No. 15-999

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

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 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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The National Congress of American Indians and Huy respectfully submit this *amicus 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 American Indian and Alaska Native interests, 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 improve the welfare of Native Americans, 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 its preparation or submission.

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. 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 NCAI, 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.

REASONS FOR GRANTING THE PETITION

Amici fully support the reasons set forth by Petitioners for granting *certiorari* in this case. In its unanimous opinion in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), this Court resolved a number of issues regarding RLUIPA's standards that were completely ignored by the U.S. Court of Appeals for the Eleventh Circuit on remand in this matter. There was every reason to believe the lower court would seriously re-examine the misguided standard applied to the Alabama Department of Corrections' ("ADOC") exemption-less grooming policy in light of *Holt*. Instead, the same

panel reissued and republished its pre-*Holt* opinion with no mention of *Holt* or the explicit directives provided by this Court.

This unrepentance of the Eleventh Circuit has very tangible and severe consequences for the Native Petitioners in this case, as well as the religious and cultural viability of their tribes, tribal communities and families. Given the over-representation of Native People in prisons, a national trend allowing unshorn hair to be worn by Native American inmates, and the rehabilitative benefits of religious practices, this case presents the Court with the opportunity to resolve the question of whether RLUIPA protects the right of Native American inmates to freely wear long hair in conformity with their deeply rooted religious tradition.

Amici urge this Court to grant the Petition for Writ of Certiorari and summarily reverse the judgment below. In the alternative, this Court should grant the Petition and set the case for briefing and argument.

I. THE ELEVENTH CIRCUIT'S DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND THIS CASE'S CLEAR CONFLICT WITH *HOLT* HAVE SEVERE CONSEQUENCES THAT CALL FOR EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

A. Traditional religious practice has an integral role in Native society and RLUIPA was enacted to prevent the type of "egregious and unnecessary" coercion away from these traditions that Native inmates suffer.

1. Traditional religion has a central role in Native culture and society. As the American Indian Religious Freedom Act acknowledged: "[T]he religious practices of the American Indian . . . are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems." 42 U.S.C. § 1996. As such, religious practice is the cornerstone of Native culture and has held Native communities together for centuries.[2] Echo-Hawk, *supra*.

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[2] No other group faces more regulation in the time, place and manner of religious exercise than Native People. While most Americans are very accustomed to free access to their churches and places of worship, Native People have the opposite experience. For Native People, certain prayers and ceremonies must be held in sacred places, which are often located on Federal lands and Natives must seek permission to access those places for ceremony. Walter Echo-Hawk, *Native Worship in American Prisons*, 19.4 Cultural

(Continued on following page)

"Protecting the rights of Indian inmates to practice their religion is of special salience when one considers the extent to which Indian people are overrepresented in prisons, the reasons for the high numbers of Indians in prison, and the highly effective role of Indian religious practices in inmate rehabilitation." Sharon O'Brien, *The Struggle to Protect the Exercise of Native Prisoner's Religious Rights*, 1:2 Indigenous Nations Studies J., 34 (Fall 2000). Approximately 29,700 American Indian and Alaska Natives are incarcerated in the United States. Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice, NCJ 238978, *Jails in Indian Country, 2011* (2012). Native People in the United States have the highest per capita incarceration rate of any racial or ethnic group – at 38 percent higher than the national rate. Nat'l Inst. of Justice, Office of Justice Programs, U.S. Dep't of Justice, NCJ 207326, *American Indian Suicides in Jail: Can Risk Screening be Culturally Sensitive?* (2005); Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice, NCJ 173386, *American Indians and Crime* (1999).[3] This

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Survival Q. (Winter 1995), *available at* http://www.culturalsurvival.org/ourpublications/csq/article/native-worship-americanprisons. Moreover, use and possession of sacred objects, such as eagle feathers, peyote and animal parts is often the subject of comprehensive federal and state laws and regulations. *Id*.

[3] The prison pipeline for Native People begins with the reality that Native youth are 30% more likely than Caucasian youth to be referred to juvenile court rather than have charges dropped. Christopher Hartney, *Native American Youth and the Juvenile Justice System*, NCCD Focus (March 2008).

stands in stark contrast to historical accounts from the 1700s and 1800s detailing Native communities virtually devoid of crime and where prisons were non-existent. *See* O'Brien, *supra*, at 31.

2. All Native American tribes regard hair as having religious significance, and uncut hair is of particular importance. (R471-PEX2 Walker Report, at ¶4). Uncut hair symbolizes and embodies the knowledge a person acquires during a lifetime and may be cut only upon the death of a close relative. *Warsoldier v. Woodford*, 418 F.3d 989, 991-92 (9th Cir. 2005). When worn in braids, it symbolizes the integration of one's mind, body, and spirit. John Rhodes, *An American Tradition: the Religious Persecution of Native Americans*, 56 Mont. L. Rev. 451, 464 (1991). It is also common for specific hair preparations to be part of American Indian religious rituals and ceremonies. Walker Report, *supra*. For many Native People, hair is a sacred part of the body, linking a person through strength and communication to the Creator. William Norman, Note, *Native American Inmates and Prison Grooming Regulations: Today's Justified Scalps: Iron Eyes v. Henry*, 18 Am. Indian L. Rev. 191, 191 (1998). Because of hair's sacredness, for the Native person forced haircutting desecrates the body and spirit, and is the supreme confiscation of personal dignity.

In fact, the centrality of hair to Native religion made it a target of federal policies explicitly aimed at eliminating Native religion and culture altogether.

Rhodes, *supra*, at 29. 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.[4] (R475 – Tr. II at 84-85 – Dr. Walker Testimony; R471-PEX 2 Walker Report, at ¶ 5); Jill E. Martin,

[4] 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.

Constitutional Rights and Indian Rites: An Uneasy Balance, 3:2 Western Legal Hist. 245, 248 (Summer/Fall 1990).

3. 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. Prison officials have long repeated the same justifications for restrictive grooming policies: "safety, security and hygiene." These justifications have remained largely the same throughout the decades, only the standard by which they are judged has shifted.

In the 1970s, when Native prisoners began challenging prison regulations burdening their religious exercise, courts applying strict scrutiny regarded the justifications offered by prison officials as largely pretextual and based merely on fear and speculation. Echo-Hawk, *supra; see, e.g.*, *Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975) (holding Native prisoner has a first amendment right to exercise his religion by wearing his hair long); *Gallahan v. Hollyfield*, 516 F. Supp. 1004 (E.D. Va. 1981) (same), *aff'd*, 670 F.2d 1345 (4th Cir. 1982). However, this changed drastically when, in 1987, this Court held that generally applicable prison regulations burdening the religious exercise of prisoners were subject only to a rational basis test. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). As a result, many prison systems swiftly began constricting minority

religious practices again. Importantly, when the restrictions were challenged, courts applying the extremely deferential rational basis standard were forced to accept the same "safety, security and hygiene" rationalizations that were previously viewed as pretextual.

The detrimental effect of this lower standard of review on Native inmate religious practice is vividly illustrated by one such case from the post-*O'Lone* period, *Iron Eyes v. Henry*. When Robert Iron Eyes, a Standing Rock Sioux, entered Missouri's Farmington Correctional Facility on a parole violation in October 1987, prison officials ordered him to get a haircut, although he was never ordered to do so during a previous one-year term. *Iron Eyes v. Henry*, 907 F.2d 810, 811-12 (8th Cir. 1990). When Iron Eyes refused, he was sent to disciplinary segregation, where he was shackled, handcuffed and subjected to a forced haircut, which one prison barber referred to as "scalping." *Id.* at 812, 816, n.16. Iron Eyes described the experience:

> Just before Christmas Maj. Harris, Capt. Rosenburg and about 9 or 10 other guards handcuffed me behind my back real hard and put leg shackles on me and made me go in a room with all of them. Then they shoved a table in front of the door so nobody could get out. Then, Dan Henry, the Asst Supt. said that I am going to get a haircut one way or the other [and] that they didn't care if I was Geronimo. I told them that the courts also said us Indians could keep our hair and Dan

> Henry said for me and the court to go and fuck ourselves [sic]. I am sorry about that word but that is what he really said.
>
> Well, Dan Henry, Maj. Harris, Capt. Rosenburg and the guards all took my leg shackles and handcuffs real hard and held me down and this inmate barber named Earl Wells came over and cut my hair into a raggedy mess. That is when they all started laughing and Maj. Harris said that now I could get some white religion.

Iron Eyes, 907 F.2d at 817.

Ten months later, he was ordered to get another haircut and this time obtained a restraining order from the U.S. District Court. In an effort to skirt the court's restraining order, while Iron Eyes awaited a hearing on the merits the prison placed him in solitary, "not for not cutting his hair, but for disobeying a direct order to cut his hair." *Id*.

Applying the rational basis test, the court did not engage in an individualized, searching inquiry into the facts of Mr. Iron Eyes' case, but instead narrowly focused on whether the prison officials' justifications could conceivably further penological interests. *Id.* at 813. For example, while prison officials worried that long hair would allow inmates to change their appearance, the court found it "incredulous" that prison officials did not simply re-photograph Iron Eyes during one of the periods that his hair was short. *Id.* at 814. Nevertheless, applying rational basis, the court found the prison's concerns "*rationally related*" to

security interests. *Id*. The case notified prison officials that they could impose severe restrictions, enforce them in a brutal manner and proceed virtually unchecked by simply waving the flag of "safety and security."

Iron Eyes was not an isolated case. Prison officials took the court's cue and became bolder, as illustrated by a case that followed. In *Kemp v. Moore*, a Chickasaw prisoner was incarcerated in a maximum security prison for the first four years of his imprisonment, where he was allowed to wear long hair consistent with his traditional religion. *Kemp v. Moore*, 946 F.2d 588, 589 (1991). After four years, his security level was *reduced* and he was transferred to a minimum security prison, where he was ordered to get a haircut. *Id.* He refused and presented verification of his administrative exemption. *Id.* Nevertheless, the superintendent ordered guards to forcibly shear his hair and disciplinary charges resulted in reduction of his work wages. *Id.*; *see also* Laurence French, *Native American Justice* 123-24 (2003). The resulting opinion was a terse, unequivocal reiteration of the *Iron Eyes* precedent as informed by the *O'Lone* rational basis standard. *Id.* Although there were obvious less restrictive means that could be employed, these were outside the bounds of rational basis inquiry. *Id.* Tragically, the low bar set by *O'Lone* and amplified in *Iron Eyes*, meant the courts gave

Mr. Kemp no protection and he was forced to abandon a core tenant of his traditional religion.[5]

Stories of this kind of routine, deplorable treatment suffered by Native prisoners at the hands of state prison officials were documented within the legislative history of RFRA and RLUIPA. As this Court observed in *Cutter v. Wilkinson*, 544 U.S. 709, 716-17 (2005):

> Before enacting § 3 [of RLUIPA], Congress documented, in hearings spanning three years, that "frivolous or arbitrary" barriers impeded institutionalized persons' religious exercise. See 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) (hereinafter Joint Statement) ("Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways."). To secure redress for inmates who encountered undue barriers to their religious observances, Congress carried over from RFRA the "compelling governmental interest"/"least restrictive means" standard. See *id*., at 16698.

As the case examples demonstrated to Congress, in the absence of strong laws protecting free exercise

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[5] In the wake of *Iron Eyes* and *Kemp*, Missouri prisons did away with religious exemptions for long hair altogether. *See Holmes v. Schneider*, 978 F.2d 1263 (8th Cir. 1992). Thus, the increased restrictions brought about by *O'Lone* came full circle into an all-out ban.

of religion, government institutions – in particular state prisons – will unduly restrict Native religious practices, often brutally. Congress further recognized that *O'Lone* disturbed a standard that "had proved workable" and was "employed without undue hardship to [ ] prisons. . . ." Senate Rep. 103-111 at 11. Thus, in passing RFRA and RLUIPA, Congress sought "to restore traditional protection afforded to prisoners' claims prior to *O'Lone*." Senate Rep. 103-111 at 10. Accordingly, it is critical for Native people that courts interpret and apply RLUIPA as Congress intended: To protect Native and other minority religious practices to the "maximum extent possible." *See* 42 U.S.C. § 2000cc-3(g); Michael J. Simpson, *Accommodating Indian Religions: The Proposed 1993 Amendment to the American Indian Religious Freedom Act*, 54 Mont. L. Rev. 19 (Winter 1993); Inouye, *supra*, at 3; Martin, *supra* at 245 (1990).

In the instant case, the Eleventh Circuit slides backward to a pre-RLUIPA standard. It does so by putting its imprimatur on ADOC's broadly formulated "safety, security and hygiene" interests and sanctioning ADOC's failure to examine the viability of obviously available less restrictive alternatives. These are hallmarks of the judicial approach that RLUIPA was expressly intended to supplant and this Court rejected in *Holt*. History demonstrates that Native inmates without these statutory protections will be subjected to "egregious and unnecessary" restrictions on their ability to worship.

B. The lower court's departure from *Holt* deprives Native inmates of traditional religious practices essential to their rehabilitation.

It is crucial that tribes and their families receive Native offenders as rehabilitated, culturally viable Native citizens upon their release. Echo-Hawk, *supra*. Indeed, 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).

A national trend allowing unshorn hair or religious exemptions suggests that exemptionless grooming standards do not actually further compelling penological interests. *See* Dawinder Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 955 (2012) (concluding the Federal Bureau of Prisons, thirty-nine 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); Statement of Interest of the United States at 8, *Limbaugh v. Thompson*, No. 2:93-cv-1404-WHA (M.D. Ala. Apr. 8, 2011). If unshorn hair were so problematic,

surely prisons would be moving toward more restrictive standards, rather than more relaxed ones.

Far from threatening safety and security, traditional religious practices address 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. O'Brien, *supra*, at 34. Moreover, alcohol plays a role in 90 percent of Indian-related homicides. *Id*. While ADOC worries about 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 refrain from drug and alcohol use. *See id*. 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. *Id.* at 35. Yet, in Alabama, Native prisoners face punishment for their religious exercise because it requires unshorn hair, which violates an arbitrary grooming policy.

Several studies have demonstrated the benefits of religious practice for prisoners and many correctional facilities now appreciate the penological benefits of accommodating Native religious practices. Corrections experts now understand that such traditional religious practice is consistent with principles of effective treatment because "[r]eligion targets antisocial values, emphasizes accountability and responsibility, changes cognitive approaches to conflict, and

provides social support and social skills through interaction with religious people and communities." Byron R. Johnson, et al., *Religious Programs, Institutional Adjustment, and Recidivism among Former Inmates in Prison Fellowship Programs*, 14 Just. Q. 145, 148 (1997) (internal citations omitted).[6] Religious involvement by inmates reduces infraction rates and is associated with reduced time in disciplinary confinement and better adjustment to prison. Thomas P. O'Connor & Michael Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation*, 35 J. Offender Rehab. 11 (2002); Todd R. Clear & Melvina T. Sumter, *Prisoners, Prison, and Religion: Religion and Adjustment to Prison*, 35 J. Offender Rehab. 127, 154 (2002). This should be weighed against the fact that ADOC offered no examples of unshorn hair actually being a security or safety issue in Alabama, nor with regard to these claimants.

While ADOC officials speculate that unshorn hair *may* lead to gang affiliation, prisons that have actually

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[6] *See also* Thomas P. O'Connor, A Sociological and Hermeneutical Study of the Influence of Religion on the Rehabilitation of Inmates (2001) (unpublished Ph.D. dissertation, Catholic University of America), *available at* http://transformingcorrections.com/wp-content/uploads/2011/11/Unpublished-Ph.D.-Dissertation.pdf; Todd R. Clear, et al., *Does Involvement in Religion Help Prisoners Adjust to Prison?*, NCCD Focus (Nov. 1992); Todd R. Clear & Marina Myhre, *A Study of Religion in Prison*, 6 Int'l Ass'n Res. & Cmty. Alts. J. on Cmty. Corrs. 20 (1995); Byron R. Johnson, et al., *A Systematic Review of the Religiosity and Delinquency Literature: A Research Note*, 16 J. Contemp. Crim. Just. 32 (2000).

thoroughly evaluated options and provided accommodations for traditional Native American religious practices report no such problems. To the contrary, California corrections officials have acknowledged that appropriate accommodation reduces violence and affords inmates a sense of pride and brotherhood and that this cooperative attitude carries over into their social reintegration upon release. Elizabeth S. Grobsmith, *Indians in Prison: Incarcerated Native Americans in Nebraska* 164 (1994). Idaho prison officials have likewise reported that Native practices enable inmates to engage 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 ADOC's male prisons are unduly restricted from exercising their religion and realizing these benefits.

In his *O'Lone* dissent, Justice Brennan wrote, "To deny the opportunity to affirm membership in a spiritual community . . . may extinguish an inmate's last source of hope for dignity and redemption." *O'Lone*, 482 U.S. at 368. For Native People, hair is an integral facet of religious practice, both in itself and as an aspect of an array of ceremonies. In erecting undue barriers to Native prisoners' religious practice through restrictive grooming policies, prisons such as ADOC have foreclosed Native inmates' opportunity for worship and its rehabilitative benefits. This not only damages individual Native inmates, but deprives

Native communities of a valued resource: a rehabilitated Native citizen who could otherwise reenter society as a contributing, culturally viable individual. Thus, this case is vitally important because it addresses the continued well-being of our Native People and tribal communities, as well as our indigenous culture and traditions.

CONCLUSION

For the forgoing reasons, Your *Amici* respectfully request that this Court grant the Petition for Writ of Certiorari and summarily reverse the judgment below. Alternatively, the Petition should be granted and the case set for briefing and argument.

Respectfully submitted,

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