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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

ICE DETAINEE #1 through 74, **Petitioners,** **v.** **JOSIAS SALAZAR,** **Warden, FCI Sheridan,** **ELIZABETH GODFREY,** **Acting Field Office Director,** **Seattle Field Office, ICE,** **Respondents.**	**Case Nos. 3:18-cv-01279-MO through 3:18-cv-01365-MO** **PROPOSED BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS' MOTION FOR EMERGENCY INTERIM RELIEF IN THE FORM OF AN ORDER REQUIRING RELIGIOUS ACCOMMODATIONS FOR ICE DETAINEES**

INTERESTS OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 1.5 million members dedicated to defending the principles embodied in the U.S. Constitution and our nation's civil rights laws. The ACLU of Oregon is a state affiliate of the national ACLU with more than 51,000 members. The ACLU and ACLU of Oregon have long fought to protect the constitutional and civil rights of immigrants and incarcerated individuals, who are especially vulnerable to neglect, mistreatment, and other abuse. Moreover, for nearly a century, the ACLU has been dedicated to preserving religious liberty. Because this matter involves the intersection of these rights, the ACLU and the ACLU of Oregon have a strong interest in its proper resolution. Finally, having won from this Court a temporary restraining order and, subsequently, a preliminary injunction granting civil-immigration detainees at the Sheridan Federal Detention Center access to attorneys, the ACLU of Oregon, in particular, has a direct interest in ensuring that Petitioners are not further deprived of their rights.

SUMMARY OF ARGUMENT

Petitioners' incarceration at the Sheridan Federal Detention Center ("Sheridan") is marked by one grim irony after another. Petitioners fled their home countries, where they were deprived of fundamental human rights and threatened with violence and persecution, to seek refuge in the United States - only to be imprisoned here under conditions that have been demeaning and inhumane. The country where they sought refuge was founded on the principle of religious freedom for people of all faiths. That principle has been enshrined in the U.S. Constitution, and Congress has even enacted laws providing heightened legal protections for incarcerated individuals' religious exercise. But during their imprisonment at Sheridan, Petitioners have been

unable to engage in basic religious practices, such as praying, attending religious services, wearing religious headgear, complying with religious dietary restrictions, reading religious texts, possessing items of religious significance, and visiting with clergy.

What is more, policies adopted by U.S. Immigration and Customs Enforcement ("ICE") and the Federal Bureau of Prisons ("BOP") - collectively, the "Sheridan Custodians" - allow the very sort of religious exercise that these agencies have denied the Petitioners. And Sheridan's own Admissions and Orientation Handbook advises individuals incarcerated there that "[r]eligion can be a significant influence in a person's life, especially during imprisonment when more time for thought and reflection is available," and encourages them to "look into opportunities for religious and personal growth and take advantage of other benefits from participation in these programs."[1] If only Petitioners were given this chance.

Petitioners' imprisonment and inability to freely practice their faith is occurring at the hands of federal officials in the executive branch, notwithstanding the President's proclamation last year, by executive order, that the executive branch "shall . . . vigorously enforce Federal law's robust protections for religious freedom."[2] Although the U.S. Attorney General has recently directed that "the free exercise of religion is not a mere policy preference to be traded against other policy preferences" but rather "a fundamental right,"[3] the Sheridan Custodians have done just that

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[1] Fed. Det. Ctr., Sheridan, Or., *Admission and Orientation Handbook* (*"Sheridan Handbook"*) 13-14 (2013), https://www.bop.gov/locations/institutions/she/SHE_fdc_aohandbook.pdf.

[2] Promoting Free Speech and Religious Liberty, Exec. Order No. 13798, 82 Fed. Reg. 21,675 § 1 (May 4, 2017), https://www.whitehouse.gov/presidential-actions/presidential-executive-order-promoting-free-speech-religious-liberty/.

[3] Office of the Att'y Gen., *Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty* (Oct. 6, 2017), https://www.justice.gov/opa/press-release/file/1001891/download.

here: Petitioners' religious-freedom rights have been cast aside in favor of the government's preferences when it comes to immigration policy.

Petitioners, who are suffering abuse during their confinement, should not be forced to surrender their religious freedom on top of everything else. Our Constitution and laws guarantee the right to free religious exercise, even for - indeed, especially for - incarcerated individuals. The government could hardly object to this Court issuing an order that enforces those guarantees, especially given ICE's and the BOP's own policies and the President's and Attorney General's recent proclamations highlighting the importance of religious liberty. The federal courts have, in fact, recognized the rights of incarcerated individuals to engage in the religious activities and expression currently restricted by the Sheridan Custodians. Accordingly, amici respectfully request that the Court grant the Petitioners' Motion for Emergency Interim Relief in the Form of an Order Requiring Religious Accommodations for ICE Detainees.

ARGUMENT

I. ROBUST JUDICIAL ENFORCEMENT OF RELIGIOUS-FREEDOM RIGHTS IS ESPECIALLY IMPORTANT FOR INCARCERATED INDIVIDUALS.

Religious freedom is a fundamental human right belonging to all people, regardless of faith, citizenship, or national origin. This right is not only enshrined in the First Amendment to the U.S. Constitution, but in various statutes, regulations, and rules across federal, state, and local governments. Robust protections for the right to exercise one's faith are, of course, important in myriad contexts, but they are particularly vital in settings where individuals are imprisoned, detained, or otherwise incarcerated by the government. As the Supreme Court has recognized, "the government exerts a degree of control [in these facilities that is] unparalleled in civilian society

and severely disabling to private religious exercise" so that "residents' right to practice their faith is at the mercy of those running the institution." *Cutter v. Wilkinson*, 544 U.S. 709, 710, 721 (2005); *see also Khatib v. Cty. of Orange*, 639 F.3d 898, 907 (9th Cir. 2011) (en banc) (noting that subsequent statutory protections enacted by Congress were "intended to safeguard the permissible religious observance of powerless persons incarcerated by the state").

In 1993, concerned that the Supreme Court was giving short shrift to free-exercise interests generally, Congress passed the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1 *et seq.*,[4] requiring that strict scrutiny be applied to all government laws, policies, practices, or other official conduct that substantially burdens an individual's religious exercise. Specifically, the law provides that the government may substantially burden a person's exercise of religion *only if* the government can demonstrate that the challenged conduct is the least restrictive means of furthering a compelling governmental interest. *Id.* § 2000bb-1(b). Upon its passage, RFRA applied across the board to all federal, state, and local government agencies, including prisons, jails, and other similar public facilities. *See City of Boerne v. Flores*, 521 U.S. 507, 532 (1997). However, after the Supreme Court partially invalidated RFRA, deeming it unconstitutional as applied to the states, *City of Boerne*, 521 U.S. at 536, RFRA's reach was limited to the federal government alone, and—with respect to institutional and carceral settings - federal facilities, such as Sheridan. Hoping to remedy the disparity between religious-exercise protections afforded to

[4] Lamenting the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), Congress complained in RFRA's "Congressional Findings and Declaration of Purposes" that "the Supreme Court [had] virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C.A. § 2000bb. *Employment Division* held that neutral laws of general applicability were subject only to rational-basis review. 494 U.S. at 884-90.

those incarcerated in federal facilities and the protections rarely provided to those incarcerated in state and local ones, Congress passed the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1 *et seq*., in 2000. RLUIPA allows state and local prisoners, among other institutionalized persons, "to seek religious accommodations pursuant to the same standard as set forth in RFRA." *Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015) (quoting *Gonzales v. O Centro Espírita Beneficente Uniõ do Vegetal*, 546 U.S. 418, 436 (2006) (internal quotation marks omitted)); *accord Khatib*, 639 F.3d at 907 ("It is clear from the legislative history that Congress intended to reinstate RFRA's protections against such restrictions [prohibiting religious exercise by institutionalized persons] when it passed RLUIPA.").[5]

Consistent with our nation's longstanding commitment to religious freedom generally, and the special concerns for protecting the religious liberty of incarcerated individuals, the Supreme Court has made clear that both RFRA and RLUIPA "provide expansive protection" for prisoners and others who have been confined by the government. *See Holt*, 135 S. Ct. at 860. In *Holt*, the Court rejected an overly narrow interpretation of the substantial-burden requirement for prisoners, *see id.* at 862-63, and held that the "sister statute[s]" do not permit courts to give "unquestioning deference" to government officials' assessment of whether the challenged conduct actually furthers a compelling governmental interest, *id.* at 859, 864. Furthermore, the Court explained that

[5] The Supreme Court upheld the constitutionality of RLUIPA in *Cutter*, noting that the law was less sweeping in scope than RFRA and grounded in federal authority under the Commerce and Spending Clauses. 544 U.S. at 715. The Court also rejected an Establishment Clause challenge to the statute's heightened protection for prisoners, explaining that RLUIPA's "institutionalized-persons provision [is] compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise." *Id.* at 720.

"[t]he least-restrictive-means standard is exceptionally demanding, and it requires the government to sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Id.* (internal citation and quotation marks omitted). Where a less restrictive means "is available for the Government to achieve its goals, the Government *must* use it." *Id.* (internal quotation marks omitted) (emphasis added).

Through RFRA and RLUIPA, then, the federal government, has gone to great lengths to protect the ability of incarcerated individuals to practice their religious beliefs. In addition, the President has issued executive orders, and the Attorney General has produced memoranda, emphasizing their concern for religious-liberty rights. *Supra* p. 2. ICE and BOP policies, moreover, expressly require officials to facilitate religious exercise. For example, ICE's Religious Practices Policy, which applies to "Contract Detention Facilities," mandates that "[d]etainees shall have regular opportunities to participate in practices of their religious faiths, *limited only by a documented threat to the safety of persons involved in such activity itself or disruption of order in the facility*." Section 5.5 (Religious Practices), 2011 Operations Manual ICE Performance-Based National Detention Standards ("2011 ICE PBNDS"), Rev. Dec. 2016, at 375, https://www.ice.gov/doclib/detention-standards/2011/5-5.pdf (emphasis added); *see also* 2004 BOP Program Statement on Religious Beliefs and Practices ("BOP Religious Program Statement"), CPD/RSB No. P5360.09, Rev. June 2015, https://www.bop.gov/policy/progstat/5360_009_CN-1.pdf. Even Sheridan acknowledges that its prisoners "have the right to freedom of religious affiliation, and voluntary religious worship" and urges them to engage in religious activities. *See Sheridan Handbook*, *supra*, at 28; *id.* at 13-14, 30 ("Choose your associates wisely. Look for people who are involved in positive activities like

educational programs, psychology groups, or religious services. Get involved in these activities yourself."). Yet, Petitioners - civil-immigration detainees who are entitled to greater liberty protections than the convicted persons typically confined at Sheridan[6] - continue to suffer serious deprivations of their religious-exercise rights. Needless to say, these conditions are unacceptable for anyone, whether or not convicted, who is imprisoned by the government.

II. PETITIONERS ARE SUFFERING WIDESPREAD, FLAGRANT VIOLATIONS OF THEIR RELIGIOUS-FREEDOM RIGHTS.

It appears that many Petitioners adhere to Sikhism, though some Petitioners are Christian, Hindu, or Muslim. *See, e.g.*, Decls. of ICE Detainee Nos. 2 (Hindu); 5 (Christian); 20 (Sikh); Decl. of William J. Teesdale ¶ 6(a). Petitioners have complained of a wide array of impediments to their religious exercise, as well as forced violations of their religious beliefs. *See* Teesdale Decl. ¶¶ 3-6. As noted in Petitioners' Motion, some Sikh detainees have been prohibited from wearing turbans. *See, e.g.*, Decls. of ICE Detainee Nos. 15, 24, 33, 34, 45. Sheridan's refusal to allow detainees to wear religious headgear does not comport with ICE or BOP policies. *See* 2011 ICE PBNDS, *supra*, at 380-82 (providing that certain headwear - "notably kufis, yarmulkes, turbans, crowns and headbands" - is "permitted in all areas of the facility . . . [and] shall be handled with respect at all times, including during the in-take process"); BOP Religious Program Statement, *supra*, § 548.16(b) (authorizing Jewish prisoners to wear yarmulkes, Muslims prisoners to wear

[6] *See, e.g.*, *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004) ("Because [plaintiff] is detained under civil—rather than criminal—process, . . . [he] is entitled to more considerate treatment than his criminally detained counterparts. . . . Therefore when a [civil] detainee is confined in conditions identical to, similar to, or more restrictive than, those in which his criminal counterparts are held, we presume that the detainee is being subjected to punishment.") (internal quotation marks and citation omitted).

kufis, Native American prisoners to wear headbands, Rastafarians prisoners to wear crowns, and Sikh prisoners to wear turbans).

Robust enforcement of these policies by this Court is consistent with the existing RFRA protections discussed above. For Sikhs, "the turban is not a fashion trend or indicia of social standing - it is an essential part of their faith." Neha Singh Gohil & Dawinder S. Sidhu, *The Sikh Turban: Post-911 Challenges to This Article of Faith*, 9 Rutgers J. L. & Religion 10 (2008). Like their long hair, Sikhs wear turbans "pursuant to religious mandate." *Id.* Thus, prohibiting them from wearing turbans plainly imposes a substantial burden on their religious exercise. *See, e.g.*, *Singh v. McHugh*, 185 F. Supp. 3d 201, 205, 217 (D.D.C. 2016) (noting Sikh plaintiff's "sincere belief that if he cut his hair, shaved his beard, or. . . abandoned his turban, he would be 'dishonoring and offending God,'" and holding that Army's denial of a religious accommodation constituted substantial burden). Given that ICE and BOP policies expressly allow these religious practices, the Sheridan Custodians cannot credibly argue that their treatment of Petitioners furthers a compelling interest or is the least restrictive means of doing so. *See generally id.* at 222-32; *cf. Warsoldier v. Woodford*, 418 F.3d 989, 998-1001 (9th Cir. 2005) (holding that rule requiring Native American prisoner to cut his hair was not the least restrictive means of furthering prison's asserted security interest).

Numerous Petitioners also have complained that Sheridan has denied them meals that comply with their religious dietary needs, forcing them instead to eat food that violates their religious beliefs or go hungry. *See, e.g.*, Decls. of ICE Detainee Nos. 2, 4, 11, 21, 26, 27, 28, 31, 34, 40, 49, 54, 65, 73. As with the prohibition on religious headwear, the Sheridan Custodian's failure to accommodate Petitioners' religious dietary needs runs afoul of ICE and BOP policy.

Under ICE rules, "[s]pecial diets shall be provided for detainees whose religious beliefs require adherence to religious dietary laws." 2011 ICE PBNDS, *supra*, at 375. Section 548.20 of the BOP Religious Program Statement also establishes a religious diet program for prisoners. These policies reflect the prevailing law, under which prisoners "have the right to be provided with food sufficient to sustain them in good health that satisfies the dietary laws of their religion." *McElyea v. Babbitt*, 833 F.2d 196, 198 (9th Cir. 1987); *see also Williams v. Annucci*, No. 15-1018, __ F.3d __, 2018 WL 3352755, at *8 (2d Cir. July 10, 2018) (holding that prison failed to meet its burden under RLUIPA in denying Nazarite Jewish prisoner a diet that comported with his religious beliefs); *United States v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1341, 1348-49 (11th Cir. 2016) (holding that state's refusal to provide Jewish prisoners with kosher meals violated RLUIPA); *Cotton v. Cate*, No. 12-15829, 578 F. App'x 712, 714–15 (9th Cir., 2014) (finding that prison violated RLUIPA in denying Kemetic prisoner a religious diet).

Other complaints lodged by Petitioners include being denied access to clergy and religious leaders, religious services, an appropriate place to pray, and religious texts and other items. *See, e.g.*, Decls. of Detainee Nos. 2, 32 (no temple space, religious books, or clean place for prayer provided for Hindu detainees); Nos. 1, 3, 5, 8, 67, 74 (Christian detainees denied access to pastors, priests, and church services); Nos. 17, 20, 27, 45 (Sikh detainees unable to pray in unclean cell next to toilet, denied group worship services with other Sikhs, and denied access to Sikh religious leaders and Sikh religious texts). Again, nothing in ICE or BOP rules requires the Sheridan Custodians to impede Petitioners' ability to practice their religious beliefs via these methods. On the contrary, ICE's detention standards state that "[a]dequate space, equipment and staff (including security and clerical) shall be provided for in order to conduct and administer religious programs."

2011 ICE PBNDS, *supra*, at 375. Moreover, under ICE rules, "[e]ach facility administrator shall allow detainees to have access to personal religious property," including holy books, rosaries and prayer beads, prayer rugs and oils, and religious jewelry. *Id.* at 380. And detainees are entitled to pastoral care. *Id.* at 377-78 ("Detainees who belong to a religious faith different from that of the chaplain or religious services provider staff may, if they prefer, have access to pastoral care and counseling from external clergy and religious service providers."). The BOP likewise authorizes personal property that includes a variety of religious items and texts, BOP Religious Program Statement, *supra*, § 548.16(a), and provides that "[a]uthorized congregate services will be made available for all inmates weekly," *id.* §548.10(b)(a).

The federal courts have recognized that accommodation of these religious practices is not only practicable in most institutionalized settings, but often required under RFRA and RLUIPA. *See, e.g.*, *Ghailani v. Sessions*, 859 F.3d 1295, 1306 (10th Cir. 2017) (holding that federal prison did not meet its burden under RFRA in refusing to allow Muslim prisoner to participate in group prayers); *Williams v. Beard*, No. 4:08-CV-1915, 2016 WL 2897655, at *1 (M.D. Pa. May 18, 2016) (issuing order pursuant to RLUIPA requiring prison administrator to "provide a clean and appropriate space for Muslim inmates working in the kitchen to offer prayer in a prone position during their shift all year round"); *cf. Cutter*, 544 U.S. at 716 n.5 (noting that, during RLUIPA hearings, Congress had documented the "egregious and unnecessary ways" in which institutionalized persons' religious exercise was impeded - *e.g.*, "prisoners' religious possessions, such as the Bible, the Koran, the Talmud or items needed by Native Americans . . . were frequently treated with contempt and were confiscated, damaged or discarded by prison officials") (internal quotation marks omitted).

The violations of Petitioners' religious-exercise rights are especially egregious here for several reasons. First, although the law does not require that religious beliefs be central to the Petitioners' faith to warrant protection,[7] the religious activities that Petitioners are concerned with (*e.g.*, wearing religious headgear, following religious diets, prayer, communal worship, clergy counseling, and study of holy books) are generally core religious practices, central to the faith systems that they follow. The essential nature of the religious practices impeded by the Sheridan Custodians offers a window into just how distressing the disregard for Petitioners' religious exercise has been to them. Petitioners do not take these deprivations lightly; neither should the Court. *Cf., e.g., Wisconsin v. Yoder*, 406 U.S. 205, 210 (holding that Amish need not send children to school beyond eighth grade where "Amish objection to formal education beyond the eighth grade [was] firmly grounded in . . . central religious concepts").

Second, as noted above, Petitioners are *civil* immigration detainees. There are "important distinctions between the characteristics of the Immigration Detention population in ICE custody and the administrative purpose of their detention . . . as compared to the punitive purpose of the Criminal Incarceration system." Dr. Dora Schriro, *Immigration Detention Overview and Recommendations* at 2 (Oct. 6, 2009), https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf. Petitioners are entitled to greater liberty protections than the typical population at Sheridan. *Supra* p. 6. When it comes to religious exercise, however, the Sheridan Custodians

[7] *See* 42 U.S.C.A. § 2000cc-5(7)(A) ("[Under RLUIPA,] 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."); *accord* 42 U.S.C.A. § 2000bb-2(4) (adopting same definition under RFRA).

are treating Petitioners *worse* than their own written policies require for criminally incarcerated individuals.

Finally, many Petitioners undoubtedly have suffered severe trauma and anguish in their home countries, on their journeys to the United States, and now, during their confinement by the government. Some likely have even suffered previous persecution *because of* their religion. After all of this, denying Petitioners the comfort and peace of mind associated with practicing their faith is, simply put, cruel. *See, e.g.*, *Case Note, Madison v. Riter*, 13 Wash. & Lee J. Civ. Rts. & Soc. Just. 491, 503 n.125 (2007) ("[M]any prisoners achieve a peace of mind from religious observance, something which helps them survive psychologically while imprisoned.") (citing Harry R. Dammer, *The Reasons for Religious Involvement in the Correctional Environment*, 35 J. of Offender Rehab. 35, 41 (Dec. 2002)). It makes a mockery of the fundamental religious-liberty principles that have guided our nation since its founding. The Court should intervene immediately to put an end to these injustices.

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CONCLUSION

For the foregoing reasons, amici respectfully request that Petitioners' Motion for Emergency Interim Relief in the Form of an Order Requiring Religious Accommodations for ICE Detainees be granted and that the Sheridan Custodians be enjoined from impeding the Petitioners' religious exercise.

Respectfully submitted,

DATED:

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