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Petion for a Writ of Certiorari. Knight v. Thompson, 136 S.Ct. 2534 (2016) (No. 15-999), 2016 U.S. S. Ct. Briefs LEXIS 542, 2016 WL 447654

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15 No. 15-999

Supreme Court, U.S.
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In The
Supreme Court of the United States

RICKY KNIGHT and
BILLY "TWO FEATHERS" JONES, *et al.*,

Petitioners,

v.

LESLIE THOMPSON and
ALABAMA DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Holt v. Hobbs*, 135 S.Ct. 853 (2015), this Court held that the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), renders unlawful an absolute ban on inmates' wearing a beard for religious reasons. The Eleventh Circuit, subsequent to and despite this Court's decision in *Holt*, rejected a RLUIPA challenge to Alabama's similarly inflexible policy prohibiting all male inmates from wearing long hair for religious reasons. A vast majority of states, the District of Columbia, and all federal prisons accommodate inmates whose religious practices include wearing beards or long hair.

The Question Presented is:

Whether Alabama's grooming policy violates RLUIPA, 42 U.S.C. § 2000cc, *et seq.*, to the extent that it prohibits Petitioners from wearing unshorn hair in accordance with their sincerely held religious beliefs.

PARTIES TO THE PROCEEDINGS

The Petitioners are Billy "Two Feathers" Jones, Thomas "Otter" Adams, Douglas "Dark Horns" Bailey, Michael Clem, Franklin "Running Bear" Irvin, Ricky Knight, and Timothy "Grey Wolf" Smith.

The Respondents are Leslie Thompson, State of Alabama Department of Corrections ("ADOC"), Governor Robert Bentley, Attorney General Luther Strange, Tom Allen, Chaplain James Bowen, Eddie Carter, Chaplain Coley Chestnut, Warden Dees, Roy Dunaway, DeWayne Estes, J.C. Giles, Thomas Gilkerson, Michael Haley, Warden Lynn Harrelson, Tommy Herring, Roy Hightower, Warden Ralph Hooks, Willie Johnson, Chaplain Bill Lindsey, James McClure, Billy Mitchem, Warden Gwyn Mosley, Deputy Warden Darrell Parker, Kenneth Patrick, Andrew W. Redd, Neal W. Russell, John Michael Shaver, William S. Sticker, Ron Sutton, Morris Thigpen, J.D. White, Chaplain Steve Walker, Chaplain Willie Whiting, and Officer Wynn. Jefferson S. Dunn, current commissioner of the Alabama Department of Corrections, is a respondent pursuant to Rule 35.3.

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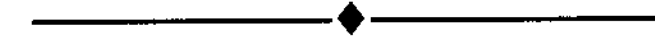
PETITION FOR WRIT OF CERTIORARI

Petitioners Ricky Knight, Billy "Two Feathers" Jones, *et al.*, respectfully petition for a writ of certiorari to review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit in this case.



OPINIONS BELOW

The August 5, 2015, opinion of the court of appeals, which is reported at 796 F.3d 1289 (11th Cir. 2015), is set out at pp. 1a-8a of the Appendix. A second August 5, 2015, opinion of the court of appeals, which is reported at 796 F.3d 934 (11th Cir. 2015), reinstates the original panel opinion previously vacated by this Court and is set out at pp. 9a-37a of the Appendix.[1] The March 8, 2012, opinion of the district court, which is unofficially reported at 2013 WL 777274 (M.D. Ala. March 8, 2012), is set out at pp. 38a-41a of the Appendix. The magistrate's unpublished Recommendation of July 11, 2011, is set out at pp. 42a-76a of the Appendix, and is available at 2011 WL 7477105. The November 4, 2015, order of the court of appeals is set out at pp. 78a-79a of the Appendix.

[1] This 2015 opinion reissued the opinion issued by the Eleventh Circuit in 2013, 723 F.3d 1275 (11th Cir. 2013), adding one sentence and part of another. That slight difference is set out in the Editor's Note at App. 31a.

JURISDICTION

The decisions of the court of appeals were entered on August 5, 2015 (App. 1a & 9a). A timely petition for rehearing and rehearing en banc was denied on November 4, 2015 (*id.* 77a-79a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. 106-274, provides in part:

> (a) General rule
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a).

STATEMENT OF THE CASE

In *Holt v. Hobbs*, 135 S.Ct. 853 (2015), this Court held that Arkansas corrections officials violated the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq.*, when they applied a prohibition against beards to an inmate whose Muslim religious beliefs required that he wear a beard, and who sought to wear a half-inch beard.

The instant appeal concerns an Alabama prison rule that requires all male inmates to wear short hair, a practice that tramples deeply rooted religious traditions of the Native American Petitioners. *See* App. F (photograph of Douglas "Dark Horns" Bailey wearing hair in traditional manner).[2] The case was originally decided by the Eleventh Circuit in July 2013, prior to the decision in *Holt.* Certiorari was sought after review had been granted in *Holt*, and this Court held that petition pending the resolution of *Holt.* The 2013 Eleventh Circuit decision was the most detailed articulation of a narrow interpretation of RLUIPA, and in *Holt* the respondents (and Alabama, in an amicus brief) cited and urged this Court to adopt the standards in that 2013 decision.

The Court in *Holt*, however, adopted a more expansive interpretation of RLUIPA. Following the issuance of that opinion, the Court vacated the 2013

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[2] This photograph features Mr. Bailey while not incarcerated.

Eleventh Circuit decision in this case and remanded it for further consideration. 135 S.Ct. 1173 (2015). On remand the Department of Justice filed an amicus brief explaining, as did the plaintiffs, that the standards in the 2013 Eleventh Circuit decision were inconsistent with the subsequent interpretation of RLUIPA in *Holt.*

But the Eleventh Circuit made no effort to conform its pre-*Holt* interpretation of RLUIPA to the standards that had subsequently been announced in *Holt.* Instead, the court below reissued the entire 2013 opinion, without deletion or modification; the reissued opinion differed from its earlier-born twin only with the addition of an inconsequential transitional sentence and phrase. App. 31a, Editor's Note. The 2015 reissued opinion establishes for courts and prisons in the Eleventh Circuit an interpretation of RLUIPA wholly at odds with this Court's decision in *Holt.* Review by this Court is required to bring legal standards in that circuit into line with the federal courts that adhere to *Holt*, and to assure that the religious practices of inmates in that circuit are afforded the same degree of protection under RLUIPA that exists for religious practices in the rest of the Nation.

A. Legal Background

Congress enacted RLUIPA and its sister statute, the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb *et seq.*, "in order to provide very broad protection for religious liberty."

Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2760 (2014). In making RFRA applicable to the states and their subdivisions, Congress relied on Section 5 of the Fourteenth Amendment. But in *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court held that RFRA exceeded Congress's powers under that provision.

Congress responded to *City of Boerne* by enacting RLUIPA, which applies to the states and their subdivisions and invokes congressional authority under the Spending and Commerce Clauses. Section 3 – the provision at issue in this case – governs religious exercise by institutionalized persons. 42 U.S.C. § 2000cc-1. Section 3 mirrors RFRA, and provides that a government may not impose a substantial burden on the religious exercise of a person residing in an institution unless the government demonstrates that the imposition of that burden on that person "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). "Several provisions of RLUIPA underscore its expansive protection for religious liberty." *Holt v. Hobbs*, 135 S.Ct. at 860. "The 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]." *Hobby Lobby*, 134 S.Ct. at 2780.

B. Pre-*Holt* Proceedings Below

This is an action brought by a group of sincere Native American practitioners challenging the Alabama Department of Corrections ("ADOC") policy that "requires all male prison inmates to wear a 'regular hair cut,' defined as 'off neck and ears.'" App. 11a. Petitioners contend that this policy violates RLUIPA by substantially burdening their religious practices without the type of justification required by that statute. App. 11a. The Department of Justice intervened in the district court litigation, and filed briefs in the court of appeals both in connection with the 2013 opinion, and on remand following *Holt*, arguing that the exemptionless short-haircut rule violated RLUIPA.

(1) The substantial burden imposed by the short-haircut requirement is no longer disputed. "Plaintiffs' expert on Native American spirituality offered extensive, undisputed testimony that long hair has great religious significance for many Native Americans, and each Plaintiff confirmed that his desire to wear unshorn hair stemmed from deep religious convictions." App. 26a. The district court[3]

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[3] The case was tried without consent before a Magistrate Judge, whose Recommendation was subsequently adopted by the District Judge. The petition uses the phrase "District Court" to refer to those adopted Recommendations, except in a few instances in which the opinion of the District Judge addresses an issue; in that situation the petition refers separately to the Magistrate and the District Judge.

concluded that "a preference for unshorn hair is a central tenet of Native American spirituality and thus, satisfies the Act's broad definition of a religions exercise." App. 52a; *see id.* 52a, n.7 ("The court finds that long hair has religious significance to American Indians and cutting that hair ... is 'an assault on their sacredness.'"); *id.* at 57a ("the court finds that long hair is a central tenet of Native American spirituality of which the plaintiffs are sincere adherents."). The court of appeals agreed that "wearing long hair is a central tenet of their religious faith." App. 11a.

The courts below recognized that ADOC's short-hair policy substantially burdened the religious practices of the plaintiffs. "Plaintiffs' expert ... gave an uncontradicted opinion that forcing Native Americans to cut their long hair would amount to an 'assault on their sacredness." App. 26a-27a (footnote omitted). "Plaintiffs proffered undisputed testimony regarding the burden that the ADOC hair length policy placed on their religious practices." App. 13a. "Prison regulations requiring short hair diminish the ability of the plaintiffs to approach their Creator with honor. Cutting their hair detracts from their abilities to practice their religion, because when their hair has been cut, they feel separated and disconnected spiritually during their religious ceremonies." App. 53a (footnote omitted). The district court found "that the involuntary cutting of the plaintiffs' hair substantially burdens the practice of their religious exercise." App. 54a; *see* App. 20a, 57a. The court of appeals noted that "[t]he ADOC does not [now] dispute that

its hair-length policy substantially burdens Plaintiffs' religious exercise, nor could it." App. 26a.

Because the plaintiffs met their initial burden of proving that ADOC's short-haircut policy substantially burdened their free exercise of religion, the burden shifted to ADOC to demonstrate both that the policy advanced a compelling governmental interest, and was "the least restrictive means" of furthering that interest. 42 U.S.C. § 2000cc-1(a). In an effort to meet that burden, the ADOC pointed to several asserted purposes, and argued that permitting inmates to grow long hair would interfere with its ability to further those interests. Plaintiffs, on the other hand, relied heavily on evidence that long hair is permitted in prisons in 38 states[4] and the District of Columbia, and by the Federal Bureau of Prisons ("BOP"). P.Ex. 23; 28 C.F.R. § 551.4.[5] "Plaintiffs ... presented undisputed testimony that a strong majority of U.S. jurisdictions permit inmates to wear long hair, either

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[4] Because Arkansas now permits hair length exemptions, the number of states is now 39.

[5] This provision, entitled "Hair length," provides:

> "a. The Warden may not restrict hair length if the inmate keeps it neat and clean.
>
> b. The Warden shall require an inmate with long hair to wear a cap or hair net when working in food service or where long hair could result in increased likelihood of work injury.
>
> c. The Warden shall make available to an inmate hair care services which comply with applicable health and sanitation requirements."

generally or as an accommodation for religious inmates." App. 13a (footnote omitted).[6] The record revealed that in 32 states, the District of Columbia and federal prisons, all inmates are permitted to wear long hair; in 6 states long hair is permitted only as an accommodation to religious beliefs. P.Ex. 23.

(2) The case was tried before a Magistrate Judge. ADOC invoked several interests it claimed to be compelling in nature: identifying inmates, detecting contraband, and preserving hygiene. ADOC also contended that uniformity for its own sake was a compelling governmental interest, so that requiring all male inmates to conform to an identical haircut rule satisfied RLUIPA even if the particular type of haircut required had no intrinsic value. The magistrate treated uniformity per se as a compelling governmental interest under RLUIPA. App. 19a.

The magistrate recognized that a large majority of states and the Bureau of Prisons permit long hair. App. 73a. But although most states have concluded that a short-haircut policy is not necessary to operate a secure prison system, the magistrate believed he

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[6] In its new 2015 opinion, the Eleventh Circuit suggested for the first time that it was possible that in "several" of these 40 jurisdictions, prison officials, although permitting long hair, might still require inmates to cut their hair at some point. App. 7a. There is no record evidence that this actually occurs. Regardless, such a practice in a few states would not alter the fact that an overwhelming majority of prison systems do not impose any hair length limitation.

had to defer to the contrary view of Alabama officials. App. 73a. "The court may not substitute its judgment for that of the prison officials." App. 74a.

The District Judge held that the actual practice in the 38 states, the District of Columbia, and all federal prisons was of no moment, stating:

> Most of the Plaintiffs' objections are devoted to a discussion of least restrictive alternatives and the fact that other prisons permit long hair. But, as noted in the Recommendation, context matters and *what happens in other prison systems is beside the point*. What the Plaintiffs want is that the court decouple deference from the least restrictive alternative so that these are considered in isolation. That is inconsistent with RLUIPA.

App. 40a (emphasis added).

(3) In 2013 the court of appeals affirmed the rejection of plaintiffs' RLUIPA claims. Its decision rested on three pivotal interpretations of the statute. First, the Eleventh Circuit held that when most states accommodate a religious practice, a state refusing to accommodate that religious practice need not demonstrate that its prisons are so different from those in other states that an accommodation that worked elsewhere would not work there. Instead, the state can either argue that the policy made its own prisons *comparatively* less risky, or convince the trial court that a prison system in *any* state would be unsafe without the policy in question. App. 34a. Second, the court of appeals concluded that under

RLUIPA a disputed policy may be underinclusive; a state can justify such a policy as eliminating one means by which an inmate could hide contraband or change his appearance, even though the state permits other inmate activities that could give rise to the same problem. App. 14a, 19a. Third, the court of appeals ruled that uniformity per se is a compelling governmental interest, because accommodating a religious inmate – and thus treating him differently from other inmates – would undermine the safe operation of a prison. App. 15a-17a, 28a. That holding did not turn on the nature of the exceptionless rule in question.

After the 2013 Eleventh Circuit decision, but before the plaintiffs had sought review by this Court, certiorari was granted in *Holt v. Hobbs.*

C. The Decision in *Holt*

The plaintiff in *Holt* challenged an Arkansas policy which forbade inmates – except for medical reasons – from growing beards. The Muslim plaintiff in that case established that this policy substantially burdened his religious beliefs, and sought an accommodation that would permit him to wear a half-inch beard. The appeal in *Holt* turned to a significant degree on the same questions of statutory interpretation that had been addressed by the 2013 Eleventh Circuit opinion in the instant case. In *Holt,* Arkansas repeatedly cited and asked this Court to adopt the standard in that Eleventh Circuit 2013 decision.

Alabama filed an amicus brief in *Holt* also relying on the decision below.

In *Holt*, as in the instant case, a large majority of states permitted inmates to engage in the practice forbidden by the defendant. Repeatedly quoting the Eleventh Circuit 2013 decision, Arkansas asked this Court to hold that practices in other states are of little significance because risks are simply a question of degree, and that the different practices in Arkansas and in most other states simply reflected differing views about how much risk a prison system should run. "[T]he RLUIPA does not pit institutions against one another in a race to the top of the risk-tolerance or cost-absorption ladder." Brief for Respondent, *Holt v. Hobbs*, 28 (quoting 2013 Eleventh Circuit opinion). "RLUIPA does not 'force institutions to follow the practices of their less-risk-averse neighbors.'" *Id.* at 60 (quoting 2013 Eleventh Circuit opinion). "[O]ther jurisdictions are simply more willing to tolerate greater risks and costs. RLUIPA does not require Arkansas to incur those same risks and costs just because other states have." *Id.* at 28. Alabama also urged the Court to adopt this part of the 2013 Eleventh Circuit decision. Brief of Alabama, *et al.*, as Amici Curiae Supporting Respondents, *Holt v. Hobbs*, 14. This Court rejected these contentions, holding that where a large number of other states do not use a disputed policy, a state which uses that policy must demonstrate that the circumstances in its own prisons are "different from the many institutions" that accommodate the religious exercise at issue. 135 S.Ct. at 853.

In *Holt*, as in the instant case, the state's policy was under-inclusive; the very problems which that policy was intended to address were still presented, as much if not more, by other things inmates were still permitted to do. Arkansas urged this Court to hold that such under-inclusiveness is irrelevant under RLUIPA.[7] This Court, however, concluded that under-inclusiveness of this type weighs heavily against the validity of a disputed policy under RLUIPA. 135 S.Ct. at 865-66.

In the lower court proceedings in *Holt*,[8] and again in its brief in opposition,[9] Arkansas argued that a state's mere desire to have a uniform grooming code was itself a compelling governmental interest, because no-exceptions policies are vital per se for order

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[7] "Courts should ... allow prison officials to address part of a problem.... The fact that contraband can be hidden in a variety of other places on the person (*i.e.*, head hair, shirt pockets, pants cuffs, shoes, body orifices, etc.) does not mean that ADC has no compelling interest in preventing contraband from being transported in a beard...." Brief for Respondents, *Holt v. Hobbs*, 40 (emphasis omitted).

[8] *Holt v. Hobbs*, 2012 WL 994481 at *3 (E.D. Ark. Jan. 27, 2012) ("Warden Lay ... expressed concern for the effect that giving one inmate preferential treatment would have on other inmates. He suggested that inmate could become a target of his fellow inmates.").

[9] Brief Opposing A Writ of Certiorari, *Holt v. Hobbs*, 4-5 ("Lay testified that allowing Petitioner to maintain a beard, while not affording the same opportunity to other inmates, would elevate Petitioner's status above that of other inmates, thereby creating the real possibility of harm to Petitioner as well as others.").

and discipline. Alabama's amicus brief in *Holt* also advanced this argument.[10] This Court held, to the contrary, that RLUIPA does require states to accommodate religious practices that differ from generally applied rules. 135 S.Ct. at 866.

Arkansas insisted at the oral argument in *Holt* that a beard – even a half-inch beard – would pose

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[10] Brief of Alabama, *et al.*, as Amici Curiae Supporting Respondents, *Holt v. Hobbs*, 4-5:

> Uniform dress and grooming policies serve state interests in order, discipline and uniform treatment.... Uniform dress and grooming policies ... free guards and chaplains from the difficult task of administering case-by-case exemptions.... A uniform policy also means that religious persons are ensured equal treatment. There is no threat that the prison will accommodate practitioners of mainstream religious and overlook those who practice minority religions.

Id. 19-20:

> Arkansas has an interest in a uniform grooming policy simply because it is *uniform*.... [O]ne of the functions of a uniform dress and grooming policy is to establish order and discipline.... Exemptions to such policies can breed resentment ... among other inmates.... [P]rison officials have an "essential interest in a readily administrable rule".... It is a simple matter to enforce a policy of no beards. It becomes much more complicated to enforce a policy allowing beards of certain shapes and lengths for certain prisoners, and denying them to others. At the very least, chaplains and guards must monitor beard lengths and keep track of exemptions at the expense of their other duties.

(emphasis in original; quoting *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S.Ct. 1510, 1522 (2012)).

significantly greater problems for a prison than long hair.[11] In its amicus brief, Alabama treated hair and beards as presenting the same problem under RLUIPA.[12]

After certiorari had been granted in *Holt*, certiorari was pursued in the instant case. *Knight v. Thompson*, No. 13-955. This Court deferred action on that petition while *Holt* was pending. Following the decision in *Holt*, the Court vacated the 2013 Eleventh Circuit decision, and remanded the case for reconsideration in light of *Holt.* 135 S.Ct. 1173 (2015).

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[11] "[C]orrectional officers very likely will be somewhat reluctant to do a full search of the beard like they would, say, head hair." 2014 WL 7661634 at *47.

> MR. CURRAN: ... [H]ead hair doesn't p[ ]ose the same disguise-related problem as a beard.
>
> JUSTICE ALITO: Why is that? Why is that so? Are you saying that somebody with or without a half inch beard – that's a bigger difference than somebody who has longish hair versus the same person with a shaved head?
>
> MR. CURRAN: In our professional judgment, it is, yes, that's correct. Because you're looking at the essential feature of a person's face, their jawline, their chin and the like, and that's the means by which we identify each other.

2014 WL 7661634 at *33-*34.

[12] Brief of Alabama, *et al.*, as Amici Curiae Supporting Respondents, *Holt v. Hobbs*, 25-28.

D. Proceedings on Remand

On remand, the parties and the Department of Justice filed supplemental briefs regarding the significance of *Holt.* The United States pointed out – as did plaintiffs – that the legal standard set out in the 2013 Eleventh Circuit decision was clearly inconsistent with the subsequent decision in *Holt.* "The Supreme Court's decision in *Holt* establishes that Alabama has failed to demonstrate that its absolute ban on long hair is the least restrictive means of furthering its compelling interests. The panel's [2013] decision in this case conflicts with *Holt* in ... important ways." Supplemental Brief for the United States as *Amicus Curiae* Supporting Plaintiffs-Appellants and Urging Reversal, 6.

The Eleventh Circuit, rather than considering afresh the new standard carefully delineated in *Holt*, simply reissued its earlier 2013 opinion, adding only one minor sentence and an introductory clause to another sentence. App. 3a, 8a, 9a-37a, Editor's Note. A second Eleventh Circuit decision handed down the same day suggested that *Holt* had not established any substantive legal standards at all regarding the meaning or application of RLUIPA, but had only held that courts are not to give blind deference to the views of prison officials. App. 5a-7a. For all practical purposes, the Eleventh Circuit treated this Court's decision in *Holt* as if it had ended after the third paragraph in part IIIA. *See* 135 S.Ct. at 864.

REASONS FOR GRANTING THE WRIT

The January 2015 decision in *Holt v. Hobbs* resolved a number of important problems about the meaning and application of RLUIPA, ending confusion and disagreement among the lower courts concerning those issues. Eight months later, the pair of Eleventh Circuit decisions in this case recreated the very divisions which *Holt* should have put to rest. Anyone who read both *Holt* and the Eleventh Circuit opinion at pages 9a-37a would conclude that the Eleventh Circuit must have written its opinion *before Holt*, because the opinion of the court of appeals is obviously inconsistent with the opinion of this Court. And the reader would be right; that court of appeals opinion was indeed written 18 months before *Holt.*

But in a turn of events that is impossible to understand or defend, the Eleventh Circuit after *Holt* reissued and republished that pre-*Holt* opinion, making it again the binding precedent in that Circuit. The crabbed interpretation of RLUIPA set out by the Eleventh Circuit in its 2013 opinion once again restricts the religious liberties of inmates in Alabama, Georgia, and Florida. Action by this Court is necessary to assure that the holding of *Holt* is the law of the land, not merely the law in 47 states. Given the clarity of the Eleventh Circuit's errors, summary reversal is warranted.

Additionally, this case presents the Court an opportunity to resolve the underlying question of whether Native American inmates are permitted to

wear long hair in conformity with deeply rooted religious tradition, which is an important and recurring issue in a number of outlier prison systems. Whether this ancient and highly personal Native American religious practice is protected by RLUIPA should not vary by the Circuit and geographical location of the prison in which an inmate is held.

I. THE REISSUED ELEVENTH CIRCUIT DECISION IS INCONSISTENT WITH THIS COURT'S DECISION IN *HOLT V. HOBBS.*

(1) One of the most important recurring issues under RLUIPA concerns the significance of a showing that most states (and the Bureau of Prisons) accommodate a religious practice that a handful of outlier states forbid.

The reissued 2015 opinion makes clear that a state in the Eleventh Circuit can render that showing irrelevant in either of two ways. First, a state may seek to persuade federal judges that all those other prison systems have simply made a mistake, not by offering evidence that the accommodation in those states has actually caused any problems, but simply by calling an expert to testify that the accommodation could not work, even if the expert has never heard of religious exemptions to grooming requirements.[13]

[13] Brief for the United States As *Amicus Curiae* Supporting Plaintiffs-Appellants, 20 ("Permitting ... prisoners to wear long hair is now the majority practice in American prisons, yet

(Continued on following page)

That is what occurred here, where the Eleventh Circuit concluded that permitting inmates to wear long hair would be dangerous.

> The ADOC has shown that Plaintiffs' requested exemption poses actual security, discipline, hygiene, and safety risks. That other jurisdictions choose to allow male inmates to wear long hair shows only that they have elected to absorb those risks. The RLUIPA does not force institutions to follow the practices of their less risk-averse neighbors.... The ADOC has shown that its departure from the practices of other jurisdictions stems not from a stubborn refusal to accept a workable alternative, but from a calculated decision not to absorb the added risks that its fellow institutions have chosen to tolerate.

App. 34a.

Second, a state can merely argue that risk, after all, is to some extent a matter of degree, and that the state that refuses to accommodate a religious practice has merely chosen to take a (perhaps slightly) smaller risk.

> Plaintiffs ask us to hold that because many other prison systems have chosen to accept the costs and risks associated with long hair,

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Alabama officials produced literally no evidence that such widespread accommodation of Native American religious liberty has resulted in any problems whatsoever.").

> the ADOC must accept them as well. This we cannot do. Although many well-run institutions have indeed decided that the benefits of giving inmates more freedom in personal grooming outweigh the disadvantage, the RLUIPA does not prevent the ADOC from making its own reasoned assessment. Allowing male inmates to wear long hair carries with it established costs and risks, and the RLUIPA does not require the ADOC to embrace them merely because other institutions have.

App. 36a. That approach may not require any evidence at all.

But under *Holt v. Hobbs*, when an accommodation is accepted in a large majority of states, a state denying that accommodation must offer evidence demonstrating that "its prison system is so *different* from the many institutions that allow [an accommodation that the accommodation] cannot be employed at its institutions." 135 S.Ct. at 865 (emphasis added).

> The Department failed to show, in the face of petitioner's evidence, why the vast majority of States and the Federal Government permit inmates to grow 1/2-inch beards, either for any reason or for religious reasons, but it cannot.... "While not controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction." ... [W]hen so many prisons offer an accommodation, a

> prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course, and the Department failed to make that showing here.

135 S.Ct. at 866 (quoting *Procunier v. Martinez*, 416 U.S. 396, 414 n.14 (1974)).

What the Department of Justice said after *Holt* about the pre-*Holt* 2013 Eleventh Circuit opinion is necessarily equally true of the identical 2015 post-*Holt* Eleventh Circuit opinion:

> *Holt* ... seriously undermines the *Knight* panel's decision that Alabama's prisons may prevail because they can choose not "to follow the practices ... their less risk-averse neighbors" have employed to lessen burdens on religious exercise.... In this case, the panel did not consider whether the prison had given any reasons, or provided evidence to prove why the Alabama prisons were unique and could not adopt similar policies to permit religious-based exemptions for Native American prisoners. Instead, the panel held that the prisons could make "a calculated decision not to absorb the added risks that its fellow institutions have chosen to tolerate." ... This reasoning is not what *Holt* requires.

Supplemental Brief for the United States as *Amicus Curiae* Supporting Plaintiffs-Appellants and Urging Reversal, 12-13.

(2) The court of appeals clearly acknowledged that Alabama had not forbidden all inmate activities

that posed the problems with which it was concerned, but instead had chosen to prohibit long hair (a rule that substantially burdened the religious practice of plaintiffs) while permitting other inmate activities that posed similar problems. For example, the court noted that long hair was not the only place an inmate could hide contraband, just an "additional" place; inmates could still hide contraband in their clothes, shoes, or cells. Long hair, in the Eleventh Circuit's words, was merely an "additional location" to hide small items. App. 14a, 19a. Similarly, Alabama forbids long hair, on the theory that long hair could be cut to alter an inmate's appearance, but it permits male inmates to have short hair which could easily be shaved off, with an even more dramatic change in appearance. In the interest of facilitating detection of "infections and infestations" (App. 17a), the state requires men to have short haircuts, but women (not genetically more immune to either) can grow shoulder length hair. In the Eleventh Circuit a prison is free to selectively address an issue in a way that substantially burdens religious belief, while simply ignoring other inmate activities that create the same problem.

Holt forbids such an under-inclusive pick-and-choose approach.

> [T]he Department has not adequately demonstrated why its grooming policy is underinclusive in at least two respects.... [T]he Department permits inmates to grow more than a 1/2 inch of hair on their heads.... [H]air on the head is a more plausible place

> to hide contraband than a 1/2 inch beard – and the same is true of an inmate's clothing and shoes. Nevertheless, the Department does not require inmates to go about bald, barefoot, or naked. Although the Department's proclaimed objectives are to stop the flow of contraband and to facilitate prisoner identification, "[t]he proffered objectives are not pursued with respect to analogous nonreligious conduct," which suggests that "those interests could be achieved by narrower [measures] that burdened religion to a far lesser degree."

135 S.Ct. at 865-66 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993)).

(3) The Eleventh Circuit holds that a prison's interest in uniformity per se is a sufficient justification for subjecting all inmates to a rigid no-exceptions rule. The court of appeals upheld as supported by the record a district court finding that "an exceptionless short-hair policy promotes order and discipline" App. 28a.[14] One warden, the court of appeals noted, insisted that "a generally applicable policy with no exemptions fosters discipline, and if the ADOC were required to grant exemptions, officers would have trouble enforcing the policy due to the difficulty of

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[14] App. 66a ("Uniformity within the institutions ... instills discipline and promotes order by exercising control over the inmates").

readily identifying which inmates are entitled to the exemption." App. 15a-16a. Another warden quoted by the Eleventh Circuit testified "that granting religious exemptions to Native American inmates would erode discipline and likely cause the ADOC's over-worked staff to stop enforcing the policy against non-exempt inmates." App. 15a. The court of appeals cited testimony that if religious accommodations were made, "non-exempt inmates might attack exempted inmates out of jealousy for their special long-hair privilege." App. 17a. "[E]xempting only certain inmates from the [short haircut] policy would allow them to identify as a special group, ... eroding order and control." App. 15a.

In *Holt*, however, this Court rejected as insufficient the state's objection that it just did not want to make exceptions to its no-beard rule.

> The Department ... asserts that few inmates require beards for medical reasons while many may request beards for religious reasons.... At bottom, this argument is but another formulation of the "classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." ... We have rejected a similar argument in analogous contexts, ... and we reject it again today.

135 S.Ct. at 866 (quoting [*Gonzales v.*] *O Centro* [*Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418,] 426 [(2006)]).

A claim under RLUIPA cannot be defeated merely by a state's objection to making exceptions to its rules, because the very purpose of RLUIPA is to require such "granting specific exemptions to particular religious claimants." *Holt*, 135 S.Ct. at 863 (quoting *Hobby Lobby,* 134 S.Ct. at 2779). The Eleventh Circuit's holding that a RLUIPA claim can be defeated by an objection to the very idea of making exceptions for religious practices reprises the constitutional attack on RFRA which this Court rejected in *Cutter v. Wilkinson*, 544 U.S. 709 (2005). *See Cutter v. Wilkinson*, 349 F.3d 257, 266 (6th Cir. 2003); *Madison v. Riter*, 240 F.Supp.2d 566, 578-81 (W.D. Va. 2003). As the United States explained in *Holt*, "prison officials cannot prevail under RLUIPA's compelling-interest/ least-restrictive-means standard by appealing to a general need for uniformity." Brief of the United States as Amicus Curiae Supporting Petitioner, *Holt v. Hobbs*, 27.

II. ACTION BY THIS COURT IS REQUIRED TO BRING THE ELEVENTH CIRCUIT INTO COMPLIANCE WITH *HOLT* AND TO PROTECT VITAL RELIGIOUS INTERESTS THROUGHOUT THAT CIRCUIT.

The action of the Eleventh Circuit in reissuing its 2013 pre-*Holt* decision has recreated in that circuit all the problems which the Court sought to resolve in *Holt*. *Holt* did not merely, or primarily, decide whether the particular inmate in that case could grow a 1/2-inch beard. As the Chief Justice explained

at oral argument, a central purpose of the Court's opinion was to establish "a generally applicable legal principle" that would govern future RLUIPA cases in the lower courts. Oral Arg., *Holt v. Hobbs*, 6-7. But lower courts in the Eleventh Circuit are now bound instead by the legal principles in the reissued pre-*Holt* opinion.

Judicial opinions about the standards governing the obligations of states under RLUIPA have immediate practical consequences. Prison authorities look to the courts for guidance about what they can and must do, and state lawyers base their advice on controlling precedents. An attorney in the Eleventh Circuit who relied on the reissued 2015 opinion would tell his or her clients that federal law permits policies which government attorneys in the rest of the country will admonish their clients are impermissible.

The carefully crafted language in *Holt* offered the type of clarity to prison officials and potential litigants alike that was calculated to reduce the risk of half inch by half inch litigation of RLUIPA issues. The Court's clarification of the significance of widespread prison accommodations was especially important. In a circuit which respected that holding, the widespread consensus in favor of permitting inmates to wear long hair would pretermit, or quickly resolve, litigation about that issue. Instead, in the Eleventh Circuit, things are back where they started.

The intransigence with which the Eleventh Circuit has responded to *Holt* invites officials in other

circuits to attempt to revisit the issues this Court thought it had decided. That portends more than just years of unnecessary litigation and wrangling. These decisions have very serious and immediate consequences for inmates whose religious beliefs are trammeled by unnecessary and spiritually damaging prison regulations. For inmates of faith committed to living each day in a manner consistent with their deeply-held religious beliefs, every prison-compelled breach of that obligation causes spiritual harm beyond any form of secular redress.

III. WHETHER RLUIPA ENTITLES NATIVE AMERICAN INMATES TO FULFILL THEIR RELIGIOUS OBLIGATION TO WEAR THEIR HAIR LONG IS AN IMPORTANT AND RECURRING ISSUE THAT WARRANTS THIS COURT'S REVIEW.

This case presents an opportunity to resolve the underlying question of whether Native American inmates are permitted to wear long hair in conformity with deeply rooted religious tradition, which is an important and recurring issue in a number of outlier prison systems. Whether this ancient and highly personal Native American religious practice is protected by RLUIPA should not vary by the Circuit and geographical location of the prison in which an inmate is held.

Wearing one's hair in the sacred, traditional manner is an issue vital to Native American culture and to the rehabilitation of Native American inmates.

Approximately 29,700 American Indian and Alaska Natives are incarcerated in the United States. Bureau of Statistics, Office of Justice Programs, U.S. Dep't of Justice, NCJ 238978, *Jails in Indian Country, 2011* (2012), *available at* http://bjs.gov/content/pub/pdf/jic11.pdf. Native inmates are "important human and cultural resources, irreplaceable to their Tribes and families. When they are released, it is important to the cultural survival of [ ] Native communities that returning offenders be contributing, culturally viable members." Walter Echo-Hawk, *Native Worship in American Prisons*, 19.4 CULTURAL SURVIVAL Q. (1995). Hair is of religious significance for all Native Tribes, communities, and families. Yet, inmates throughout the Eleventh Circuit must endure the continuing indignity of forced haircuts.

Given that this important, recurring issue remains unresolved even in light of *Holt*, the instant Petition presents an ideal vehicle for protecting paramount religious rights of highly vulnerable prison populations. The Eleventh Circuit squarely held that RLUIPA does not require prison officials to consider and distinguish the less restrictive measures of other systems, even in the presence of widespread, time-tested prison policies, and the Eleventh Circuit continues to acknowledge that its interpretation of RLUIPA conflicts with decisions in other Circuits. App. 32a-33a. This case, therefore, presents an issue of tremendous religious importance to Native American

communities and to Native-American inmates seeking to wear their hair in the traditional manner.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment below summarily reversed. Alternatively, the petition should be granted and the case set for briefing and argument.

Respectfully submitted,

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