No. 09-1353

In the Supreme Court of the United States

IRON THUNDERHORSE,

Petitioner,

v.

BILL PIERCE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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Respondents initially contend that the circuit split over the question presented by this case is "nonexistent," Opp. at 12, then that "the spectrum of outcomes is actually quite narrow," *id.* at 13, and finally that the contradictory decisions in the circuits should be left "to percolate." *Id.* at 13. These shifting and inconsistent arguments reveal precisely the disarray in the lower courts that warrants the grant of certiorari in this case. Respondents begin by listing the Fourth, Fifth, and Eleventh Circuits among those that "have all upheld prison grooming codes against RLUIPA challenges," *id.* at 6, and then end their brief by listing the same circuits as ones in which "RLUIPA challenges to prison grooming codes are currently under review." *Id.* at 13. They cannot have it both ways: that the law is settled in their favor and that it is unsettled and needs to develop further.

Respondents' main argument rests on the implausible premise that a ruling on a preliminary injunction cannot create a conflict among the circuits on the merits. They contend that *Warsoldier* v. *Woodford*, 418 F.3d 989 (9th Cir. 2005), which ordered entry of a preliminary injunction, either could not or did not constitute a binding interpretation of the Religious Land Use and Institutionalized Persons Act (RUILPA), 42 U.S.C. § 2000cc *et seq.* Respondents are wrong on both counts.

On appeal from the grant or denial of a preliminary injunction, "[r]eview properly extends to

all matters inextricably bound up with the injunction decision." 16 Wright, Miller & Cooper, Jurisdiction and Related Matters § 3921.1, at 27-28 (2d ed. 1996) (footnote omitted). As this Court has recognized, review can extend to the ultimate merits of the case. *Munaf* v. *Geren*, 128 S. Ct. 2207, 2219 (2008). And even review short of the merits can determine the outcome of the case, as this Court pointed out in *Winter* v. *Natural Resources Defense Council, Inc.*, 129 S. Ct. 365 (2008). In reversing the grant of a preliminary injunction there, this Court added "that it would be an abuse of discretion to enter a permanent injunction, after final decision on the merits, along the same lines as the preliminary injunction." *Id.* at 381. Any number of other decisions have made similar outcome determinative rulings on review of preliminary injunctions. *E.g.*, *New York State Board of Elections* v. *Torres*, 552 U.S. 196, 209 (2008) (no denial of First Amendment rights in judicial nominating process); *Rumsfeld* v. *Forum for Academic and Institutional Rights*, 547 U.S. 47, 55 (2006) (rejecting constitutional objections to required access of military recruiters to schools receiving federal funds).[1]

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[1] The cases cited by respondents concern a far different situation: where a court rules on a preliminary injunction, but explicitly refuses to decide a question going to the merits. Thus, in *New York State Liquor Authority* v. *Bellanca*, 452 U.S. 714, 716 (1981), this Court distinguished *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975), when that case "intimate[d] no view as to the ultimate merits." *Id.* at 934. (citation and internal quotation marks omitted). So, too, in *Pitt News* v. *Pappert*, 379 F.3d 96 (3d Cir. 2004), then-Judge Alito distinguished a prior decision in the same case because the earlier panel had not decided whether the

Respondents appear to be alone in their belief that *Warsoldier* is an impaired or limited precedent. The decision below, with which they otherwise agree, did not dismiss *Warsoldier* as a nonprecedent; the panel refused to follow it because it conflicted with Fifth Circuit precedent. Pet. at 10a n.3. The judges in the Ninth Circuit also would be surprised to learn that they were not bound by *Warsoldier*. They have repeatedly endorsed *Warsoldier* as binding law in that circuit. *E.g., Navajo Nation* v. *U.S. Forest Service*, 535 F.3d 1058, 1077 (9th Cir. 2008) ("We held the prison policy imposed a substantial burden on Warsoldier's exercise of his religion because it coerced him to violate his religious beliefs under the threat of punishment."); *Alvarez* v. *Hill*, 518 F.3d 1152, 1167 (9th Cir. 2008) (quoting *Warsoldier* for proposition that prison officials "now must demonstrate that they 'actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice'").

As respondents concede, the Ninth Circuit understands that an appeal from a preliminary injunction can result in a binding decision on a pure question of law. Opp. at 11 (citing *Ranchers Cattlemen Action Legal Fund United Strockgrowers* v. *USDA*, 499 F.3d 1108, 1114 (9th Cir. 2007)). That is exactly what *Warsoldier* decided: that RLUIPA required more than conclusory statements from

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statute in question was constitutional. He added this all-important qualification: "Had [the prior panel] gone further and taken an unequivocal position on the merits, we would consider ourselves bound." *Id.* at 105.

prison officials "to explain why prisons in other jurisdictions and its own women's prisons are able to meet the same compelling interests of prison safety and security without requiring short hair or permitting a religious exemption." 418 F.3d at 1001.

Respondents imply that the precedential force of this holding in a published decision was later limited by the unpublished decision in *Haley* v. *Donovan*, 250 F. Appx. 202 (9th Cir. 2007). They convey this impression, however, only by means of selective quotation. Opp. at 9. In passages that respondents leave out, *Haley* characterized *Warsoldier* as holding that the prison officials "did not demonstrate that [the grooming regulation] was the least restrictive alternative," and that before *Warsoldier*, "it was not *yet* clearly established" that enforcement of prison grooming regulations against religious practices violated RLUIPA. Ibid. (emphasis added). The obvious import of these statements is exactly the opposite of respondents'. It is that after *Warsoldier*, it was "clearly established" that prison grooming rules did violate RLUIPA.

The district courts within the Ninth Circuit take the same view, as does the California Department of Corrections and Rehabilitation. The very case cited by respondents, *David* v. *Giurbino*, 488 F. Supp. 2d 1048 (S.D. Cal. 2007), establishes how pervasive the influence of *Warsoldier* has been. The district court described the decision in these terms:

> [T]he Ninth Circuit held that the CDCR's grooming regulations for male prisoners violated

> the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1, because the policy was not the least restrictive means to achieve the state's compelling interest in maintaining prison safety and security. *See Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. July 29, 2005). In response to *Warsoldier* and other litigation, the CDCR filed emergency changes to its grooming regulations. *See* Initial Statement of Reasons ("ISOR") Grooming/ Programs, dated Dec. 29, 2005, attached to Compl. at Ex. H. The new grooming regulations, in relevant part, allowed an inmate's hair to be any length "but [hair] shall not extend over the eyebrows, cover the inmate's face or pose a health and safety risk." Cal.Code Regs. tit. 15, § 3062(e) (2006). The changes, which were operative on January 17, 2006, became final on July 27, 2006. Def.'s Mem. at 5; Cal.Code Regs. tit. 15, § 3062 and history thereof.

488 F. Supp. 2d at 1053. Respondents evidently would not give the same weight to rulings on preliminary injunctions as their counterparts in California. But the fact remains that others plainly have, resulting in the application of different rules in different parts of the country—precisely the conflict among the circuits that warrants review in this case.

This fact makes respondents' plea for further percolation in the lower courts particularly puzzling. They represent that the "illusory circuit split could vanish when the Ninth Circuit squarely addresses this issue." Opp. at 11. But they can point to no

indication, in the five years since *Warsoldier* was decided, that the Ninth Circuit is inclined to take this step. They also offer no evidence that the correctional departments in that circuit are willing to challenge the decision. The conflict among the circuits is not likely to go away. Nor is it likely to come to this Court from the Ninth Circuit.

Respondents refer to several RLUIPA cases, in which petitions for certiorari, filed *in forma pauperis*, were denied by this Court. Opp. at 12. Petitioner has already explained why this case is a superior vehicle for resolving the question presented here. Pet. at 21-22. Since then, this Court has granted certiorari in *Sossamon* v. *Texas*, 560 F.3d 316 (5th Cir. 2009), No. 08-1438 (cert. granted, May 24, 2010), presenting the question whether states and state officials are liable for damages under RLUIPA. That question is not implicated in this case, because petitioner has sought only injunctive relief, Pet. at 26a, but it does reveal how significant RLUIPA is. If the remedies available under RLUIPA warrant this Court's attention, then the standards for finding a violation of the statute do so even more.

Respondents contend that any attempt to clarify those standards and resolve the inherent tension between strict scrutiny under RLUIPA and due deference to prison officials would be "to engage in a purely academic exercise," with no relation to the outcome of this case. Opp. at 13. This contention is baffling. Every case, like this one, in which a prison rule imposes a substantial burden on religious

exercise, depends on how this tension is resolved. This case is not hypothetical, abstract, moot, or academic in any sense. See *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 130-31 (2007) (discussing these limits on a constitutional case or controversy). It is a live controversy over petitioner's exercise of his sincerely held religious beliefs, found by the lower courts to have been substantially burdened by the grooming rule in this case. Pet. at 8a-9a, 66a, 69a. Despite intimations to the contrary in their restatement of the facts, respondents do not seriously contest the sincerity of petitioner's religious beliefs or the findings below that the exercise of those beliefs was substantially burdened. Opp. at 1-3. Petitioner, for his part, does not challenge the fundamental interest in prison security. This case therefore reduces to the single question of whether respondents have met their burden of proving "least restrictive means" under RLUIPA. There is no other issue in this case and the outcome depends upon it.

Respondents contend that they have met their burden of proof based on an inventory from past precedent of the contraband found in prisoners' hair, a contention accepted by the court below. Opp. at 7-8. See Pet. at 8a-10a & n.3. Respondents argue for deference to this sample of past prison experience, entirely neglecting the present policies of many prisons to allow inmates to have long hair or to make exceptions for religious practice. See Pet. at 23-24. Respondents regard deference to the judgment of prison officials as a one-way street: when it works in their favor, they rely upon it, and when it doesn't,

they ignore it. But they cannot ignore the implications of their own argument. The more they contend that inmates' long hair presents a threat to prison security, the more they need to explain how other prisons can accommodate long hair as a religious practice. Their opposition says not one word about this issue.

RLUIPA puts the burden of proof on respondents on the issue of "least restrictive means." § 2(a), 42 U.S.C. § 2000cc-1(a). In RLUIPA and in its predecessor, the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq*., Congress has twice required strict scrutiny of prison policies that substantially burden the religious exercise of prison inmates. If strict scrutiny under RLUIPA means anything at all, it means that some explanation must be forthcoming in this case—an explanation why a religious practice, widely allowed in other prisons, is not feasible in this one. This case sharply and clearly presents this question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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