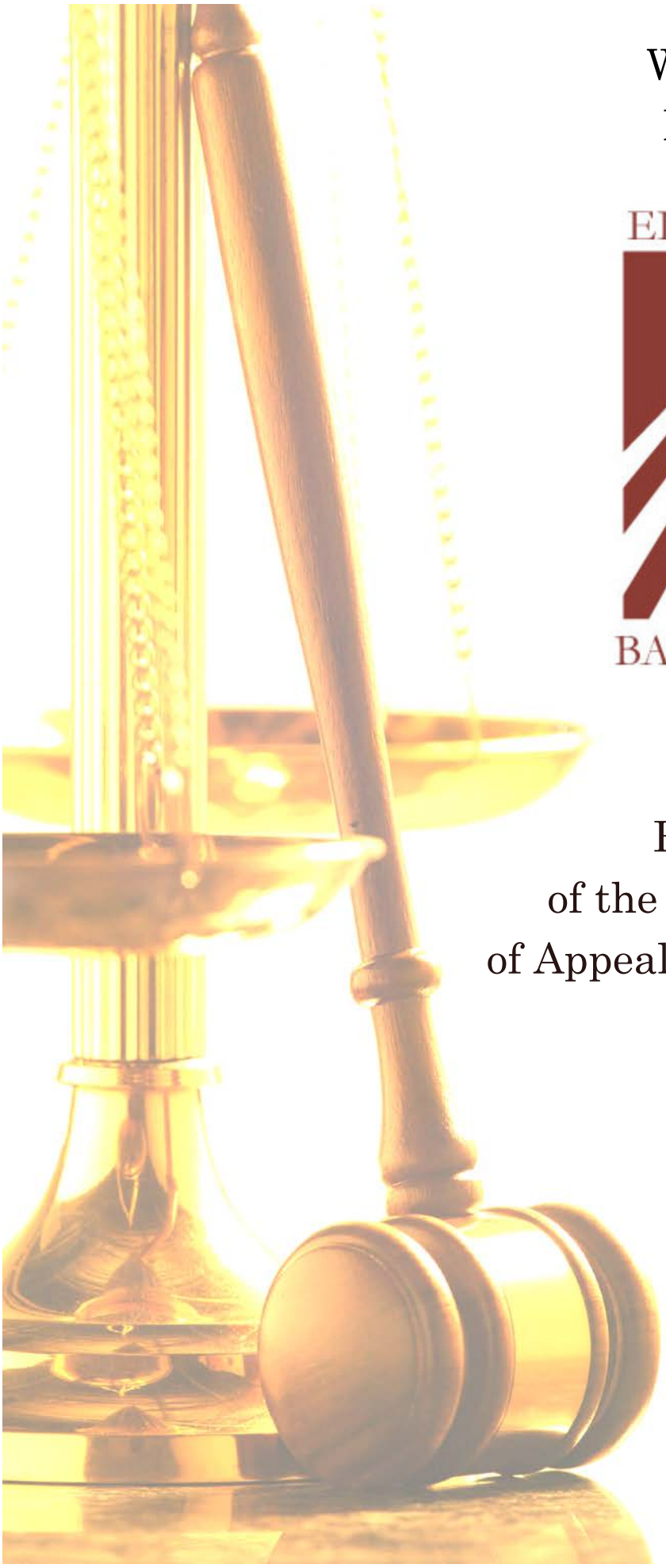

Winter 2015 Newsletter

EIGHTH CIRCUIT BAR ASSOCIATION

Bar Association of the United States Court of Appeals for the Eighth Circuit

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Supreme Court Decides RLUIPA Case From Eighth Circuit

by Zoe E. Naylor[1]

On October 7th 2014, a little case from Arkansas made its way to the U.S. Supreme Court for oral argument. In *Holt v. Hobbes*, No. 13-6827, Gregory Holt challenged the Arkansas Department of Correction (ADC) grooming policy under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §200cc-1(a)(1)-(2) as to whether it prohibits a person from growing a one-half-inch beard in accordance with his religious beliefs. Holt requested to grow a beard based on his Muslim belief and was denied by ADC citing security concerns. Holt brought suit and received temporary relief before the district court dismissed the case upon hearing other options were available for Holt to practice his religion and ADC had an interest in prison security.

Holt appealed through the Eighth Circuit who affirmed the district court, agreeing that "the defendants met their burden under RLUIPA of establishing that ADC's grooming policy was the least restrictive means of furthering a compelling penological interest." *Holt v. Hobbs,* No. 12-3185, Fed. App'x 561 (8th Cir. 2013).

In arguments before the U.S. Supreme Court, Petitioner and Respondents continued bringing the same arguments before the Justices. Holt's attorney argued that as a Muslim, Holt must grow a beard to practice his religion. He noted that Holt

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conceded to growing a half-inch beard as a 'reasonable compromise', to which Scalia replied, "Religious beliefs aren't reasonable." However, the Justices recognized that this case needs to look at the entire principle (or entire beard, not just half an inch) and make a ruling on growing an entire beard or not based on RLUIPA.

On the other side, ADC argued that there are legitimate safety concerns when inmates grow beards as when inmates escape; shaven faces cause a distinctly different appearance. Petitioner responded to that by showing that hair grown on top of the head has no such restrictions and could cause the same problem as Respondent presents. Respondent continued arguing that there are safety concerns with contraband concealed in a beard, to which Justice Alito responded by asking why the prison can't just give the inmate a comb and tell him to comb out his beard and if there is a tiny revolver hidden in his half-inch beard, it will fall out.

The Justices poked many holes in both sides of the arguments, but this case will have a significant impact on how RLUIPA is handled by the lower courts. Historically, the lower courts defer to the ADC and prison guards judgment, especially when it comes to areas of security. The United States and many religious organizations, including Jews, Christians, Sikhs, and Muslims filed amicus briefs on behalf of the Petitioner. Respondent Arkansas had the state of Alabama as its sole amicus brief supporter.

On January 20th, 2015, the U.S. Supreme Court entered its unanimous opinion on this case, reversing and remanding the District Court's decision. The Court explained that RLUIPA expands the First Amendment, causing the government to find the 'least restrictive' means of furthering a compelling governmental interest. The ADC was unable to meet this burden, or show that other less restrictive means were a better alternative. Justice Alito's Opinion did take blanket deference away from prison officials when dealing with these matters, as expected when RLUIPA was fleshed out. However, Justice Sotomayor, concurring, noted that deference should still be given to prison officials, but these should not be made with 'mere speculation' or simply by declaring a compelling governmental interest.

Regardless, a unanimous opinion was made that held declaring that the ADC grooming policy violates RLUIPA by preventing petitioner from growing a ½ inch beard due to his religious beliefs. One surprise is that the Justices only ruled on the ½ inch beard issue, an area that was criticized by the Justices during oral arguments. Perhaps we will see a full inch beard petition in the future, but for now, Mr. Holt [Muhammad] can now rejoice and practice his religion in jail.

A Modest Proposal to Disturb the Sound of Appellate Silence[2]: Why the Eighth Circuit Should Articulate a Rule 23(f) Standard for Appeals of Class Certification Decisions

by Stephen P. Safranski & Trish E. Furlong[3]

More often than not, in class actions, the district court's decision on class certification is the pivotal moment—the "crucial inflection point" in the case.[4] The denial of class certification often spells the end of the litigation because it is no longer economically feasible to continue an individual suit; the grant of class certification can have the same effect for the defendant, by creating extraordinary settlement pressure on a defendant. As a result, "the fight over class certification is often the whole ballgame,"[5] where the economics of litigation force the loser to retreat from the field of play, and the class certification decision itself becomes effectively unreviewable.

The Supreme Court adopted Rule 23(f) of the Federal Rules of Civil Procedure to create an avenue for interlocutory review of class certification decisions. This avenue is vital to the development of the law of class certification, as illustrated by the fact that Rule 23(f)—not 28 U.S.C. § 1291 or the final judgment rule—was the vehicle that resulted in the Supreme Court's most important class-certification precedents in recent years, including *Wal-Mart Stores, Inc. v. Dukes*,[6] *Comcast Corp. v. Behrend*,[7] and *Halliburton Co. v. Erica P. John Fund, Inc.*[8]

Despite the Rule's pronouncement of a seemingly dedicated avenue of interlocutory review for class certification decisions, a precise understanding of the circumstances in which review is warranted remains elusive. That is especially true in the Eighth Circuit, where the court has not formally announced the standard for reviewing Rule 23(f) petitions.

Rather than reveal the factors it considers in assessing a petition, the Eighth Circuit has cited, without comment, the advisory committee's notes and the differing tests adopted by other Circuits, stating "we need not undertake here the task of refining a

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[2] *Cf.* Simon and Garfunkel, The Sound of Silence (Columbia 1964) ("People talking without speaking/ People hearing without listening/People writing songs that voices never share and no one dared disturb the sound of silence.").

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[4] *George v. China Auto. Sys., Inc.*, No. 11-1533, 2013 U.S. Dist. LEXIS 93698, at *2 (S.D.N.Y. July 3, 2013).

[5] *Hartford Accident & Indem. Co. v. Beaver*, 466 F.3d 1289, 1294 (11th Cir. 2006).

[6] 131 S. Ct. 2541 (2011).

[7] 133 S. Ct. 1426 (2013).

[8] 134 S. Ct. 2398 (2014).

circuit standard for review of such petitions."[9] Not only has the court as a whole yet to undertake that task, at least publicly, it is uncertain whether individual judges are applying developed criteria for considering Rule 23(f) petitions, or whether they are using an *ad hoc* "I know it when I see it"[10] approach to deciding whether interlocutory review is warranted. In the shadow of the Eighth Circuit's silence, litigants are left to argue this issue based on the advisory committee notes, adopting *a la carte* elements of the differing standards embraced by other Circuits.

The Eighth Circuit should break its silence. With an articulated standard for review of Rule 23(f) petitions, the court will benefit from better argued, more focused petitions that meaningfully and informatively address the criteria that the court is applying in its review. Litigants will benefit from greater predictability, as well as consistency in approach from one panel to the other. The court may even see an administrative benefit—attorneys, guided by the court's articulated standard, may decide not to file petitions that would be futile under that standard. Ultimately, the court's exposition of the criteria it evaluates in reviewing Rule 23(f) petitions will benefit society by fostering the development of class-certification law.

[9] *Liles v. Del Campo*, 350 F.3d 742, 746 n.5 (8th Cir. 2003).

[10] *Cf. Jacobelis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Rule 23(f) Grants "Unfettered" Discretion to the Courts of Appeals

Before the Supreme Court promulgated Rule 23(f) in 1998, a party unsatisfied with a district court's class certification decision generally had three options: (1) ask for permission to file interlocutory review under 28 U.S.C. § 1292(b); (2) file a mandamus action under 28 U.S.C. § 1651; or (3) wait to appeal on final judgment. As amended in 2009, Rule 23(f) provides:

> A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Fed. R. Civ. P. 23(f).

Under the plain language of the rule, appellate review is subject entirely to the discretion of the court of appeals. The advisory committee notes confirm that the court's discretion is "unfettered."[11] But unfettered does not mean unguided. Explicitly stating that the § 1292(b) standard did *not* apply, the Rules Advisory Committee anticipated that "[t]he courts of appeals

[11] Fed. R. Civ. P. 23(f) advisory committee notes 1998.

will develop standards for granting review that reflect the changing areas of uncertainty in class litigation."[12] Further, "[p]ermission to appeal may be granted or denied on the basis of *any* consideration that the court of appeals finds persuasive."[13]

The Adoption of a Standard by Eighth Circuit Would Serve the Parties, Counsel, and the Court

Despite the Advisory Committee's invitation to develop standards to resolve Rule 23(f) petitions, the Eighth Circuit has to date declined to adopt a standard, and adjudicates the merits of petitions through unpublished summary orders that offer no insight into the court's reasoning for granting or denying a petition. Certainly, litigants can draw some guidance from the advisory committee notes and authorities from other Circuits, but other federal courts are not uniform in how they define or balance the factors for granting appellate review. While those courts generally find that plaintiff's or defendant's "death-knell" scenarios weigh in favor of appellate review,[14] they vary considerably on how the merits of the decision—including the importance of the issues involved and correctness of the decision—factor into the analysis.[15] Thus, important questions remain to be addressed by the Eighth Circuit. Is a "death-knell" scenario sufficient by itself to warrant review? What quantum of proof must be offered to establish a "death knell"? Conversely, is interlocutory review appropriate for a manifestly erroneous decision that is unlikely to end the litigation and could be reviewable after final judgment? Are the factors independently dispositive, or do they balance on a sliding scale?

Eighth Circuit statistics suggest that panels assigned to Rule 23(f) petitions are applying an exacting standard, as Rule 23(f) appeals are by far the exception rather than the rule:

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[12] *Id.* (emphasis added).

[13] *Id.* (emphasis added).

[14] *See, e.g.*, *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834–35 (7th Cir. 1999) ("Rule 23(f) gives appellate courts discretion to entertain appeals in 'death knell' cases . . . .")

[15] *See, e.g.*, *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (3d Cir. 2001) (finding that Rule 23(f) review is proper when "the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review"); *Lienhart v. Dryvit Sys.*, 255 F.3d 138, 150 (4th Cir. 2001) (adopting a sliding scale for consideration of whether the district court erred and holding that "[w]here a district court's certification decision is manifestly erroneous and virtually certain to be reversed on appeal, the issues involved need not be of general importance, nor must the certification decision constitute a 'death knell' for the litigation").

Year	Number of Petitions	Granted	Denied	Grant Rate
2009	2	1	1	50%
2010	13	1	12	7.7%
2011	7	3	4	43%
2012	3	1	2	33.3%
2013	10[16]	2	8	20%
2014	15[17]	3	12	20%
TOTAL	50	11	39	22%

These statistics also suggest an overbreadth problem, because parties and counsel have no way to assess the potential success of a petition. Parties file the petition, hoping that some argument within it will strike a nerve with a quorum of judges on the assigned panel. Yet the vast majority of these petitions are denied. An articulated standard, as contemplated by the advisory committee, would allow litigants to make an informed decision on whether to file a Rule 23(f) petition, benefitting the litigants and the court.

It would also ensure that panels are applying the same considerations in their evaluation of Rule 23(f) petitions. A "cardinal rule" in the Eighth Circuit is that "one panel is bound by the decision of a prior panel."[18] The self-evident purpose of this rule is to ensure that the standards applied by the court do not depend on which judges are assigned to a panel. But, as it stands, it is entirely possible—even likely—that different panels of the court are applying different tests to Rule 23(f) petitions.

Moreover, if lawyers know what the court considers in reviewing a petition, they could address those points in their submissions, thereby providing the court with the tools it needs to make decisions that are well reasoned and consistent. Perhaps more importantly, if the Eighth Circuit adopted and articulated a standard for reviewing Rule 23(f) petitions, it would likely result in not only fewer petitions, but petitions that squarely address the issues central to the court's decision.

What the standard should be in the Eighth Circuit is beyond the scope of this article. Logically, the standard would include consideration of the advisory committee factors that led to the adoption of Rule 23(f) in the first place, including whether the decision rests on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation. But the standard should also maintain the flexibility suggested by advisory committee's notes, allowing review for any reason the court deems

[16] The court received eleven petitions for Rule 23(f) review in 2013. However, because the petition in 13-8023 was withdrawn and docketed as the grant of a motion to dismiss, it is not considered in these figures.

[17] The court construed the notice of appeal in 14-1235 as Rule 23(f) petition.

[18] *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc).

persuasive—or an avenue for extraordinary circumstances that do not precisely fit the other criteria.

But until the court adopts a standard, practitioners must continue to rely on the advisory committee notes and explicit guidance from other Circuits, and implied guidance from the circumstances in which the Eighth Circuit has granted review in the past. Above all, the Rule 23(f) petition should emphasize the *exceptional* quality of the circumstances warranting appellate review, maintaining a "limiting principle" that explains why compelling reasons exist for review in the case at hand that will not open the door to countless petitions with similar "unique" circumstances.

When should an inferior court just sit tight?
by Ryan Koopmans & Ryan Leemkuil[19]

That was the main question in *Deaton v. Arkansas Department of Correction*, No. 14-1916. Arkansas prisoner Christopher Deaton wants to grow a full-length beard for religious reasons, but prison policy doesn't allow it because of safety concerns. Deaton sued under the Religious Land Use and Institutionalized Person Act (RLUIPA), but a federal district court threw out the case and in December an Eighth Circuit panel summarily affirmed that ruling in a one-paragraph order.

One paragraph, because the Eighth Circuit had already decided that question. In fact, the court ruled last year in *Holt v. Hobbs* that the no-beard policy doesn't violate RLUIPA even if the prisoner agrees to keep his facial hair to a half inch. And since one three-judge panel cannot overrule another, the panel in *Deaton* had no authority to say that a full-length beard is okay.

At least it didn't at that point, which is why Judge Colloton dissented. The Supreme Court granted cert. in *Holt* and heard oral argument in October. So when the Eighth Circuit decided *Deaton* on December 17, it seemed likely that a decision in *Holt* would be coming at any time and that the law in the Eighth Circuit could change. So why not wait for the Supreme Court to rule, Judge Colloton asked:

> This case is factually distinguishable from *Holt*, because appellant Deaton—like the prisoner in *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008)—claims a right based on RLUIPA to grow a full beard in accordance with his religious beliefs. But the Court's reasoning in *Holt* will inform how Deaton's claim should be analyzed and whether *Fegans* has continuing vitality. In the interest of judicial economy, I would hold this case briefly pending a decision

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> in *Holt* rather than burden Mr. Deaton with the need to file a petition for writ of certiorari to secure an order granting certiorari, vacating this court's decision, and remanding for further consideration in light of Holt.

That's not the kind of dissent we usually get to see. It's not about the merits of the case (everyone agreed that Eighth Circuit precedent dictated the outcome, at least at that time) but on how the court should conduct its business. Filing a cert. petition and a motion to proceed *in forma pauperis* (i.e., ask the court to waive the filing fee) is not a small task for Deaton (who's in prison). But the extra burden isn't just on Deaton. The Supreme Court clerk's office would have to docket the case, a law clerk in the Supreme Court clerk pool would have to review the cert. petition, verify that the *Holt* decision could possibly change the outcome, and draft a memo to the justices recommending that the court grant the petition and remand the case to the Eighth Circuit. Once the Court enters the order, the Eighth Circuit clerk's office will have to notify the panel that the case is back, thus putting the three judges back in the same position they would have been had they held the case (which was submitted in November) a few more months. Hence Judge Colloton's dissent.

Thankfully, though, it seems that none of that will have to take place. Deaton asked for more time to file a petition for rehearing, and on January 20 (before Deaton's case was final in the Eighth Circuit), the Supreme Court ruled that Gregory Holt is entitled to grow a half-inch beard consistent with his religious beliefs. The timing of the Supreme Court's decision will allow the Eighth Circuit to reconsider *Deaton* without the need for a cert. petition. And the Supreme Court's load is lighter by one case.

Interested in Writing for the Newsletter?

Contact the editor, Scott M. Flaherty, *sflaherty@briggs.com*.