent use of scissors or electric shavers but applies only to "the marring of the beard with a razor." Appendix I, note.

There are, however, significant segments of the world-wide Orthodox Jewish community that treat these Biblical verses as extending beyond prohibiting use of a razor to remove male facial hair. In a comprehensive discussion of the Jewish Law observances regarding male facial hair, Rabbi Eliyahu Touger concluded that "there is substantial basis to prohibit removing the beard by any means; this is the opinion of some of the greatest *halachic* luminaries over the course of Jewish history." Eliyahu Touger, *The Beard in Jewish Law: Halachic Imperative or Kabbalistic Stringency* (Ktav 2010), p. vi.²

² Rabbi Touger also found: "Jewish tradition venerates growing a beard and ascribes an awesome degree of holiness to its hairs. A beard is traditionally referred to as 'the image of G-d' and, as above, is considered a sign of Jewish identity. Throughout the ages, Jews have always related to their beards with reverence, as a sacred object. Indeed, there is a broadly followed custom of burying hairs that have fallen from the beard in a cemetery

The *Encyclopedia Judaica* notes that “with the spread of kabbalism in Eastern Europe, trimming the beard was gradually prohibited by leading rabbinic authorities and with the rise of Hasidism, the removal of the beard became tantamount to a formal break with Jewish tradition.” 3 *Encyclopedia Judaica* 236 (2d ed. 2007) (Appendix II to this Brief) (citation omitted).

A famous opinion of the head of the rabbinic court of Munkacz, Rabbi Chayim Elazar Spira (1871-1937), known as the *Minchas Elazar*, declared in a widely publicized responsum that any trimming of the beard of a Jewish male is forbidden “according to the letter of the law.” (A full translation of this opinion appears at pages 3-33 of Touger, *op. cit. supra*.) The opinion of Rabbi Jonathan Eyebshuetz (1690-1764), author of 30 published works of Jewish Law and chief rabbi of several leading Jewish communities in Germany, was that “one who removes his beard forfeits the image of G-d.” *Ya’aros Dvash, Drush 15*. More modern rabbinic authorities such as Rabbi Yisrael Meir Kagan (the *Chofetz Chaim*) (1839-1933) and Rabbi Avraham Yeshayahu Karelitz (the *Chazon Ish*) (1878-1953) prohibited the

and in certain communities, it was customary to grasp one’s beard when taking an oath in court, thus affording the beard status similar to that of a Torah scroll or *Tefillin*.”

“License to remove the beard with scissors or depilatory cream was originally granted only because of persecution and because of a threat to life. Indeed, over the course of our national history, sages and common people alike have risked and sacrificed their lives rather than remove their beards.”

use of shaving machines and strongly encouraged untrimmed beards. Touger, *op. cit. supra* 39, 40, 43-51.

A beard was considered a Jewish insignia through centuries of Jewish history in the Diaspora.³ Wherever they seized control of Jewish populations in the 1930's, Nazi rulers displayed their hatred of, and contempt for, Jews by having the SS publicly cut or tear the beards of Jewish men. See, *e.g.*, *The Holocaust Chronicle* (Legacy 2009), pp. 150, 173, 330, 376 and photographs.⁴

³ An eighteenth-century author included the following in his description of the appearance of a Jew: "The German Jews wear their Beards from the Extremity of one Jaw to the other, like a Cord, which is divided by a Tuft into two equal Parts, which falls very agreeably from the Chin upon the Breast." A nineteenth-century observer of Jewish life in Poland said in his description: "[T]he beard is unkempt and reaches to the chest." Rubens, *A History of Jewish Costume* (Valentine, Mitchell 1967), pp. 154, 132.

⁴ Photographs on the cited pages bear the following captions:

"A Jew in Poland is publicly humiliated by the forcible trimming of his beard, a symbol of his faith."

"One of the favorite forms of 'entertainment' for the German invaders of Poland was to shear the beards of Orthodox Jews. This photograph shows SS troops from the *Leibstandarte* (bodyguard regiment) 'Adolf Hitler' forcibly shaving an Orthodox Jew in Lublin, Poland. Not only was this humiliating for the victim, but it also violated the religious scruples of many Eastern European Jews."

"The Nazis often insisted upon adding insult to injury by tormenting Jews who were about to be deported to their deaths. Here, Nazi thugs humiliate an Orthodox Jew from the

A Hasidic community that scrupulously follows the rule prohibiting any trimming whatever of the beard is Chabad-Lubavitch. See *Responsa of the Tzemach Tzedek* (1789-1865), Yoreh Deah sec. 93; see also Moshe Weiner, *Hadras Ponim-Zaken, The Cutting and Growth of the Beard in Halachic Perspective* (1977), pp. 43, 236-242, 302-304, 319-321, 690-691.

SUMMARY OF ARGUMENT

This brief will not echo the compelling arguments made by petitioner. We support his position and believe that all contentions asserted by the respondents are completely and persuasively answered in petitioner's brief.

We urge the Court to make an exception in this case to its usual preference for issuing a judgment on the narrowest available grounds. Merely sustaining petitioner's claim that he may grow a one-half-inch beard in Arkansas' prisons will not resolve the important issues now percolating in the lower courts. Indeed, since petitioner "compromised" his demand in order to be able to

Czechoslovakian town of Stropkov by trimming his beard – an all too common occurrence. Such actions not only pained the victims, but also allowed the perpetrators to unleash their contempt for the centuries-old culture of European Jewry."

"One of the things that distinguished Orthodox Jewish men was their beards. Many, such as Rabbi Avraham Grodzensky (*pictured*), shaved their beards, violating Orthodox traditions. He likely shaved it because Orthodox men were more likely to be chosen and abused, even on the streets.")"

wear a beard while the litigation was pending, a narrow ruling in his favor will not give him the full relief to which he is entitled.

Litigation over religiously mandated facial hair in prison and in other surroundings under governmental control has been aggressively fought by State authorities. While the litigation is pending, individuals whose conscientious convictions compel them to retain facial hair are routinely required to shave. This results in ongoing constitutional violations notwithstanding the general rule – articulated by Justice Black in his opinion in *New York Times Co. v. United States*, 403 U.S. 713, 715 (1971) – that “every moment’s continuance” of a restriction on First Amendment rights is “a flagrant, indefensible, and continuing” constitutional harm.

Review of analogous cases in which claims were made by Jewish kashrut-observing prisoners for kosher food demonstrates that a narrow holding will not prevent future violations of the First Amendment. The history of lawsuits brought by Orthodox Jews who sought to retain their beards over objections by government agencies also demonstrates that this subject calls for a broad ruling by this Court that will have a prophylactic effect in securing religious liberty.

ARGUMENT**I.****THE RESPONDENTS' JUSTIFICATIONS
FOR PROHIBITING A HALF-INCH BEARD
ARE FULLY REFUTED BY PETITIONER'S BRIEF**

The petitioner's brief by Professor Laycock – well-known to this Court – has, in our opinion, answered in extensive detail all of the respondents' flimsy contentions purporting to justify the Arkansas' authorities' refusal to permit petitioner to grow a one-half-inch beard while in Arkansas' prisons. We would be performing no service to the Court if we merely echoed the arguments petitioner makes, which we fully support. The inadequacy of respondents' position is demonstrated compellingly by the fact that 44 American prison systems – including the authority governing federal prisons – would not prevent petitioner from complying with his religious belief and growing a one-half-inch beard.

II.**THIS COURT'S RULING SHOULD
GO BEYOND THE NARROW QUESTION PRESENTED**

We urge this Court, however, to go beyond the narrow facts of this case. Petitioner "compromised" his need to observe the full tenet of his faith in order to be permitted to engage in partial observance while the litigation was ongoing. Hence, as this case is presently structured, a decision in petitioner's favor

will not enable him to comply fully with his religious observance.

The Court can prevent future unjustified limitations on male prisoners' observances of their faith's commands regarding facial hair (including potential claims by Jewish prisoners) by ruling that RLUIPA bars any local prison regulation that limits a prisoner's right to grow facial hair to any length that his religious observance dictates. Petitioner's brief reports that 39 States, the District of Columbia, and the federal government prescribe no fixed length limitation for prison inmates. Brief for the Petitioner 24. Religious prison inmates in the remaining 11 States that do impose a limit on the length of a beard should not have to challenge the wardens of their prisons and bring lawsuits in order to secure fundamental rights protected by RLUIPA based on the First Amendment. Prisoners in these jurisdictions or prisoners whose faith will not permit them to "compromise" on a short beard should not be left dangling following a decision in petitioner's favor in this case. If their rights are in doubt, such prisoners will have to trim or shave their beards in order to avoid prison discipline even while they are asserting their rights in a prison's administrative procedure and in court.

III.

**UNLESS THIS COURT ISSUES A
BROAD PROPHYLACTIC RULING,
CONSTITUTIONALLY PROTECTED RIGHTS
OF RELIGIOUS OBSERVANCE WILL BE DENIED**

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). The history of prison litigation over the religious rights of inmates in state prisons demonstrates that State jurisdictions act independently and contest prisoners’ rights even after the identical prisoner claim has been sustained by a federal court.

The battle over providing kosher food to prisoners in State-administered penal institutions proves this point. In *Willis v. Commissioner, Indiana Dep’t of Correction*, 753 F. Supp. 2d 768 (S.D. Ind. 2010), Indiana was ordered to provide kosher food to a class of kosher-observing inmates in its prisons. The State appealed the district court’s decision to the United States Court of Appeals for the Seventh Circuit, asserting that it was too costly to comply with this judicial decree. *Willis v. Buss*, Seventh Circuit Court of Appeals No. 11-1071. After briefing, including *amicus* submissions by national organizations, Indiana dismissed its appeal and complied with the district court’s injunction. Kosher meals are now being provided in the Indiana prisons. The Fifth Circuit also held in *Moussazadeh v. Texas Department of Criminal Justice*, 703 F.3d 781 (5th

Cir. 2012), that kosher food must be provided in Texas' prisons.

These precedents have not, however, prevented the State of Florida from presenting in its federal courts the same flawed argument that kosher meals are too expensive to be provided in its State prisons. An individual prisoner prevailed in the Court of Appeals for the Eleventh Circuit on his demand for kosher meals (*Rich v. Florida Dep't of Corrections*, 716 F.3d 525 (11th Cir. 2013)), but Florida is currently making the same excessive-cost assertion in the Court of Appeals in opposition to an injunction issued on the application of the United States on behalf of all inmates in Florida's prisons. *United States v. Secretary, Florida Dep't of Corrections*, Eleventh Circuit Court of Appeals No. 14-10086-D.

If this Court merely upholds petitioner's right to wear a one-half inch beard, jurisdictions that impose facial-hair restrictions on male inmates of their prisons are likely to continue to battle at each succeeding step. The inevitable result will be that even state prisoners who ultimately prevail in their lawsuits and others similarly situated will, pending the outcome of their litigation, be denied the right protected by the First Amendment and by RLUIPA to grow or retain religiously mandated beards.

IV.

**LITIGATION TO PERMIT OBSERVANT JEWS
TO WEAR RELIGIOUSLY MANDATED BEARDS
HAS BEEN HARD-FOUGHT**

The litigation experience of Jewish plaintiffs asserting a religious right to retain facial hair demonstrates that government agencies do not readily acquiesce, even *pendente lite*, in an individual's request to retain a religiously compelled beard. In *Geller v. Secretary of Defense*, 423 F. Supp. 16 (D.D.C. 1976), a Jewish Air Force chaplain who had worn a beard during seven years of service was ordered to shave his beard. When he refused to do so, he was "reassigned to inactive reserve status." Rabbi Geller acknowledged in the litigation brought on his behalf by undersigned counsel that, although Orthodox, he did not believe that wearing a beard was "required" by his religion. Nonetheless, he asserted that his beard was "religiously motivated."

The district court was persuaded after a full hearing "that the wearing of beards, although not required, is a well established religious tradition among members of the Jewish faith." 423 F. Supp. at 17. The court found that "there appears no adequate justification for the inflexible approach of the Air Force" (423 F. Supp. at 18), and it granted summary judgment in Rabbi Geller's favor.

Notwithstanding the precedent of the *Geller* case, the Department of the Army refused in 2009 to permit Menachem Stern, a rabbi affiliated with the Chabad-Lubavitch movement who refused to trim

his beard, to serve as a chaplain. It cited the Army's regulation prohibiting the wearing of facial hair. Stern then initiated litigation, with undersigned counsel as his lawyer, in the United States District Court for the District of Columbia. *Stern v. Secretary of the Army*, Civ. Action No. 10-2077 (JDB). After memoranda of law were filed by both parties, the Department of the Army agreed in 2011 to accept Rabbi Stern as a chaplain in the United States Army. He is presently a captain stationed in Fort Leonard Wood, Missouri, having recently returned from a tour of duty in Afghanistan.

Fishel Litzman is a young man who "follows the rules and traditions of the Chabad Lubavitch Jewish community, and his Orthodox Jewish faith prohibits him from cutting or trimming his facial hair." *Litzman v. New York City Police Department*, 2013 WL 6049066 (S.D.N.Y. 2013). He was accepted to the New York City Police Academy and, in several months of training, ranked in the top 1.3% of his class. But his requests for a religious exemption from a Police Department regulation that prohibited beards exceeding one millimeter in length were denied, and he was terminated in June 2012 from the Police Academy.

Represented by undersigned counsel, Litzman sued the New York City Police Department under 42 U.S.C. § 1983, in the United States District Court for the Southern District of New York, alleging a violation of the First Amendment. In November 2013 the district court granted summary judgment on Litzman's Section 1983 claim. 2013 WL 6049066 at p. 5. The New York Police Department initially filed

a Notice of Appeal but subsequently withdrew its appeal. Litzman was reinstated and he is now a uniformed New York City police officer in Brooklyn.

The justifications asserted by government officials in the cases of chaplains and police officers differ from those put forth in response to claims by prison inmates. Nonetheless, the basic framework is the same and the coercive effect of a no-beard rule is greater in the prison context. An Orthodox Jewish man who is in a penal institution that prohibits the wearing of beards will be forced to violate his religious observance when ordered by the warden to shave his beard. An applicant for a government position as a chaplain or as a policeman may lose a job if he refuses to shave or trim his beard, but he may, at some cost, retain religious observance.

V.

THE DECISION IN THIS CASE SHOULD ENCOMPASS A RELATED ISSUE CONCERNING FACIAL HAIR IN STATE PRISONS

Aleph Institute personnel familiar with the entire range of prison regulations and unpublished prison procedures report that in some jurisdictions electric shavers may not be used to trim or remove a prisoner's beard. Wherever such a rule is in force, observant Jewish inmates are compelled to violate the Jewish religious precept that forbids shaving with a razor. No conceivable compelling governmental interest bars use of electric shavers when and if Jewish prisoners must trim or remove their beards. This Court should, in its ruling on male

facial hair in prisons, disapprove practices that prescribe religiously prohibited means for removing facial hair.

CONCLUSION

For the foregoing reasons and those stated in petitioner's brief, the judgment of the court of appeals should be reversed with a decision sustaining a prisoner's right to wear facial hair to any length and with instructions to grant summary judgment to the plaintiff.

Respectfully submitted,

NATHAN LEWIN

Counsel of Record

ALYZA D. LEWIN

LEWIN & LEWIN, LLP

1775 Eye Street NW

Suite 850

Washington, DC 20006

(202) 828-1000

nat@lewinlewin.com

Attorneys for Amici Curiae

Of Counsel

DENNIS RAPPS

NATIONAL JEWISH

COMMISSION ON LAW

AND PUBLIC AFFAIRS

450 Seventh Avenue

44th Floor

New York, NY 10123

(718) 715-3124

May 29, 2014

APPENDIX I

The Commandments

Sefer Ha-Mitzvoth of Maimonides

*Translated from the Hebrew with foreword, notes,
glossary, appendices and indices by Rabbi Dr.
Charles B. Chavel*

The Soncino Press / London & New York

NEGATIVE COMMANDMENT 44

44 Shaving the beard

By this prohibition we are forbidden to shave the beard, which has five parts: the upper right jaw, the upper left jaw, the lower right jaw, the lower left jaw, and the peak of the beard. The complete prohibition is contained in the words, *Neither shalt thou mar the corners of thy beard*¹, because the whole is included in the term 'beard.' Scripture does not say 'Neither shalt thou mar they beard,' but *Neither shalt thou mar the corners of thy beard*, meaning that you may not shave even one corner of the whole beard, which according to Tradition consists of five 'corners', as detailed above, and one is liable to five whippings for shaving his entire beard, even though he saves it off all at once.

¹ Lev. XIX, 27.

The Mishnah says: '[For shaving off] the beard [one is liable on] five counts: two counts for the right side, two for the left, and one for the lower down. R. Eliezer says: If he took them all of in a single movement, he is liable only on one count'² and from this the Talmud concludes: 'Hence (we must conclude) that R. Eliezer considers the whole [process as covered by the] one prohibition.'³ Thus we have clear proof that the First Sage [i.e. the first of the authorities quoted in the Mishnah] is of the opinion that there are five prohibitions, and that is the law.

[The marring of the beard] was likewise a practice of idolatrous priests, and it is well known that in our day European priests shave off their beards.

The reason why [the prohibition against marring the five corners of the beard is not to be counted as five Commandments is that the prohibition deals with a single matter in a single expression, as we have explained in dealing with the preceding Commandment. The provisions of this Commandment are explained at the end of Makkoth. It is not binding on women.

Note This prohibition applies only to the marring of the beard with a razor; there is nothing against cutting off the beard with scissors, tweezers, or plane-like or file-like tools (Mishneh Torah, Mada, Hilchoth Abodath Kochabim XII, 7; also, Lev XXI, 5, Rashi).

² Mak. 20a (Sonc. ed p. 141).

³ *Ibid*, 21a (Sonc. ed. p. 145).

APPENDIX II
ENCYCLOPAEDIA JUDAICA

Second Edition

Volume 3

BEARD AND SHAVING. The characteristic manner in which the beard and hair were shaved, cut, curled, or groomed identified specific peoples in the ancient world. Egyptian, Assyrian, and Babylonian monuments depict the unique way various peoples treated facial hair, thereby illustrating their ethnic identity. The Semites appear with thick beards or with thin and groomed beards; the Lybians are shown with pointed beards, while the Hittites, Ethiopians, and Sea People are portrayed as clean-shaven. The Babylonians and Persians are represented with curly and groomed beards, and the majority of the images of Egyptian males reveal clean-shaven faces with the exception of a number of pharaohs who appear with plaited beards extending from the chin only. Shaving was performed either by the individual himself or by a barber (Heb. *Galav*) who also attended to bodily ailments in a quasi-medical fashion. Razors were made entirely from metal or from flint blades fixed in a stone handle. Shaving was also connected with cosmetic treatment of the face (see *Cosmetics). According to Leviticus 19:27 and 21:5 in an apparent reference to the hair between the head and the cheeks (sidelocks) it is forbidden to destroy the “corners” of the beard. It is difficult to determine the reason for the ban, but it is possible that it was promulgated in order to differentiate Israelites from other peoples. Another

possible explanation is that shaving specific areas of the face was associated with pagan cults or symbolized those who ministered to their gods and just as the Bible opposes imitation of pagan practices so it opposes this form of ritual shaving. In the Bible shaving of the head and beard is considered a sign of mourning (e.g. Job 1:20) and degradation. Shaving was identified with the spontaneous plucking of the beard, and expression of great sorrow (Ezek. 5:1). To humiliate a man, it was the practice to forcibly shave half of the beard as in 11 Samuel 10:4, where the elders, because of this humiliation, were commanded to hide in Jericho until their beards grew again. Shaving is also part of rituals of purification (Lev. 14:8; Num. 6:9; 8:7). Priests were forbidden to shave the “edges” of their beards (Lev. 21:5), and “the priests, the Levites, the sons of Zadok” (Ezek. 44:15) were allowed neither to shave their heads nor let their locks grow long, but only to trim their hair (*ibid.* 44:20).

[Ze'ev Yeivin]

In Talmudic Times

The Talmud regards the beard as “the adornment of a man’s face” (BM84a); a man without a beard was compared to a eunuch (Yev. 80b; Shab.152a). Young priests whose beards had not yet grown were not permitted to bless the people (TJ, Suk. 3:14, 54a). *Sennacherib was punished by God by having his beard shaved off (Sanh. 95b-96a). Rabbinic authorities permitted only those who had frequent dealings with the Roman authorities to clip their beard with forceps (*kom*; BK 83a). Objection to the removal of the beard was on the ground that God

gave it to man to distinguish him from woman; to shave it, was therefore an offense against nature (see Abrabanel to Lev. 19:27).

In the Middle Ages

Jews living in Islamic countries cultivated long beards whereas those in Christian Europe clipped them with scissors. This was permitted by *halakhah*. (Sh. Ar., YD 181:10). Rabbinical courts punished adulterers by cutting off their beards (C.M. Horowitz, *Toratan shel Rishonim*, 1 (1881), 29; 2 (21881), 18). The post of *hazzan* was only bestowed upon a man with a beard (*Bah*, OH 53). Kabbalists ascribed mystical powers to the beard (and hair). Isaac *Luria refrained from touching his, lest he should cause any hairs to fall out (*Ba'er Hetev*, YD 181:5).. With the spread of kabbalism to Eastern Europe, trimming the beard was gradually prohibited by leading rabbinic authorities (*Noda bi-Yhudah*, *Mahadura Tinyana*, YD 80) and with the rise of Hasidism, the removal of the beard became tantamount to a formal break with Jewish tradition. Nevertheless, from a strictly traditional point of view, shaving was permitted as long as it was done in a certain fashion. *Halakhah* forbids only the shaving proper of the beard; this is defined as the act of removing the hair with an instrument with one cutting edge. Chemical means (depilatory powder), scissors, or an electric shaver with two cuttings edges, are permitted. Although it is customary not to use a single-edge razor to shave any part of the beard, the strict letter of the law forbids its use only for five parts of the face. Considerable difference of opinion among the rabbis as to the exact location of these five places had led to the practice of not using

a single edge at all. In Western Europe and especially among Sephardic Jews, rabbinic authorities (S.D. Luzzatto among others), consented both to the trimming of the beard and even of its entire removal by chemical agents. This became the accepted custom (from the second half of the 17th century). The question of cutting and shaving the beard on *hold-ha-moed*, prohibited by the Talmud (MK 3:1), was a matter of much controversy at the turn of the 19th century. R. Isaac Samuel Reggio tried to prove that this Talmudic injunction no longer applied because of changed circumstances (*Ma'amar ha-Tiglahat*, 1835) but the traditional opinion of the Shulhan Arukh (OH 531) prevails among strictly observant Jews, who also refrain from cutting their beard (and from shaving) during the Omer period (*Sefirah*) and the Three Weeks (see also Mourning Customs). To trim the beard (and have a haircut) in honor of the Sabbath and the festival is regarded as a pious duty. Several rulers (e.g., Nicholas I of Russia) tried to force the Jewish population to cut off their beards and earlocks; others (e.g. Maria Theresa of Austria) ordered Jews to have beards so as to be easily singled out as a foreign element by their Christian neighbors.