No. 15-999

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 *AMICUS CURIAE* LAW PROFESSORS AND RELIGIOUS LIBERTY PRACTITIONERS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*[1]

Amici are law professors, scholars, and religious liberty practitioners who teach, research, and write about issues of law and religion. Our interest is in clarifying the application of RLUIPA to minority religions.

Dr. Andrew J. Ekonomou, Counsel of Record, is among other things, a Special Assistant Attorney General for the State of Georgia, Partner at Ekonomou Atkinson & Lambros, LLC, a former Assistant Attorney General for the State of Georgia, and a former Assistant United States Attorney, North District of Georgia.

Perry Dane is Professor of Law at Rutgers Law School. He has written landmark articles on choice of law, religion and law, the jurisprudence of Jewish law, legal pluralism and jurisdiction/ He is presently a faculty affiliate of the Rutgers Institute for Law and Philosophy and has been a member of the national seminar of the Project on Religious Institutions at Yale University's Program on Non-Profit Organizations.

Michael Broyde is Professor of Law at Emory University School of Law, Projects Director and Senior Fellow at the Center for the Study of Law and

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel for the parties received notice of intent to file this brief at least 10 days before its due date, and the parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party's counsel authored this brief in whole or in part, and no one other than amicus, its members, or its counsel made any monetary contribution intended to fund its preparation or submission.

Religion. He has published hundreds of articles on law and religion topics.

Mark Goldfeder is Senior Lecturer at Emory Law School, Senior Fellow at the Center for the Study of Law and Religion, Director of the Law and Religion Student Program, and Director of the Religious Freedom Project at Emory. He is also an adjunct professor of Religion at Emory University, and an adjunct Professor of Law at Georgia State University. He has written dozens of articles of law and religion topics.

Eliot Pasik is President of the Jewish Board of Advocates for Children (JBAC) and a lawyer in private practice. JBAC is a nonprofit that is dedicated to the proper spiritual, physical, intellectual, and social development of children.

First Liberty Institute is the largest non-profit, public interest legal organization dedicated solely to the preservation of religious liberty in the United States. First Liberty provides pro bono legal representation to persons of many different faiths, including members of non-mainstream religions who have struggled to defend their sincere religious beliefs: (1) a Native American Sweat Lodge seeking to operate on federal property; (2) an Orthodox Jewish congregation threatened with municipal land-use sanctions; and (3) Falun Gong practitioners expelled from a hotel because of their minority religious beliefs. Time and again, First Liberty has seen courts devalue and misrepresent the religious burdens suffered by religious adherents whose beliefs are not understood by the courts.

SUMMAR

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SUMMARY OF THE ARGUMENT

While the law requires treating all religious traditions equally, minority faiths often face additional hurdles when seeking reasonable accommodations. The more unique or unknown an individual's belief system is, the more concern exists that courts may underestimate or misunderstand their religious tenets and beliefs. As was reaffirmed in *Holt v. Hobbs*, the broad protections of RLUIPA are meant to be construed in favor of *any* exercise of religion, regardless of whether it is rooted in a system of religious belief or not. However, the history of jurisprudence in the area of minority religious protections suggests that minority traditions—even those rooted in a Judeo-Christian background—have been met with inconsistent judgments by courts.

The manner in which this Court views idiosyncratic and minority religious traditions has improved, but it is still a far cry from the intent embodied in the First Amendment. Native American traditions, in particular, have received improper treatment by the courts. In *Lyng*, for instance, the government's own study concluded that building a contemplated road would cause everlasting and severe harm to the Native American religious way of life, yet the Court still ruled in favor of paving through their sacred land.

Ultimately, this case concerns the beliefs of Native American Petitioners who—as a central tenet of their faith—wish to leave their hair unshorn. The Alabama Department of Corrections (ADOC) does not dispute that its hair-length policy substantially burdens Petitioners, but rather asserts that there

are valid penological interests at stake. Under *Holt*, mere assertions of such interests without any proof of reasonable attempts at accommodation cannot be allowed to infringe on the fundamental rights of Petitioners, who view their hair as an integral part of their religious practice and identity as Native Americans. The Court should grant review to make certain that lower courts are applying this Court's decision in *Holt* universally, and protecting the right of all individuals, including those of minority faiths, to practice their religious beliefs.

ARGUMENT

I. MINORITY RELIGIOUS TRADITIONS OFTEN FACE EXTRA BURDENS AT THE COURT.

A. *Sincere People of Religious Faith Face Greater Scrutiny by the Courts When Their Practice Is Part of an Unfamiliar or Idiosyncratic Religious Tradition.*

Despite the fact that our very First Amendment seeks to protect the free exercise of all religions, as this Court has noted in a variety of contexts, when courts do not understand a religious practice, they are more likely to undervalue the substantiality of burdens placed on that practice. And to the extent that a religious minority's rights depend on a court's understanding of the religion, adherents might reasonably "be concerned that a judge would not understand its religious tenets and sense of mission." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987); *see id.* at 343 (Brennan, J., concurring).

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When it last considered the Religious Land Use and Institutionalized Persons Act (RLUIPA), in *Holt v. Hobbs*, this Court noted its broad sweep:

> Several provisions of RLUIPA underscore its expansive protection for religious liberty. Congress defined "religious exercise" capaciously to include "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc–5(7)(A). Congress mandated that this concept "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." § 2000cc–3(g).

Holt v. Hobbs, 135 S. Ct. 853, 860, 190 L. Ed. 2d 747 (2015) (emphasis added).

In theory, RLUIPA's broad interpretation should easily cover the religious traditions and practices of all minority faiths, and the Court knows that it "must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths," see *Kiryas Joel*, 512 U.S. 687, 114 S. Ct. 2481, 129 L. Ed. 2d 546; *Cutter v. Wilkinson*, 544 U.S. 709, 709, 125 S. Ct. 2113, 2115, 161 L. Ed. 2d 1020 (2005). Yet even a cursory glance at this Court's history of dealing with non-mainstream religions reveals that theory has not always matched practice. "The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish." *Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 902, 110 S. Ct. 1595, 1613, 108

L. Ed. 2d 876 (1990). As Justice O'Connor noted in her dissent from *Smith*, the case that eventually led to the creation of RFRA and RLUIPA, "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility." *Id.* at 494 U.S. 872, 902, 110 S. Ct. 1595, 1613, 108 L. Ed. 2d 876.

Even amongst faiths generally cognizable as part of the mainstream Judeo-Christian tradition, the Court's record of recognizing less familiar religious observances has been unsatisfactory and inconsistent. In *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), the Court found that Jehovah's Witnesses were not entitled to an accommodation and instead required children of that faith to salute the American flag and say the pledge of allegiance each morning, even though doing so violated a core tenet of their faith. *Id.* at 591. The Court declared that to insist on an accommodation for "dissidents" would "cast doubts in the minds of other children" and "weaken" the instilment of patriotic virtues. *Id.* at 600–01. While the Court agreed that it might be best to "give to the least popular sect leave from conformities," it declined to do so because "the court-room is not the place for debating . . . individual idiosyncrasies." *Id.* at 598.

By the 1960s, the Court appeared to have recognized the importance of protecting the religious rights of Christian minorities. And yet, even in 1986, Orthodox Jewish members of the armed services were denied the dignity of that same benign recognition. In *Goldman v. Weinberger*, 475 U.S. 503, 505 (1986), the Court held that an Orthodox Jewish service member could not wear his yarmulke while

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in uniform despite the dictates of his faith, *id.* at 505–06, even though the code at issue specifically granted exceptions to uniform requirements for indoor religious ceremonies. *Id.* at 509.

In recent decades, the Court has grown in its understanding of various denominational differences within the main three Abrahamic faiths, but concerns still remain for other religious traditions and practices. In *Hosanna-Tabor*, Justice Alito recognized this issue and emphasized the importance of crafting religious jurisprudence cognizant of a diversity of religions, stating, "[I]t would be a mistake if the term 'minster' or the concept of ordination," a concept foreign to a plethora of faiths, were made central to the ministerial exception." *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S. Ct. 694, 711 (2012) (Alito, J., concurrence). Nonetheless, this lack of an inclusive understanding of other minority religious traditions—and the accompanying lack of equal legal protections—has continued into the 21st Century. In 2005's *Cutter v. Wilkinson*, a district court had rejected the claims of various "nonmainstream" religions, including Wicca and Asatru, for an accommodation under RLUIPA. *Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005). In reversing, the Court noted that an Ohio prison's accommodation for "traditionally recognized religions" was legitimate, but simultaneously failing to accommodate petitioners' exercise of their "nonmainstream" religions in a variety of ways was not. *Id.* at 709.

It is this history of inconsistent treatment of religious minorities that has prompted cases like *Holt v. Hobbs* and now *Knight*, and which requires

the Court to be extra vigilant in making sure that it protects the rights of religious minorities.

B. *Native Americans In Particular Often Face Extra Scrutiny*

The Court's treatment of Native American religious beliefs has begun to improve, with the Court's recognition of First Amendment and statutory protection for customary tribal religious rituals. However, the Court still sometimes fails to provide Native American faiths adequate protections for reasons largely rooted in a misunderstanding of Native American religion. Much of this confusion is rooted in the failure of judges to grasp the extent of various impacts and burdens on Native Americans. *See* Brief of the Christian Legal Society et al. as Amici Curiae Supporting Respondents, at 4, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

Perhaps the most famous example of this lack of understanding was laid bare in *Lyng v. Northwest Indian Cemetery Protective Association*, a 5-3 decision (Justice Kennedy did not participate) ruling that the First Amendment's Free Exercise Clause does not prohibit the government "from permitting timber harvesting in, or constructing a road through, a portion of a National Forest that has traditionally been used for religious purposes by members of three American Indian tribes in northwestern California." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 441–42 (1988). Unbelievably, the opinion itself literally notes that the *government's own commissioned survey* "found that the entire area is significant as an integral and indispensable part of Indian religious conceptualization and practice,"

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App. 181, and that "constructing a road along any of the available routes would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples." *Id.*, at 182; *Lyng*, 485 U.S. 439, 442, 108 S. Ct. 1319, 1322, 99 L. Ed. 2d 534.

Despite the fact that amici in that case made it clear that Native American religion requires that their ceremonies "must be performed continuously or great harm and destruction will come to the people," Brief of National Congress of American Indians et al. as Amici Curiae Supporting Respondents, at 11, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the Court was undaunted in allowing the government's "incidental interference," *id.* at 450, while simultaneously acknowledging that "we have no reason to doubt . . . that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices" and might "virtually destroy the . . . Indians' ability to practice their religion." *Id.* at 485 U.S. 439, 451, 108 S. Ct. 1319, 1326–27, 99 L. Ed. 2d 534. The Court characterized the interference as merely making it "more difficult to practice certain religions." *Id.* at 450. Perhaps the most startling claim is found in the Court's concession that even if the construction virtually destroys the Indians' ability to practice their religion, "the Constitution simply does not provide a principle that could justify upholding respondents' legal claims." *Id.* at 451–52. As Justice Brennan noted in dissent, "that such a reading is wholly untenable . . . is demonstrated by the cruelly surreal result it produces here: governmental action that will

virtually destroy a religion is nevertheless deemed not to 'burden' that religion." *Id.* at 485 U.S. 439, 472, 108 S. Ct. 1319, 1337, 99 L. Ed. 2d 534 (Brennan, J., dissenting).

In *Navajo Nation v. U.S. Forest Service*, the Court declined to hear the request of a number of Native Americans "to prohibit the federal government from allowing the use of artificial snow for skiing on a portion of a public mountain sacred in their religion." *Navajo Nation v. U.S. Forest Service,* 535 F.3d 1058, 1062 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2763 (2009). The burden claimed by the groups essentially said that the process and its use of "human waste" to make the artificial snow "desecrates the entire mountain, deprecates their religious ceremonies, and injures their religious sensibilities." *Id.* at 1063. However, the Ninth Circuit failed to recognize a substantial burden, echoing the conclusions of this Court in *Lyng*. It found that the "sole effect of the artificial snow is on the Plaintiffs' subjective spiritual experience" and did nothing more than "decrease the spiritual fulfillment Plaintiffs get from practicing their religion on the mountain." *Id.* The court explained that "government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a 'substantial burden.'" *Navajo Nation v. U.S. Forest Service,* 535 F.3d 1058, 1063 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 2763 (2009). The Court also noted that "there is no showing the government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit

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In his dissent in *Navajo Nation*, Justice Fletcher echoes Justice Brennan's concerns in *Lyng* and strongly objects to the majority's treatment of Native Americans and their ancient faith traditions. He scathingly declares:

> The majority holds that spraying 1.5 million gallons per day of treated sewage effluent on the most sacred mountain of southwestern Indian tribes does not "substantially burden" their "exercise of religion" in violation of RFRA. [...] In so holding, the majority misstate the evidence below, misstates the law under RFRA, and misunderstands the very nature of religion.

Id. at 1081 (Fletcher, J., dissenting). Furthermore, in concluding, Justice Fletcher laments the realities of this decision for Native Americans and religious liberty:

> RFRA was passed to protect the exercise of all religions, including the religions of American Indians. If Indians' land-based exercise of religion is not protected by RFRA in this case, I cannot imagine a case in which it will be. I am truly sorry that the majority has effectively read American Indians out of RFRA.

Id. at 1113-14.

Michael D. McNally echoes Justice Fletcher's prognostication explaining, the "*Navajo Nation* decision further impoverishes the language with which courts understand Native religions generally,

and very likely the religious exercise of other communities that Congress intended to protect under RFRA." Michael D. McNally, *From Substantial Burden on Religion to Diminished Spiritual Fulfillment: The San Francisco Peaks Case and the Misunderstanding of Native American Religion*, J.L. & RELIGION 38 (2015). McNally notes that the Ninth Circuit, in ignoring the burden around "spiritual fulfillment," is falsely applying the pop-language of "spirituality" to the *religious* practices of Native Americans. *Id.* at 46. Its "conceptual filter" in viewing the religious practice of Native Americans within the framework of "spiritual fulfillment" reduces the religion "to a singular emotional subjective spirituality." *Id.* at 55. Framing the burden in those terms lends to an easier finding that no substantial burden exists.

Thankfully RLUIPA's expansive protections for religious liberty—"religious exercise" is defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief"— seems to have been designed to forbid such horrible "incidental interferences." § 2000cc–5(7)(A).

II. THE ACCOMMODATION THE NATIVE AMERICAN PETITIONERS SEEK HERE IS COMMONPLACE AND REASONABLE.

The instant appeal concerns an Alabama prison rule that requires all male inmates to wear short hair, a practice that violates the deeply rooted religious traditions of the Native American Petitioners. The centrality of this belief, and the burden it imposes, are well-established. The district court concluded that "a preference for unshorn hair is a central tenet of Native American spirituality and

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thus, satisfies the Act's broad definition of a religions exercise." App. 52a; see *id.* 52a, n.7. "Plaintiffs proffered undisputed testimony regarding the burden that the ADOC hair length policy placed on their religious practices." App. 13a. 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.

The type of request the Petitioners make is hardly new. In *Teterud v. Burns*, 522 F.2d 357, 359 (8th Cir. 1975), the court recognized a Native American prisoner's right to wear his hair in compliance with his religious beliefs. In *Warsoldier v. Woodford*, 418 F.3d 989, 1002 (9th Cir. 2005), the court held that a Native American prisoner—whose faith taught that hair should only be cut upon the death of a close relative—could not be punished for violating a rule prohibiting prisoners from having hair longer than three inches, unless the prison showed that the policy constituted the least restrictive way of promoting safety.

For its part, 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 necessarily satisfied RLUIPA—even if the particular type of haircut required had no intrinsic value. Despite these claims, Alabama officials "produced literally no evidence that . . . widespread accommodation of Native American religious liberty has resulted in any problems whatsoever." Brief for the United

States as Amicus Curiae Supporting Plaintiffs-Appellants, 20. As this Court has noted, however,

> [RLUIPA] does not permit such unquestioning deference. RLUIPA, like RFRA, "makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress." *O Centro*, [546 U.S.] at 434. That test requires the Department not merely to explain why it denied the exemption but to prove that denying the exemption is the least restrictive means of furthering a compelling governmental interest. Prison officials are experts in running prisons and evaluating the likely effects of altering prison rules, and courts should respect that expertise. But that respect does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard.

Holt, 135 S. Ct. 853, 864, 190 L. Ed. 2d 747.

Therefore, in *Holt v. Hobbs*, this Court held that Arkansas corrections officials violated RLUIPA when they applied a prohibition against beards to an inmate whose Muslim religious beliefs required that he wear one. *Id.* That case and this one are substantially the same, and yet, the Eleventh Circuit made no effort to conform its pre-*Holt* interpretation of RLUIPA to the standards that case announced.

Religious exemptions from prison grooming policies are common. Plaintiffs brought evidence that long hair is permitted in prisons in 38 states 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

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a strong majority of U.S. jurisdictions permit inmates to wear long hair, either generally or as an accommodation for religious inmates." App. 13a (footnote omitted). Courts have always held, in theory, that religious exemptions for grooming policies should be neutral as to the underlying faith. *Reed v. Faulkner*, 842 F.2d 960, 964 (7th Cir. 1988), held that enforcing hair length policy against Rastafarians, but not Native Americans, violated the Free Exercise Clause, and in *Sasnett v. Litscher*, 197 F.3d 290, 292 (7th Cir. 1999), the court held that corrections officials had no safety or other interests that justified treating one group of inmates who claimed a religious belief precluding them from cutting their hair differently than other exempted religious groups. Where prison officials permit long hair and beards for some religions but not others, they must present evidence justifying this unequal treatment. *Wilson v. Moore*, 270 F. Supp. 2d 1328, 1353 (N.D. Fla. 2003). The ADOC currently recognizes a religious exception for those who wish to wear beards for religious purposes.

In *Holt v. Hobbs* the state of Alabama actually signed an amicus brief which was almost directly on point. As they noted:

The exception requested by the petitioner may seem to be a reasonable accommodation because half-inch beards are mainstream. But that kind of reasoning creates the danger that a similar claim on behalf of another religious person will be dismissed as too extreme or unusual. As Justice Stevens once warned, "[i]f exceptions from dress code regulations are to be granted on the basis of a multifactored test," the degree to which the exemption is acceptable to the majority "inevitably" will "play a

critical part in the decision." *Id.* at 512-13. The difference between a half-inch beard, a kouplock, and a dreadlock "is not merely a difference in 'appearance'—it is also the difference between" a Muslim inmate like petitioner on the one hand and a Native American inmate or a Rastafarian on the other. *Id.* A prison system should be able to prioritize the benefit of not drawing those kinds of inter-religious distinctions in its grooming policy. *Holt v. Hobbs*, 2014 WL 3767420 (U.S.), 22 (U.S. 2014)

This case presents an undisputed burden, no demonstrated compelling interest, and no search for a less restrictive means. The Eleventh Circuit decision has shown no evidence to justify the kind of unequal treatment that Alabama itself was concerned about—the drawing of inter-religious distinctions. Review by this Court is required to bring Eleventh Circuit legal standards into line with the vast majority of federal courts that adhere to *Holt*. This Court must ensure that minority faiths—and Native American religions in particular—are afforded the same degree of protection under RLUIPA that exists for other religious practices in our prison system, so that all religions and faiths are protected in practice and not just theory.

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CONCLUSION

For the foregoing reason, *amici* respectfully ask this Court to reverse the Eleventh Circuit's decision.

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