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 IN OPPOSITION

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Question Presented

(restated)

Does the Religious Land Use and Institutionalized Persons Act (RLUIPA) require that *every* prison in the country allow inmates to grow indefinitely long hair for religious reasons merely because *some* prisons in the country choose to do so?

PARTIES TO THE PROCEEDING

The respondents agree with the petitioners' statement about the parties to the proceeding.

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INTRODUCTION

The Court should deny the petition for certiorari. The petitioners are prisoners who want to grow completely unshorn hair because of their participation in a Native American religion. Unlike the petitioner in *Holt v. Hobbs* (13-6827), in which this Court recently granted certiorari, the petitioners here do not want an arguably measured accommodation to a prison grooming policy; they want a complete and open-ended exception so that they can grow hair of indefinite length. The petitioners have not contested respondents' position that "[t]here is absolutely no evidence in the record to support the contention that the hair-length policy," which applies to all male inmates without exception, "discriminates on the basis of race or religion." Pet. App. 22a. Instead, the defendants developed an extensive and very favorable record below that established both the compelling need for reasonable hair-length restrictions in the unique context of Alabama's prisons and the ineffectiveness of the petitioners' asserted alternatives. On this record, the Eleventh Circuit's decision would be correct no matter how *Holt v. Hobbs* is ultimately resolved.

The petition has also failed to establish a circuit split on the actual issue presented here—whether an inmate has the right under RLUIPA to grow completely unshorn hair merely because some prisons would allow it.[1] No court of appeals has

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[1] This case marks the third time the Eleventh Circuit has held that a prison policy restricting hair length passes

granted that kind of an unlimited religious exception from generally applicable grooming policies. And even if this Court wanted to address the question presented, this case would be a woefully inadequate vehicle to do so. The petitioners have failed to introduce evidence in support of their proposed less restrictive alternatives. They have also waived any argument for the most common kind of hair-length accommodation for practitioners of Native American religions—a small patch of long hair called a "kouplock." The petition should be denied.

STATEMENT

For its male inmates, the Alabama Department of Corrections requires a "regular" hair cut defined as "off neck and ears." (Doc.471-DEX1). No medical, religious, or other exemption to the hair-length policy is afforded to any inmate. (Transcript, First Day of Trial at 146, *Limbaugh v. Thompson*, No. 2:93-cv-1404, January 21, 2009, subsequent references are to TR and respective day of the three day trial and page number).

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strict scrutiny on a claim for complete exemption. *Harris v. Chapman*, 97 F.3d 499 (11th Cir.1996), *cert. denied*, 520 U.S. 1257 (1997) (RFRA challenge to Florida policy by Rastafarian inmates); *Brunskill v. Boyd*, 141 Fed. Appx. 771 (11th Cir. 2005) (RLUIPA challenge by Native American). RFRA and RLUIPA impose the same standard: a government can justify a substantial burden on religious exercise by showing that the burden is the least restrictive means of furthering a compelling governmental interest. *Compare* 42 U.S.C. 2000bb-a(b)(1) - (2), with 42 U.S.C. 2000cc-1(a)(1) - (2). Accordingly, courts rely on RFRA precedent in RLUIPA cases.

The petitioners have been challenging this policy for roughly two decades. Following an evidentiary hearing in February, 1998, the district court rejected the petitioners' Free Exercise claim. Congress later enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000. On remand for consideration in light of the new statute, the petitioners amended their pleadings to add a RLUIPA claim, and the parties stipulated that a new evidentiary hearing was not necessary. The district court then ruled on cross-motions for summary judgment, rejecting petitioners' RLUIPA challenge to the hair-length policy. *See Limbaugh v. Thompson*, Nos. 2:93-cv-1404-WHA, 2:96-cv-554-WHA, 2006 WL 2642388 (M.D. Ala. Sept. 14, 2006). The Eleventh Circuit held that summary judgment was inappropriate and remanded a second time for a new evidentiary hearing on the RLUIPA claim. *Lathan v. Thompson*, 251 Fed. Appx. 665, 667 (11th Cir. 2007) (per curiam).

The district court held a bench trial over three days in January 2009. The defendants presented numerous exhibits and the testimony of four witnesses concerning the necessity of hair-length restriction in the current context of Alabama prisons. Those witnesses and exhibits explained that restricting hair length furthers the prison's interest in "security and safety" by "maintaining order and discipline, preventing violence, hindering the introduction of contraband into the prisons, and enabling the accurate identification of inmates." Pet. App. 53a. "[L]ong hair is a danger because it can be used in a fight," Pet. App. 51a, and because "long hair can be used as a means of hiding weapons or

other contraband," Pet. App. 49a. Restrictions on hair length also "promote the health, hygiene and sanitation" of the prisons. Pet. App. 53a.

The defendants also presented specific evidence on the importance of uniformity in the hair-length policy. Warden Culliver explained that if certain inmates were allowed to wear their hair long, discipline would begin to erode as this would be an area where the inmate could not be told what to do. TR., First Day of Trial at 163-164. ADOC Institutional Coordinator Gwendolyn Mosley testified that allowing grooming exemptions to select inmates would allow exempt inmates to identify as members of a special group, and that the ADOC attempts to prevent such as it promotes gang activity, a serious threat to order and security. TR., Second Day of Trial at 27-28. She also testified ADOC's inmate-to-officer ratio is almost twice the national average. TR., Second Day of Trial at 31. And the petitioners' expert witness testified that when he was warden at a seriously overcrowded prison in Oregon with a ratio of only 7 to 1, he was on the verge of losing control. *Id*. at 142.

The defendants' witnesses also rebutted the petitioners' various proposals to satisfy security and hygiene concerns while also allowing long hair. With regard to the petitioners' argument that exempt inmates could be searched more frequently or search their own hair, numerous Alabama prison officials and the defense's expert testified that searching long hair is more difficult, time consuming, and places corrections staff at risk. TR., First Day of Trial at 165, TR., Second Day of Trial at 36, 59.

The petitioners argued that Photo Shop would eliminate security and identification concerns because officers could create photo-shopped pictures of inmates with different lengths of hair. (The magistrate judge remarked from the bench that this is "the most absurd argument that I have ever seen." TR., Second Day of Trial at 146.) In response, defense witnesses testified that Photo Shop frustrates the ready identification of an inmate in the event of escape, as multiple photos engender confusion by giving the public conflicting images of the same escapee. TR., Second Day of Trial at 95-96. Defense witnesses also explained that corrections officials must readily identify inmates on a daily basis; Photo Shop does nothing to serve this need. TR., First Day of Trial at 162; TR., Second Day of Trial at 27.

Finally, the petitioners argued that exempt inmates could be housed in a single institution. But Warden Culliver testified this would not be feasible "because of different custody levels" and other restraints. TR., First Day of Trial at 168-169.

By contrast, the petitioners presented one witness on this issue: a security consultant, George Sullivan, who had neither worked in nor administered a prison in Alabama, and had done nothing since the 1998 hearing to gain an understanding of conditions in Alabama prisons. TR., Third Day of Trial at 30. Sullivan's only contribution to the trial was to opine that some other prison systems either have no hair-length policy or allow certain exemptions to their hair-length policies.

The district court found as a matter of fact that "the ADOC's restriction on inmate hair length is the least restrictive means of furthering its compelling governmental interests in prison safety and security." Pet. App. 35a. The district court based its fact-findings on the testimony presented in this case and the unique difficulties of administering prisons in Alabama. Specifically, the district court explained that Alabama's inmate population is "younger, bolder, and meaner" and that, at the same time, Alabama's prisons are "understaffed and overcrowded." Pet. App. 51a. These unique circumstances "increase the difficulties prison guards face daily in controlling inmates and securing order" in Alabama's prisons. Pet. App. 55a. In light of the unique facts of this case, the district court found that Sullivan's testimony about other prisons' policies "is insufficient by itself to demonstrate that the ADOC's grooming policies are not the least restrictive means of furthering compelling government interests in this state." Pet. App. 58a.

The Eleventh Circuit affirmed the district court's judgment. The court of appeals noted that the district court resolved the case by weighing conflicting testimony and may have "chosen to discredit" plaintiffs' expert witness "because he has testified in many prisoner religious rights case, but never on behalf of a prison system, and because he admitted a lack of familiarity with the ADOC's prisons." Pet. App. 18a at n.8. Nonetheless, the court of appeals considered testimony about the practices of other prisons systems to be "relevant" but "not controlling." Pet. App. 21a. Ultimately, the court of appeals held that the ADOC had "shown that its

departure from the practices of other jurisdictions stems not from a stubborn refusal to accept a workable alternative, but rather from a calculated decision not to absorb the added risks that its fellow institutions have chosen to tolerate." Pet. App. 21a.

REASONS THE WRIT SHOULD BE DENIED

No court has ever required any prison system to allow violent prisoners like petitioners to grow indefinitely long hair. Instead, decisions in the First, Fourth, Fifth, and Eighth Circuits, (cited by the petitioners as on the other side of an alleged split) are fully consistent with both the analysis and result of the present decision. Even if there were a split, this case would be a uniquely bad vehicle through which to resolve it because, among other things, the petitioners have waived any request for the most common exemption from a hair-length policy for those who practice Native American religions. The petition should neither be granted nor held for a ruling in *Holt v. Hobbs*; it should be denied.

I. The court of appeals' decision is consistent with the law of this Court and other circuits.

The court of appeals' decision here is consistent with this Court's case law and the decisions of other courts. The petitioners' arguments to the contrary disregard the core holdings of *Cutter v. Wilkinson*, 544 U.S. 709 (2005). There, this Court held that context matters in applying strict scrutiny under RLUIPA, and that courts must defer to the

experience and expertise of prison administrators in "establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Id.* at 723. The Court also explained that, under RLUIPA, "an accommodation must be *measured* so that it does not override other significant interests." *Id.* at 722 (emphasis added). The notion that a prison has to try exemptions, and fail, is patently inconsistent both with the legislative intent of RLUIPA and *Cutter*'s admonition that deference be afforded to the experience and expertise of prison administrators in matters of security and discipline. *Id.* at 722.

The petitioners' claim for a complete exemption to the hair-length policy is the antithesis of a "measured" accommodation, and their poor trial presentation ignored the context of Alabama's prisons. The petition does not cite, and we have not found, any RFRA or RLUIPA case holding in a final decision on the merits that a prison must allow a complete exemption to hair-length restrictions for violent long-term incarcerated prisoners. The linchpin of the petitioners' effort to show a circuit conflict, *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005), was not a final adjudication on the merits and involved a trustee level inmate who was scheduled to be released from custody eighteen days after the hearing on his motion for preliminary injunction. The courts have been unanimous since *Warsoldier* in rejecting claims for a complete exemption to hair-length and shaving policies.

A. The circuits have consistently rejected claims for complete exemption from grooming policies

The courts that have addressed claims like the petitioners' have rejected them. These cases forcefully refute the petition's assertion that, because of the alleged split, "the same inmate enjoys federal civil rights protection in one state's prison that he would not have in another." Pet. 21.

1. *Eighth Circuit*

The Eighth Circuit has consistently rejected claims for unlimited exemptions to grooming policies. In *Hamilton v. Schriro*, the Eighth Circuit relied on the testimony of Missouri's Assistant Director of Corrections "that there was no alternative to the hair length policy because only short hair can easily be searched and remain free of contraband." *Hamilton v. Schriro*, 74 F.3d 1545, 1548 (8th Cir. 1996). The court noted that "prison officials ordinarily must have wide latitude within which to make appropriate limitations to maintain institutional security" because "central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Id.* at 1554 (citing *Pell v. Procunier*, 417 U.S. 822, 823 (1974)). The Eighth Circuit reaffirmed *Hamilton* in *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008), which also rejected a RLUIPA challenge to a hair-length policy. The petitioners seek to distinguish *Fegans*, noting the evidence showed Arkansas experienced security issues from long hair prior to enforcing a hair-length

restriction. But the court of appeals in *Fegans* treated the testimony of prison officials based on their experience the same way it did in *Hamilton v. Schriro*. *Fegans*, 537 F.3d at 904 ("Hamilton relied for empirical proof on the testimony of prison officials, based on their collective experience in administering correction facilities....").

The Eighth Circuit did not, in *Fegans*, require state prison officials to cite empirical examples of security breaches in their system to establish least restrictive means. And it makes no sense for petitioners to rely on the exemption policies of other systems and simultaneously argue that state prison officials cannot cite empirical evidence of problems experienced in other systems. If the exemption practices of other prisons are relevant, then the problems engendered by those practices are also relevant.

2. *Fifth Circuit*

On claims for complete exemption, the Fifth Circuit has held repeatedly that the Texas prison's hair-length policy passes strict scrutiny. *See Longoria v. Dretke*, 507 F.3d 898 (5th Cir. 2007); *Diaz v. Collins*, 114 F.3d 69 (5th Cir. 1997). The Fifth Circuit in *Diaz* followed *Hamilton v. Schriro* and rejected a RFRA challenge by a Native American inmate. In doing so, the court affirmed the magistrate judge's finding that "long hair also facilitates the transfer of contraband and weapons into and around [Texas's] institutions ... requiring prisoners to have short hair makes it more difficult for escaped prisoners to alter their appearance ... and

these interests could not be achieved without some sort of regulation limiting hair length." *Id.* at 73.

3. *Fourth Circuit*

Like the Fifth, Eighth, and Eleventh Circuits, the Fourth Circuit has upheld prison policies restricting the length of inmate hair against RLUIPA challenges seeking a complete exemption from the policies. *See Maxwell v. Clarke*, 540 Fed. Appx. 196 (4th Cir. 2013); *Ragland v. Angelone*, 420 F. Supp. 2d 507 (W.D. Va. 2006), a*ff'd sub nom. Ragland v. Powell*, 193 Fed. Appx. 218 (4th Cir. 2006), cert. denied, 549 U.S. 1306 (2007).[2]

The petition's citation of *Couch v. Jabe*, 679 F.3d 197, 203 (4th Cir. 2012), forcefully demonstrates the lack of a circuit split in the context of complete exemption. There, the inmate requested permission to grow and maintain a one-eighth-inch beard, identical in length to a medical exemption allowed by the Virginia prisons. In ruling in favor of the inmate, the Fourth Circuit distinguished that kind of modest exemption from the more drastic and unlimited exemption requested in cases like this one. The Fourth Circuit cited the failure of prison officials to address "the feasibility of implementing a religious exemption or discuss whether a one-eighth-inch beard would in fact implicate the identified

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[2] Ronald Angelone, the former director of Virginia's prison system, testified as an expert in this case about Virginia's grooming policy that was upheld by the Fourth Circuit. TR., Second Day of Trial at 46-49. *See* Pet. App. 14a. (discussing testimony of Angelone)

health and security concerns in the Policy." *Id.* The court held that the prison had failed "to explain how the prison is able to deal with the beards of medically exempt inmates but could not similarly accommodate religious exemptions" and that "at no point did [Virginia Department of Corrections employees] even assert that the Policy was the least restrictive means of furthering the identified compelling interests." *Id.* There is no split; only different results on different facts.

4. *Sixth Circuit*

The Sixth Circuit has also upheld a hair-length policy as the least restrictive means under RLUIPA. In *Hoevenaar v. Lazaroff*, 422 F.3d 366, 369-372 (5th Cir. 2005) *cert. denied, Hoevanaar v. Lazaroff*, 549 U.S. 875 (2006), the court reversed a preliminary injunction ordering Ohio prison officials to allow a Native American inmate to wear a kouplock, which is an approximately two-inch strip of long hair at the base of the skull. The district court had concluded that, although the prisoner would likely lose on his request for a complete exemption, he would likely prevail on the kouplock accommodation. *Id.* at 369. The Sixth Circuit reversed, holding the kouplock was not an efficacious lesser restrictive means based on the testimony of a prison warden, because it too compromised security interests. This court denied certiorari.

B. The present decision is not in conflict with the First, Second, Third, or Tenth Circuit

The lower court's decision does not conflict with decisions in other circuits that do not address the kind of total exemption claim at issue in this case.

1. First Circuit

The First Circuit's law is consistent with the Eleventh Circuit's. The petition cites *Spratt v. Rhode Island Dept. of Corrections*, 482 F.3d 33 (1st Cir. 2007), which involves a ban on inmate preaching. But *Spratt* is not a grooming case and is not in conflict with the present case. Where the First Circuit has evaluated claims for a complete exemption from a grooming policy, it has held them to be valid under RLUIPA just like other courts of appeal. *See Kuperman v. Wrenn*, 645 F.3d 69 (1st Cir. 2011) (rejecting an inmate's request for complete exemption from New Hampshire's shaving policy).

2. Second Circuit

The Second Circuit's law is also consistent with the Eleventh Circuit's. The petition cites *Jova v. Smith*, 582 F.3d 410 (2d Cir. 2009), *cert. denied*, 559 U.S. 1077 (2010), which accommodated a request for a special religious diet. But the Eleventh Circuit has also held that state prison systems may have to accommodate special meals for prisoners. *See Rich v.*

Secretary, Florida Dept. Corrections, 716 F.3d 525, 534 (11th Cir. 2013). The Eleventh Circuit's decision below cites its prior decision in *Rich* and is entirely consistent with the result in *Jova*. Pet. App. 21a.

3. Third Circuit

The petition cites *Washington v. Klem*, 497 F.3d 272 (3d Cir. 2007) as evidencing a circuit split. But *Washington v. Klem* is not a grooming case. It involved limitations on an inmate's possession of religious books. *Klem* has not been applied in any grooming case to hold that RLUIPA requires a complete exemption from a hair-length policy.

4. Tenth Circuit

The Tenth Circuit's decision in *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. Jan. 23, 2014), is not a grooming case and is not in conflict with the decision here. *Yellowbear* reversed a summary judgment on a RLUIPA claim challenging the denial of access to a sweatlodge. The Court held that in order to satisfy its burden on least restrictive means, a government must refute alternative schemes suggested by the inmate and must demonstrate that the claimant's alternatives are ineffective to achieve the government's stated goals. *Id.* at 63. That is precisely what the defendants did in this case. *See* Pet. App. 18a.

C. *Warsoldier* is distinguishable

The only case that arguably required a complete exemption from a prison grooming policy is *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005). But that case is not, as petitioners argue, "essentially indistinguishable from the present case." Pet. 13. Instead, *Warsoldier* is distinguishable both procedurally and factually.

Procedurally, the Ninth Circuit did not enter a final judgment in *Warsoldier*. Instead, it resolved an appeal from a motion for a preliminary injunction such that the parties did not have "the benefit . . . of a full opportunity to present their cases" and the appellate court did not have the benefit of "a final judicial decision based on the actual merits of the controversy." *University of Texas v. Camenisch*, 451 U.S. 390, 396 (1981). In reversing, the Ninth Circuit faulted California for offering "only conclusory statements." *Warsoldier*, 418 F.3d at 998. Such failures of proof often occur in "the haste characteristic of a request for a preliminary injunction." *Camenisch*, 451 U.S. at 398. Given its interlocutory nature, the Ninth Circuit merely held that "there exists serious questions going to the merits of Warsoldier's claim." *Warsoldier*, 418 F.3d at 1001. As far as we can tell, no court ever entered a final judgment in *Warsoldier*.

There are also three big factual differences between this case and *Warsoldier*.

First, the Ninth Circuit's chief concern in *Warsoldier* was California's very general justification for restricting the hair length of male inmates, although it did not restrict the hair length of female

inmates. But that concern is not present here. In Alabama, neither males nor females are allowed to grow their hair to any length they desire, which is the only accommodation the petitioners requested.[3] Although the California policy at issue in *Warsoldier* provided that "[a] female inmate's hair may be any length," *id.* at 995, Alabama restricts the hair-length of female inmates to "the collar of the shirt." Doc.471-DEX36 at 6. The evidence here also established that, at the time of trial, the ADOC was in the process of implementing a gender differentiated inmate classification system that, as a general matter, treated women more liberally than men. TR., Second Day of Trial at 12. Warden Mosley explained that a study through the National Institute of Corrections had confirmed that female inmates have a "rate of misconduct [that] is much lower than males." *Id.* and Doc.471-DEX17. Accordingly, to the extent Alabama's prisons differentiate between the genders, there is hard evidence to explain that difference and, in any event, the difference is irrelevant to the petitioners' claim.

Second, unlike the petitioners here, Warsoldier was in minimum security. Warsoldier was a trustee level inmate and enjoyed many privileges, including sleeping in unlocked rooms. *Warsoldier*, 418 F.2d at 798-99. He was a mere eighteen days from release when the preliminary injunction was denied by the district court. Id. at 993. Indeed, so minimal was the security risk that

[3] The petitioners erroneously assert that the ADOC provides females exemptions to hair-length restrictions. Pet. 4. The truth is that the ADOC allows no exemptions to its hair-length restriction for females. TR., Second day of Trial at 11.

the Ninth Circuit entered an emergency order that Warsoldier be released from custody pending his appeal. *Id.* at 992, n.1. By contrast, each of the petitioners was convicted of a serious violent crime. Three were convicted of rape and/or sodomy, one was convicted of murder, and two were convicted of robbery.[4] None of the petitioners is a minimum security inmate, none enjoy the privilege of sleeping in unlocked rooms, and none is mere days away from release.

Third, the defendants produced more and better evidence than California produced in *Warsoldier*. Unlike California's evidentiary failings at the preliminary injunction stage in *Warsoldier*, the defendants here provided extensive and detailed evidence of conditions in Alabama prisons and the necessity for hair-length restrictions in light of those conditions. Three wardens, each with decades of experience operating Alabama prisons across all security levels, testified that overcrowding and understaffing render hair-length restriction a particular necessity. The district court expressly credited and relied on this live testimony.

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The court of appeals' decision does not conflict with this Court's case law or a decision from any other circuit. In order for the petitioners to prevail on

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[4]The petition includes a seventh petitioner, Douglas Bailey, who was convicted of robbery. Bailey was released from ADOC custody prior to the January, 2009 trial, and his RLUIPA claim was dismissed as moot. *Doc. 470*-Pretrial Order-1.

this record, RLUIPA would have to be construed as enacting a national standard on grooming regardless of context. That would be patently inconsistent with this Court's holding in *Cutter* that context matters, that RLUIPA does not elevate the accommodation of religious exercise over considerations of institutional security, that particular sensitivity is afforded to security concerns, and that a requested accommodation must be measured.

Although petitioners correctly assert that prisoners frequently challenge grooming policies, Pet. 25, the petition does not cite any case that grants a prisoner a complete exemption to a hair length policy on facts even remotely similar to these. Instead, four circuits (Fourth, Fifth, Eighth and Eleventh discussed above) have rejected claims for a complete exemption to prison hair-length policies, and the First Circuit has rejected a claim for a complete exemption to a shaving policy. These decisions are consistent with this Court's admonitions in *Cutter* that RLUIPA allows only "measured" accommodations that do not interfere with institutional interests.

II. This case is a bad vehicle to address the question presented.

Even if the Court wanted to address the question presented, this would not be the case to do it.

First, the petitioners have not requested the accommodation that observers of Native American religions most commonly request to hair-length restrictions—the kouplock, which is a narrow strip of

hair. *See* Pet. App. 2a, n.1, ("The District Court did not consider the kouplock ..., Plaintiffs have waived the issue."). Instead, the petitioners sought an absolute, complete exemption that would allow them to grow indefinitely long hair. The petitioners' all-or-nothing approach presents a substantial vehicle problem. If this Court wants to address a Native American inmate's claim for a hair-length accommodation, it should wait for a vehicle where all possible accommodations are at issue, not just the most extreme.[5]

Given the petitioners' assertion that "challenges ... to grooming regulations, like the one raised in this petition, are particularly common," Pet. 25, the Court will not have to wait long for a better vehicle. Unlike the petitioners here, inmates are increasingly asking for arguably measured accommodations. This is evident from inmate Holt's request for a one-half-inch beard in the case that is now before this Court. The trend is also shown by

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[5] This case has no implications for the application of RLUIPA in the land use context. The amicus brief of International Center of Advocates Against Discrimination undercuts its own assertion in this regard by admitting that "[d]isputes about whether a lot will become a Costco or non-denominational church, tend to be more complex than disputes about how long inmates may grow their hair. Thus, when land use regulations are held to a strict scrutiny under RLUIPA, more alternatives, and more evidence of their efficacy tend to be available." *International Center of Advocates Against Discrimination*, *Amicus Brief* at 16-17 (internal citation omitted).

Broussard v. Stephens, No. 2:13-CV-211, 2013 WL 6858510 at *2 (S.D. Tex. Dec. 30, 2013), in which an inmate amended his complaint to replace a RLUIPA claim for a "fist full" length beard with a request for a one-half-inch beard. The trend toward more measured accommodations is also evidenced in the hair-length cases cited in note 8 of the petition. *Compare Bogard v. Perkins*, No. 4:11-CV-97-M-V, 2013 WL 4829267 *2 (N.D. Miss. Sept. 10, 2013) (complete exemption RLUIPA claim challenging Mississippi hair-length policy fails to state claim in light of Fifth Circuit precedent that prisons have compelling interests in requiring inmates to wear short hair) *with Legate v. Stephens*, No. 2:13-CV-00148, 2013 WL 4479033 *4 (S.D. Tex. April 19, 2013) (kouplock accommodation raises colorable RLUIPA claim under Fifth Circuit precedent). If the Court wants to address hair-length claims, it should do so in one of those cases.

Second, the record in this case is incredibly one-sided and favorable to the defendants. The petitioners presented a single expert who advocated for the policies of other systems without any information about how those systems compare to Alabama's system. Like some other experts, the expert in this case "did not indicate how prisoners in other state systems and the federal system are similarly situated to [Alabama] prisoners." *Bisby v. Crites*, 312 Fed. Appx. 631, 632 (5th Cir.), *cert. denied*, 558 U.S. 990 (2009). The expert had visited only four Alabama prisons prior to the first 1998 trial, and had not stepped foot in any Alabama prison since then nor done anything else to gain an understanding of current conditions before the 2009

evidentiary hearing. TR., Third Day of Trial at 30. When pressed by the magistrate judge to respond to the testimony of ADOC officials, the expert candidly acknowledged "I do not know that much about Alabama's prisons . . .." *Id.*17-18. The court of appeals expressly noted that this expert—petitioners' only witness on this point—was not credible. *See* Pet. 18a, n.8. The petitioners' complete failure of proof on key fact issues should preclude this Court's review of the question presented.

Finally, this case is uniquely unsuited for nationwide rulemaking. Eleven state prison systems, including all three in the Eleventh Circuit, restrict inmate hair length and recognize no exemptions. But the lower courts relied extensively on unchallenged, case-specific testimony about the unique problems faced by the violent inmates and crowded conditions in Alabama's prison system. *See, e.g.,* Pet. App. 21a, 46a-47a, 52a. Those uncontested facts about Alabama's system make this a poor vehicle to create a rule that could apply in other contexts.

III. There is no reason to hold this case for a decision in *Holt v. Hobbs.*

In *Holt v. Hobbs*, this Court recently granted certiorari on the following question: "Whether the Arkansas Department of Correction's grooming policy violates the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc et seq., to the extent that it prohibits petitioner from growing a one-half-inch beard in accordance with his religious beliefs." No. 13–6827,

2014 WL 803796 (Mar. 3, 2014). There is no reason for the Court to hold this case for *Holt v. Hobbs* because the evidentiary record here compels the same result regardless of how *Holt* is decided.[6]

First, unlike in this case, the requested exception in *Holt* is very limited, and the limited nature of the exception is central to the case. In *Holt*, the petitioner consistently sought to "distinguish[] the fact that [he] want[ed] the half-inch" beard instead of an accommodation that would allow him "more freedom in growing his beard." Petitioners Reply Brief in Case No. 13-6827, at 2. Indeed in his reply brief, Holt expressly distinguished cases like this one that address complete exemptions because they involve "an uncut beard with shoulder-length hair." *Id.* at 3. Unlike *Holt*, this case does not even arguably present a close question. The petitioners' claim for an absolute exemption is not the kind of "measured" accommodation that RLUIPA envisions, nor is it comparable to the kind of accommodation at issue at *Holt*.

Second, because of the nature of the evidence that the defendants presented at trial, the precise nature of the government's burden under RLUIPA is an academic question in this case. The lower courts held as a matter of fact that the defendants had presented evidence about specific features of Alabama's prison system that differentiated it from

[6] The amicus brief of the International Center for Advocates Against Discrimination asserts this Court should hold the petition pending disposition of *Holt v. Hobbs* and the amicus brief of the Sikh Coalition contends this Court should grant certiorari to be considered at the same time as *Holt*. For the reasons stated above, neither approach is warranted.

prison systems that have adopted looser hair-length policies. Accordingly, this case is not comparable to *Iron Thunderhorse v. Pierce*, No. 09-1353, as the petitioners suggest. *See* Pet. 30-31. In that case, the petitioner reasonably argued that the precise application of the standard of review mattered. Here, because of the petitioners' evidentiary failings, it does not.

There is thus no reason to hold this case until *Holt* is resolved. The petitioners are fixated on the policies of other systems, but they made absolutely no showing of similarity between the various systems that allow long hair and the context of Alabama prisons. And they are not requesting any kind of remotely reasonable accommodation like the petitioner in *Holt*. This 21-year-old litigation needs to end without giving the petitioners yet another bite at the apple.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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