No. 13-955

# In The Supreme Court of the United States

RICKY KNIGHT, ET AL.,

*Petitioners,*

v.

LESLIE THOMPSON, ET AL.,

*Respondents.*

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

## BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS AND HUY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the U.S. Court of Appeals for the Eleventh Circuit:

1. Billy "Two Feathers" Jones, Thomas "Otter" Adams, Douglas "Dark Horns" Bailey, Michael Clem, Franklin "Running Bear" Irvin, Ricky Knight, and Timothy "Grey Wolf" Smith, were appellants below and are petitioners in this Court.

2. Leslie Thompson, State of Alabama Department of Corrections, Tom Allen, Governor Robert Bentley (Governor of the State of Alabama), Chaplain James Bowen, Eddie Carter, Chaplain Coley Chestnut, Warden Dees, Roy Dunaway, DeWayne Estes, J.C. Giles, Thomas Gilkerson, Michael Haley (former Commissioner of Alabama Department of Corrections), 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 (former general counsel, Alabama Department of Corrections), Neal W. Russell, John Michael Shaver, William S. Sticker, Luther Strange (attorney general, State of Alabama), Ron Sutton, Morris Thigpen, Chaplain Steve Walker, J.D. White, Chaplain Willie Whiting, and Officer Wynn were appellees below and are respondents in this Court. Kim Thomas, current commissioner of Alabama Department of Corrections, is a respondent pursuant to Rule 35.3.

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The National Congress of American Indians and Huy respectfully submit this *amici curiae* brief in support of Petitioners.[1]

## INTERESTS OF *AMICI CURIAE*

*Amicus Curiae* National Congress of American Indians (NCAI) is the oldest and largest national organization representing the interests of American Indians and Alaska Natives, with a membership of more than 250 American Indian tribes and Alaska Native villages. NCAI was established in 1944 to protect the rights of Indian tribes and to improve the welfare of American Indians, including religious and cultural rights. In courtrooms around the nation and within the halls of Congress, NCAI has vigorously advocated for Native American religious freedom, including passage of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq*. (RFRA) and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq*. (RLUIPA).

[1] Pursuant to Rule 37.2 of the Rules of the Supreme Court, counsel of record for all parties received timely notice of this brief and have provided their written consent. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

*Amicus Curiae* Huy is a nationally recognized non-profit organization established to enhance religious, cultural, and other rehabilitative opportunities for imprisoned American Indians, Alaska Natives and Native Hawaiians (collectively hereafter referred to as "Native" or "Native People"). In the traditional Coast Salish language known as Lushootseed, the word huy (pronounced "hoyt"), means: "See you again/we never say goodbye." Huy's directors include, among others, the President of the National Congress of American Indians, elected chairpersons of federally recognized tribal governments, a former Washington State legislator, and the immediate past Secretary of the Washington State Department of Corrections. In addition to funding and supporting Indigenous prisoner religious programs, Huy advocates for Native prisoners' religious rights in federal courts, state administrative rulemakings, and through testimony and reports to the United Nations.

This case presents issues vital to Native cultural survival. Approximately 29,700 American Indian and Alaska Natives are incarcerated in the United States. Todd D. Minton, JAILS IN INDIAN COUNTRY, 2011 (Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice) Sept. 2012, *available at* http://bjs.gov/content/pub/pdf/jic11.pdf. Native People in the United States have the highest incarceration rate of any racial or ethnic group, at 38 percent higher than the national rate. Christine Wilson Duclos & Margaret Severson, *American Indian Suicides in Jail: Can Risk Screening be Culturally*

*Sensitive?*, RESEARCH FOR PRACTICE (Nat'l Inst. of Justice, Office of Justice Programs, U.S. Dep't of Justice) June 2005, *available at* https://ncjrs.gov/pdffiles1/nij/207326.pdf.; Lawrence A. Greenfeld & Steven K. Smith, AMERICAN INDIANS AND CRIME (Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice) Feb. 1999, *available at* http://bjs.gov/content/pub/pdf/aic.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*, CULTURAL SURVIVAL Q., Winter 1995, *available at* http://www.culturalsurvival.org/ourpublications/csq/article/native-worship-american-prisons. For these reasons, Tribal governments share with federal, state and local governments the penological goals of repressing criminal activity and facilitating rehabilitation in order to prevent habitual criminal offense. *See* National Congress of American Indians Res. No. REN-13-005 (June 27, 2013).

Hair has religious significance for all American Indian tribes, communities and families; uncut hair is of particular religious significance to Native People. (R471-PEX2 at ¶ 4). For the Native person, forced haircutting desecrates the body and spirit and is the supreme confiscation of personal dignity. Ever since the Republic's founding, forced haircuts and imprisonment have been specific modes of governmental

religious discrimination against Native People. In a calculated effort to extinguish Native culture, the United States historically outlawed traditional practices and ceremonies, punishing practitioners with imprisonment and starvation. Senator Daniel K. Inouye, *Discrimination and Native American Religion*, 23 UWLA L. REV. 3, 14 (1992). Due to its religious significance, United States officials implementing an explicit "kill the Indian, save the man" federal policy, utilized forced haircutting to coerce American Indians away from their traditional religion, even into the Twentieth Century.[2] (R475 – Tr. II at 84-85 – Dr. Walker Testimony; R471-PEX 2 at ¶ 5); *see also* Jill E. Martin, *Constitutional Rights and Indian Rites: An Uneasy Balance*, 3:2 WESTERN LEGAL HISTORY 245, 248 (Summer/Fall 1990).

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[2] These overtly discriminatory policies ended in 1934, but infringement on Native religious liberty persisted, necessitating a succession of laws in the latter Twentieth Century crafted to protect Native religion and culture. Among these was the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1993 amendments at 42 U.S.C. § 1996a), which explicitly recognized that First Amendment religious liberty protection had never worked for Native people, thus requiring a specific federal law preserving their religious rights. Other laws crafted to remedy this shameful legacy include, the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001 *et seq.*, the Indian Arts and Crafts Act of 1990, 25 U.S.C. §§ 3005 *et seq.*, the National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq*., and the Archeological Resource Protection Act, 16 U.S.C. §§ 470aa *et seq.*, RFRA and RLUIPA.

The same coercion exists today in prison systems like Alabama's, which forces Native inmates to make a Hobson's choice: abandon their sacred religious practice, or undergo either forced haircuts or punishment for non-compliance with grooming policies.

This degrading and unnecessary treatment of our citizens not only damages the individual Native inmate but deprives Native communities of a valued resource: a Native citizen who could otherwise return to society as a contributing, culturally viable member. Thus, it is vitally important to *Amici* that the Court hear this case addressing the continued well-being of our Native People, our tribal communities, and our indigenous culture and traditions.

## SUMMARY OF THE ARGUMENT

While RLUIPA's substantive provisions for prisoners are an issue of first impression for the Court, Native People have for decades litigated the issue of wearing unshorn hair in prison because it is a fundamental, essential facet of traditional beliefs and practice. While the legal standards have shifted over time, correctional facility justifications for banning the sacred religious practice of long hair have not. The refrain has always been safety, security and hygiene. To be sure, these can be compelling interests, but over time the vast majority of prison systems have acknowledged that exceptionless bans on unshorn hair are not the least restrictive means of

achieving those interests. Dawinder Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. MIAMI L. REV. 923, 955 (2012) (concluding the Federal Bureau of Prisons, 39 states, and the District of Columbia have permissive hair-length policies); *see also Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005) ("For more than a decade, the Federal Bureau of Prisons has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners.") (quoting Brief for United States).[3]

As studies and the experience of 80 percent of correctional systems show, these practices remedy many ills unique to Native inmates. For example, Native inmates use alcohol in 95 percent of the crimes they commit, 15 percent higher than the general prison population nationally. Sharon O'Brien, *The Struggle to Protect the Exercise of Native Prisoner's Religious Rights*, 1:2 INDIGENOUS NATIONS STUDIES J., 34 (Fall 2000). Moreover, alcohol plays a role in 90 percent of Indian-related homicides. *Id*. While the Alabama Department of Corrections worries about

[3] *Amici* do not advocate a "one size fits all" approach for grooming policies and religious accommodation. Well-run prisons have used a variety of models. While the Federal Bureau of Prisons follows a detailed policy, Technical Reference, Fed. Bureau of Prisons, Inmate Religious Beliefs and Practices No. T5360.01 (2002), a range of viable options have been utilized in other jurisdictions. State-by-state summaries are contained in Sidhu, *supra*, at Appx. B.

unshorn hair, it ignores – or does not know – that the values taught through the Native American Church and The Way of the Pipe (the two most dominant Native traditions practiced in prisons) emphasize the body's sacred nature and require adherents to refrain from drug and alcohol use. O'Brien, *supra*, at 34. To properly fulfill these beneficial teachings, Native inmates need to participate in ceremonies and follow other religious practices, such as the wearing of unshorn hair. O'Brien, *supra*, at 35. Yet, in prison systems like Alabama's, Native prisoners face punishment for their religious exercise because it requires long hair, which violates an arbitrary grooming policy.[4]

Moreover, as prison systems have been more accommodating to the religious needs of Native People, they have found that other penological objectives, such as enhanced rehabilitation and reduced violence and recidivism, have been greatly furthered through safe accommodation.

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[4] As a growing number of prisons harness this power to quell addictive tendencies, additional empirical data is emerging. For instance, Montana has launched a culturally-relevant treatment program within its prisons called Medicine Wheel. Preliminary data gathered by the University of Montana suggests that it reduces recidivism and misconduct among female Native inmates. Dusten R. Hollist, Ph.D., et al., *Medicine Wheel and Anger Management Treatment in Montana Women's Prison: An Analysis of the Impact of Treatment on Inmate Misconduct and Recidivism* (University of Montana-Missoula, 2004).

This case does not call on the Court to second-guess well-informed judgments of prison administrators. Instead, it calls on the Court to resolve how prison grooming policies must be tailored to meet strict scrutiny. That standard, enacted by Congress in RLUIPA, and well-established in American jurisprudence, has been ignored in some jurisdictions to the detriment of the very minority religious practitioners that Congress sought to protect, especially Native People.

## ARGUMENT

This case presents the issue of whether strict scrutiny requires a prison grooming policy prohibiting a Native religious practice be devised with consideration of sound, less restrictive correctional methods of accommodation. Section 3 of RLUIPA forbids any government from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means." 42 U.S.C. § 2000cc-1(a)(1)-(2).

On February 6, 2014, Petitioners filed their Petition for Writ of *Certiorari*, seeking review of an Alabama prison grooming policy that restricts Native inmates from wearing unshorn hair in accordance with their religion. On March 3, 2014, this Court

granted review in *Holt v. Hobbs*, No. 13-6827, a case involving an Arkansas prison grooming policy prohibiting an inmate from growing a one-half-inch beard consistent with his religion. According to the Petitions for Writ of *Certiorari*, in both cases RLUIPA was violated where the prison officials failed to demonstrate safety or security threats specific to the inmate-plaintiffs. Additionally, the inmates in both cases offered evidence of the penological benefits flowing from the accommodation of their religious practice as well as the fact that more than 40 jurisdictions, including the Federal Bureau of Prisons, accommodate these religious practices without compromising safety, security and hygiene.

The evidence that beards and unshorn hair are safely accommodated in the vast majority of jurisdictions raises the question: What is the difference between the handful of prison systems refusing to grant religious exemptions and the 80 percent that do? At least for the two state prison systems at issue in *Holt* and *Knight*, there appears to be no distinction. Instead, their denial of religious exceptions to their grooming policies is based on "speculation, exaggerated fears, [and] post-hoc rationalization," which RLUIPA was crafted to remedy. *See* Joint Statement of Senator Orrin Hatch and Senator Edward Kennedy on Religious Land Use and Institutionalized Persons Act, 146 Cong. Rec. 16698, 16699 (2000).

Yet, for the similarities between the two cases, there are important differences. In *Holt v. Hobbs* the Arkansas prison system prohibits beards for religious purposes but grants some prisoners medical exceptions for beards. In *Knight*, Alabama's prisons have

no religious exemptions for long hair, but allow long hair in women's prisons. While the question presented in *Holt v. Hobbs* certainly appears to address the proper application of RLUIPA's strict scrutiny standard to prison grooming policies, *Knight* places before the Court more encompassing facts that complement and enhance the Court's analysis of RLUIPA's strict scrutiny standard. Thus, the Court is encouraged to grant review in *Knight* and hear it as a companion case to *Holt v. Hobbs*.

## I. BY OFFERING ONLY AN UNSUBSTANTIATED RATIONALE UNRELATED TO ANY SPECIFIC PLAINTIFF, RESPONDENTS FAILED TO MEET STRICT SCRUTINY.

### A. Respondents violate RLUIPA by allowing long hair for female inmates, but refusing a religious exemption for Native American men.

Respondents' permissive grooming policy for female inmates undermines their justification for refusing a long hair religious exemption for Native male inmates. (Tr. Trans, Vol. II at 5). In a Third Circuit opinion, then-judge Samuel J. Alito concluded that a city's rationale for a no-beard policy for police officers was undermined because it contained a medical exemption: "We are at a loss to understand why religious exemptions threaten important [government] interests but medical exemptions do not." *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 367 (3d Cir. 1999). Similarly,

in this case it is difficult to square Respondents' apparent ability to further the state's interests in preventing the secreting of contraband, identification upon escape and inmate hygiene through a policy allowing long hair for women, but requires a categorical prohibition to further the same penological goals for male inmates. Indeed, this contradiction in Respondents' position suggests that the restrictive grooming policy does not further those penological interests and that Respondents are not utilizing the least restrictive means.

While Respondents may maintain that male inmates are generally more violent, this generality ignores a key tenent of RLUIPA: individualized inquiry. RLUIPA's strict scrutiny analysis is applied with regard to the specific person seeking a religious exemption. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (RFRA's strict scrutiny application); *Cutter v. Wilkenson*, 544 U.S. 709 (2005) (RLUIPA's strict scrutiny standard is carried over from RFRA). Respondents' non-specific, speculative assertions fail that test. They never demonstrate how employing a less restrictive alternative for *these specific inmates* is infeasible. Without that particularized explanation, a court is left with only "speculation, exaggerated fears, [and] post-hoc rationalizations," which neither prisons nor reviewing courts may rely upon. 146 Cong. Rec. 16698, 16699.

Additionally, the fact that the Federal Bureau of Prisons, at least 38 states and the District of Columbia

safely accommodate unshorn hair without incident further suggests Respondents are not utilizing the least restrictive means. Respondents admittedly did not investigate, or even consider, the successful accommodation measures taken by any of these prisons. Accordingly, one questions whether Respondents' refusal to provide a religious exemption has well-informed justifications, or whether they are simply acting on speculative and exaggerated fears of hypothetical worst-case scenarios.

When a court defers to such flimsy justifications, it judicially converts Congress' strict scrutiny standard into a rational basis standard. While Congress anticipated "due deference," it is folly to defer to a judgment that is unsubstantiated and admittedly uninformed. That amounts to no review whatsoever and abdicates the judicial obligation under RLUIPA to apply strict scrutiny. Acting without the particularized evidence tied to the plaintiff that RLUIPA demands, courts *de facto* apply a rational basis standard, which RFRA and RLUIPA were expressly enacted to supplant. *See Cutter*, 544 U.S. at 714-18.

### B. Contrary to Respondents' speculation, accommodation has been demonstrably beneficial to both inmates and prisons.

In this case, the United States correctly pointed out that Respondents likewise fail strict scrutiny because they do not show that "their compelling

interest is *actually furthered* by banning [these] specific Plaintiffs from having long hair." Statement of Interest of the United States at 8, *Limbaugh v. Thompson*, No. 2:93-cv-1401-WHA (M.D. Ala. Apr. 8, 2011) (emphasis added).

A national trend allowing long hair or religious exemptions suggests that exemptionless grooming standards do not actually further compelling penological interests. *See* Sidhu, *supra*, at 955. Notably in the lead of these 40 jurisdictions is the Federal Bureau of Prisons, which manages the largest inmate population in the United States. If long hair were problematic, surely these jurisdictions would be moving toward more restrictive standards rather than more relaxed ones.

Far from threatening safety and security, religious practice, including traditional Native religious practice, reduces recidivism, positively affects discipline, reduces violence, and aids rehabilitation. *See*, *e.g.*, Melvina T. Sumter, Religiousness and Post-Release Community Adjustment: Graduate Research Fellowship – Final Report (Aug. 3, 1999) (unpublished Ph.D. dissertation, Florida State University) (on file with National Criminal Justice Reference Service – U.S. Dep't of Justice); Byron R. Johnson et al*., Religious Programs, Institutional Adjustment, and Recidivism Among Former Inmates in Prison Fellowship Programs*, 14 JUST. Q. 145 (1997); Matt Hooley & Jacob Stroub, *Sweatlodges in American Prisons*, HARVARD PLURALISM PROJECT, http://www.

pluralism.org/reports/view/103 (last visited 3/11/2014). This should be weighed against the fact that Respondents could not give a single concrete example of long hair actually being a security or safety issue in Alabama, let alone with regard to Petitioners.

While Respondents speculate that long hair may lead to gang affiliation, prisons that have actually thoroughly evaluated options and provided accommodations report no such problems. To the contrary, California corrections officials have acknowledged that appropriate accommodation reduced violence and afforded inmates a sense of pride and brotherhood and that this cooperative attitude carried over into their social reintegration upon release. Elizabeth S. Grobsmith, INDIANS IN PRISON: INCARCERATED NATIVE AMERICANS IN NEBRASKA 164 (1994). Idaho prison officials have reported that Native practices in prison enable inmates to come together in mutual self-help, stating, "It is definitely rehabilitative for those individuals that have no direction in life or no concern or understanding for self or others." *Id.* Oklahoma officials stated that Native People's practices have a positive effect on discipline. *Id.* However, Native inmates in Respondents' male prisons are unduly restricted from exercising their religion and realizing these benefits.

It is cases like the one *sub judice*, where prison officials admittedly made absolutely no inquiry into ways to accommodate an inmate's religious practice, that RLUIPA was specifically enacted to remedy. Respondents, as well as several prison systems across

the United States, simply refuse to consider demonstrably viable methods of accommodation utilized in the heavy majority of other prisons. Their refusal deprives inmates of the ability to worship, extinguishes their "last source of hope for dignity and redemption," and deprives tribal communities of the opportunity for the return of productive and contributing tribal citizens. Thus, this misguided application of RLUIPA has very tangible, negative impacts on Native inmates as well as Tribal governments, Native communities and Native families throughout the United States.

Two features of this case make it an excellent companion case to *Holt v. Hobbs*. First, the instant case exists within a continuum of laws, policies and methods erasing Native culture, which the correct application of RLUIPA serves to remedy in the prison context. Second, the issue in *Knight* can be resolved by looking no further than Respondents' own grooming policy, which allows long hair for women inmates but not religious exemptions for male inmates.

## CONCLUSION

For the forgoing reasons, your *Amici* respectfully request that the Court grant the Petition and hear this as a companion case to *Holt v. Hobbs*.

Respectfully submitted,

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