No. 12-11926-D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

THOMAS OTTER ADAMS & RICKY KNIGHT, *et al.*,

Plaintiffs-Appellants

v.

LESLIE THOMPSON & ALABAMA DEP'T OF CORRECTIONS, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS

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Case No. 12-11926-D
Knight, et al. v. *Thompson, et al.*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for *amicus curiae* United States of America adopts the appellants' certificate of interested persons and further certifies that the following additional persons may have an interest in the outcome of this case:

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2. Perez, Thomas E., Assistant Attorney General, Civil Rights Division, United States Department of Justice, counsel for *amicus curiae* United States
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Date: August 27, 2012

s/Sasha Samberg-Champion
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STATEMENT OF THE ISSUE

Whether Alabama demonstrated that requiring Native American prisoners to cut their hair short is the "least restrictive means" of furthering state prisons' safety and security interests, consistent with the State's obligations under Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc-1(a).

INTEREST OF THE UNITED STATES

This case concerns RLUIPA's requirement that a State may impose a

substantial burden on its prisoners' exercise of religion only if it can demonstrate that doing so is the "least restrictive means" of furthering a compelling governmental interest. The Department of Justice is charged with enforcing RLUIPA, see 42 U.S.C. 2000cc-2(f), and has an interest in how courts construe the statute.

STATEMENT OF THE CASE

1. Section 3 of RLUIPA prohibits state and local governments from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the government shows that the burden furthers "a compelling governmental interest" and does so by "the least restrictive means." 42 U.S.C. 2000cc-1(a). Section 3 thus "protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter* v. *Wilkinson*, 544 U.S. 709, 721, 125 S. Ct. 2113, 2115 (2005). It imposes the same obligation on state prison officials to accommodate religious liberties as federal prison officials adhere to pursuant to the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq*. It was the intent of RLUIPA's drafters that RLUIPA be construed consistent with RFRA and against the

background of the federal Bureau of Prisons' experience administering RFRA. See *Cutter*, 544 U.S. at 725-726, 125 S. Ct. at 2124-2125.[1]

2. This appeal is part of a long-standing challenge to Alabama's policy regarding the accommodation of Native American inmates' religious needs. A group of inmates filed this suit in 1993, challenging a variety of practices. The only unresolved issue is whether, pursuant to RLUIPA, Native American inmates are entitled to a religious accommodation from Alabama's requirement that prisoners cut their hair short. See *Lathan* v. *Thompson*, 251 F. App'x 665, 666 (11th Cir. 2007). None of the plaintiffs are at level five (maximum security) prisons. Jan. 21 Tr. 122.[2]

On an earlier appeal, this Court found that "on the present record factual issues exist" as to whether the defendants' policy is the least restrictive means of furthering their interests "in security, discipline, hygiene and safety within the prisons and the public's safety in the event of escapes and alteration of appearances." *Lathan*, 251 F. App'x at 666. Accordingly, it remanded "for a full

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[1] Accordingly, this brief cites interchangeably cases decided under those two statutes.

[2] Citations to Jan. 21 Tr., Jan. 22 Tr., and Jan. 23 Tr. refer to the transcripts of the three days of trial. Those transcripts are in the record as document numbers 474-2, 475-2, and 476-2, respectively.

evidentiary hearing and bench trial, following which the district court shall make detailed findings of fact and conclusions of law." *Ibid.*

3. A magistrate judge held a bench trial on January 21-23, 2009. The plaintiffs testified as to the burden on their religious practice caused by the hair-length rule. See, *e.g.*, Jan. 21 Tr. 8-9, 26-28, 45-46, 52-53. Their testimony was supported by an expert in Native American religious practices. See generally Jan. 21 Tr. 63-118. Additionally, the plaintiffs put on undisputed testimony that the federal Bureau of Prisons, approximately 38 States, and the District of Columbia permit long hair (either for all prisoners or for those whose religions require it) without major incident. See Jan. 22 Tr. 133; *id.* at 143. George Sullivan, who has been a warden or state official in several systems that permitted long hair, and who now audits federal and state prisons across the country, testified that denying religious exemptions for long hair is not necessary to accomplish any legitimate interest. See, *e.g.*, Jan. 22 Tr. 121-122.

The defendants nonetheless asserted that their policy is essential to accomplishing several compelling interests, including preventing contraband; facilitating identification; ensuring good hygiene and health; and fostering prison discipline through uniformity. They offered no empirical evidence that their policy significantly furthers any of these interests. None of the defendants' witnesses even claimed familiarity with the practices of the federal prisons and other States

that allow prisoners long hair, much less offered evidence that such practices would be unworkable in Alabama. See, *e.g.*, Jan. 22 Tr. 10; accord *id.* at 37, 104. Alabama officials also acknowledged that they had not seriously considered accommodating requests to wear long hair, let alone reached a reasoned conclusion that doing so would be untenable. See, *e.g.*, Jan. 21 Tr. 141-142; Jan. 22 Tr. 4.

a. The defendants opined that long hair would cause prisoner searches to take significantly longer and permit contraband. One warden asserted that "it would take a longer period of time to try to search," Jan. 21 Tr. 165, but acknowledged that he had never seen a prisoner with long hair searched, *id.* at 130; nor was he aware of the search procedures of the federal prisons or the state prisons that permit long hair. *Id.* at 132, 136. Similarly, a former director of the Virginia Department of Corrections testified that the State had trouble searching certain prisoners with long hair at a time when it had a no-long-hair policy on the books but, because "the department was in chaos," failed to enforce it. See Jan. 22 Tr. 45, 48. He did not provide evidence regarding any facility that deliberately permits long hair and follows the requisite practices (with respect to, *e.g.*, searches and hygiene) to accommodate it. In particular, before working for Virginia, he was director of Nevada prisons, where inmates were permitted long hair, see *id.* at 68, yet he offered no testimony regarding his experience there.

Meanwhile, plaintiffs' expert Sullivan testified that prisoners "have so many other ways to secret their contraband that in my experience hair is the last place they would try to use." Jan. 22 Tr. 124. The plaintiffs agreed that hair would not be an effective place to hide contraband, compared with, for example, a waistband, sock, or pillow. Jan. 21 Tr. 13-14. They also testified that it was particularly unlikely that anyone receiving a religious exemption would hide contraband in his hair, as that would be "a total desecration," leading to a ban from "Indian grounds." Jan. 21 Tr. 13. The warden of a maximum-security prison acknowledged that inmates at even his higher-security prison may wear items with more obvious potential to conceal contraband, such as caps, winter toboggan hats, gloves, and jackets with pockets. *Id.* at 126. He also acknowledged that, were inmates permitted to wear long hair, the "contraband problem" already existing would not "be exacerbated." *Id.* at 168. Another Alabama official acknowledged that, in the State's women's prisons – where inmates are permitted to grow longer hair – there have been no known instances of contraband hidden in hair. See Jan. 22 Tr. 6.

Sullivan testified that prison protocol for searching long hair is well established. For example,

> [i]f the inmate has his hair in a ponytail and he's approaching an officer knowing he's going to be searched, the first thing he'll do is undo the ponytail. He would simply bend over, let his hair fall down

> in front of him, and then would run his own hands and fingers in his own hair and then flop it back. Again, it simply takes no time.

Jan. 23 Tr. 8. Indeed, Sullivan testified, long hair presents less logistical difficulty than many other accommodations that Alabama does grant:

> If you think of a Native American with long hair and the time it takes to search his hair compared to searching a Muslim inmate who is wearing a Kufi and has his prayer rug and probably his Koran, I would submit that that's a much longer search requirement * * * than the Native-American requirement.

Jan 23. Tr. 7.

b. The defendants also contended that permitting some prisoners to have long hair would interfere with identification of prisoners, both within prison and in the event of an escape. In support, they offered a single anecdote: the unusual case of a prisoner who, to aid his escape, placed a dummy in his bed that included his cut-off ponytail. See Jan. 22 Tr. 46. Despite that change in his appearance, the escaped prisoner was apprehended "three or four days later." *Id.* at 47. Moreover, Sullivan testified, Alabama could more effectively improve its identification of escaped prisoners in other ways, such as by updating inmate pictures more often than every five years, its current practice. Jan. 22 Tr. 145-146.

Inside the prison, the defendants contended, long hair would make it difficult to identify individual prisoners. See, *e.g.*, Jan. 22 Tr. 60. They presented no evidence in furtherance of this contention. And the inmates testified that they would not object to a requirement that they "wear [their hair] up or in a ponytail or

in some other prescribed way" that eliminates any perceived issue. Jan. 21 Tr. 29; see also *id.* at 47-48, 53, 57.

c. The defendants suggested that permitting long hair could cause significant hygiene and health problems, see, *e.g.*, Jan. 22 Tr. 33. A warden testified that he had "seen a case recently" where an inmate with longer hair "had a fungus that actually grew from his head." Jan. 21 Tr. 165. But he acknowledged that inmates with short hair also develop fungus. *Id.* at 171. The former Virginia director stated that, when the prison system failed to enforce its grooming policy, certain inmates "had cysts and tumors and other things that they did not even know existed on their head until they got their hair cut." Jan. 22 Tr. 52. He offered no evidence that this problem exists at the majority of prison systems that permit long hair as a matter of policy, as opposed to a poorly run one. And Sullivan testified that other prisons easily avoid such hygiene problems by requiring prisoners to keep their hair "clean and well groomed." Jan. 22 Tr. 134.

d. Finally, the defendants contended that permitting some prisoners to have long hair would break down their culture of "uniformity" and hinder discipline. One warden testified that inmates' having uniform hair length is important because "[i]t instills discipline. * * * [O]verall it sets a tone for order and this is the manner in which we're going to conduct business here." Jan. 21 Tr. 142-143. If Native American prisoners were allowed their requested religious exemption, he said,

"then that dictates to me [that] I have no control there. I'm not able to tell you that you need to do this as far as your hair is concerned." *Id.* at 164. The defendants' witnesses testified that this need for total control over inmates was important in Alabama, because the ratio of inmates to officers is greater than nine to one. See, *e.g.*, Jan. 22 Tr. 58-59. They did not explain their logic, and Sullivan testified that, based on his experience working in overcrowded prisons, hair length did not add to the problems associated with overcrowding. Jan. 23 Tr. 24. Indeed, he testified, attempting such total control over inmates' individuality can make an overcrowded prison *more* dangerous: "[T]he more freedom you give an inmate to conduct his life as he would like to conduct it * * * in the free world, the better you have his support and acceptance of a prison environment." Jan. 22 Tr. 149.

Additionally, another of defendants' witnesses testified, it is undesirable to permit inmates to display "[t]heir identity as a special group," because that leads to gang formation. Jan. 22 Tr. 26. State officials also speculated that permitting a religious exemption could cause "animosity between other ethnic groups or religious groups towards the Native-American group that they are allowed to do this whereas we are not." Jan. 21 Tr. 164; accord Jan. 22 Tr. 53. No evidence, even anecdotal evidence, was introduced to support these assertions. And the plaintiffs, as well as a former inmate, testified that inmates are permitted to visibly wear and carry without incident various other symbols of faith, including Native

American medicine bags, Christian crosses, and symbols of the Muslim and Jewish faiths. See Jan. 21 Tr. 60-63; Jan. 22 Tr. 108, 110-111.

Defendants' witnesses also contended that, in a fight, an inmate "might want to just grab a handful of hair and pull them one way or the other." Jan. 21 Tr. 165; accord Jan. 22 Tr. 52. No evidence was offered to support this contention, and a witness for the defendants acknowledged that he was "not aware of any actual incident" in which this happened. Jan. 22 Tr. 69. Similarly, plaintiffs' expert Sullivan testified that he has "never encountered a situation where one inmate grabbed another inmate's long hair to subdue him, or to struggle with him at all." *Id.* at 124.

4. On July 11, 2011, the magistrate judge recommended that the district court rule for the defendants. The plaintiffs had demonstrated that they were "sincere adherents of Native American spirituality whose religious exercise has been substantially burdened by [Alabama's] policies restricting inmate hair length," the magistrate determined. See Doc. 530 at 4. The magistrate rejected the defendants' argument that their hair length restrictions do not substantially burden Native American religious practice "because [Alabama] permits Native Americans to participate in a panoply of other religious practices," *id.* at 11, finding that "[t]he existence of alternate expressions of Native American spirituality does not obviate the centrality of the religious practices at issue in this case," *id.* at 12.

However, the magistrate found, the hair length restriction "is the least restrictive means of furthering its compelling governmental interests in prison safety and security." Doc. 530 at 4. The magistrate found it "well established that security, order, and discipline are compelling governmental interests." *Id.* at 15. The hair length restriction, the magistrate found, furthered those interests. *Id.* at 15-16. In particular, the magistrate found, long hair impedes identification of inmates, allows the formation of gangs, and fosters contraband. *Ibid.* With respect to searches, the magistrate found, without citation to anything in the record:

> Requiring correctional officers to search long hair for contraband or weapons constitutes a safety and health hazard to the correctional officers. * * * Long hair exacerbates the difficulty of and length of time necessary to search for contraband, which is of particular concern to [Alabama] because of their reduced number of correctional officers.

Id. at 17.

The magistrate also found that hair length restrictions (1) "allow[] the defendants to maintain control, order, and discipline in the prisons," which is particularly important because "inmates today are 'younger, bolder, and meaner,'"[3] Doc. 530 at 17-18; (2) avoid the danger of long hair being pulled in a fight, *id.* at 18; and (3) "promote health, hygiene and sanitation" and "reduce health care

[3] This "finding" appears to be simply a quote from one state official's conclusory statement. See Jan. 22 Tr. 38. No evidence was offered to demonstrate any of those supposed characteristics of the inmate population, let alone what significance they might have to the accomplishment of any compelling interest.

costs." *Id.* at 19. The magistrate noted the plaintiffs' argument that the defendants failed to introduce evidence to support any of their assertions regarding the relationship between long hair and security. In response, the magistrate stated: "This suggestion is simply incorrect." *Id.* at 18. The magistrate did not refer to Sullivan's extensive testimony, let alone explain why that testimony was unpersuasive.

The magistrate then found that the grooming policies are the least restrictive means of achieving the State's interests. For this finding, it cited only other court decisions. In particular, the magistrate said the court was "bound by the Eleventh Circuit's holding in *Harris* v. *Chapman*," 97 F.3d 499 (11th Cir. 1996). See Doc. 530 at 23. The fact that "numerous other jurisdictions and the Federal Bureau of Prisons permit long hair," the magistrate found, was "insufficient by itself to demonstrate that [Alabama's] grooming policies are not the least restrictive means of furthering compelling governmental interests in this state." *Id.* at 24-25. The magistrate also pointed to the deference owed to prison administrators' expertise. *Id.* at 25-26.

The district court adopted the magistrate's recommendation in full. It found that the magistrate correctly deferred to state prison administrators with respect to the least restrictive alternative analysis. See Doc. 549 at 2. "What the plaintiffs want," the district court stated, "is that the court decouple deference from least

restrictive alternative so that those are considered in isolation. This is inconsistent with RLUIPA." *Ibid.* That other prison systems permit long hair without problem is irrelevant, the district court found: "[C]ontext matters and what happens in other prison systems is beside the point." *Ibid.*

SUMMARY OF ARGUMENT

Alabama has failed to demonstrate, as required by RLUIPA, that denying any religious accommodation from its short-hair policy is the least restrictive means of furthering its compelling interests. By instituting a least-restrictive-means test, Congress required that prison officials seriously consider alternative practices that would not burden religious liberties and that courts, in turn, engage in real scrutiny of prison officials' justifications for not adopting such alternatives. While those officials' considered and expert judgments are entitled to deference, the record does not show that defendants made any such judgment here.

The federal Bureau of Prisons and the majority of States permit the requested accommodation, and plaintiffs put on an expert witness familiar with those prison systems who testified that Alabama could do the same. Though the defendants' witnesses asserted that it would not be feasible for Alabama to do so, none of them claimed any actual knowledge of the mechanics of granting such an accommodation. Instead, they offered only speculation to support their claim that Alabama would not be able to make this well-established accommodation to

Native American religious liberty. RLUIPA's scrutiny of official action is not so toothless as to be satisfied by willful ignorance of accommodations that are made routinely in the majority of prisons.

As a preliminary matter, the United States agrees that plaintiffs satisfied their initial burden of showing that Alabama's policy substantially burdens their exercise of religion. We also agree that prisons have compelling governmental interests in security and in the health and safety of prisoners and guards alike. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 725 n.13, 129 S. Ct. 2113, 2124 n.13 (2005). The only question, therefore, is whether the least restrictive means of satisfying those interests is by denying plaintiffs their requested accommodation.

ARGUMENT

ALABAMA DID NOT DEMONSTRATE THAT REFUSING TO GIVE NATIVE AMERICANS A RELIGIOUS EXEMPTION FROM ITS SHORT-HAIR REQUIREMENT IS THE LEAST RESTRICTIVE MEANS OF FURTHERING ITS COMPELLING INTERESTS

1. The very purpose of Section 3 of RLUIPA, which requires prison administrators to demonstrate that a policy that burdens religious liberty is the least restrictive means of accomplishing a compelling aim, is to ensure real scrutiny of such decisions. Prior to enacting RLUIPA, "Congress documented, in hearings spanning three years, that 'frivolous or arbitrary' barriers impeded institutionalized persons' religious exercise." *Cutter* v. *Wilkinson*, 544 U.S. 709, 716, 129 S. Ct. 2113, 2119 (quoting 146 Cong. Rec. 16,698, 16,699 (2000) (joint statement of Sen.

Hatch and Sen. Kennedy)). As *Cutter* observed, Congress documented in these hearings a wide variety of ways in which prisons unnecessarily infringed upon religious rights:

> The hearings held by Congress revealed, for a typical example, that "[a] state prison in Ohio refused to provide Moslems with Hallal food, even though it provided Kosher food." Across the country, Jewish inmates complained that prison officials refused to provide sack lunches, which would enable inmates to break their fasts after nightfall. The "Michigan Department of Corrections . . . prohibit[ed] the lighting of Chanukah candles at all state prisons" even though "smoking" and "votive candles" were permitted. A priest responsible for communications between Roman Catholic dioceses and corrections facilities in Oklahoma stated that there "was [a] nearly yearly battle over the Catholic use of Sacramental Wine . . . for the celebration of the Mass," and that prisoners' religious possessions, "such as the Bible, the Koran, the Talmud or items needed by Native Americans[,] . . . were frequently treated with contempt and were confiscated, damaged or discarded" by prison officials.

Id. at 717 n.5, 125 S. Ct. at 2119 n.5 (citations omitted; brackets in original).

In light of this history, Congress replaced the rational basis scrutiny that would apply to a First Amendment challenge in this context with tougher scrutiny of institutional refusal to accommodate religious practice. See *Smith* v. *Allen*, 502 F.3d 1255, 1266 (11th Cir. 2007). Specifically, it instituted a "least restrictive means" test, incorporating the standard used in religious freedom caselaw prior to *Employment Division* v. *Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990). See, *e.g.*, *Benning* v. *Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004); accord *World Outreach Conference Ctr.* v. *City of Chicago*, 591 F.3d 531, 534 (7th Cir. 2009). That

standard, which continues to apply in other First Amendment contexts, requires a court to do more than simply determine whether a government policy plausibly advances a compelling interest to any degree. Rather, a court must verify, after considering viable alternatives, that the challenged policy is the one that causes "the minimal imposition" on religious liberty while still accomplishing "the government's compelling ends." *United States* v. *Hardman*, 297 F.3d 1116, 1145 (10th Cir. 2002) (Hartz, J., concurring).

As the Supreme Court explained in applying the "least restrictive means" test in the free speech context:

> The purpose of the test is not to consider whether the challenged restriction has some effect in achieving Congress' goal, regardless of the restriction it imposes. The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal. * * * For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.

See *Ashcroft* v. *American Civil Liberties Union*, 542 U.S. 656, 666, 124 S. Ct. 2783, 2791 (2004).

The least restrictive means standard does not impose upon prison officials the "herculean burden" of "refut[ing] every conceivable option." See *Hamilton* v. *Schriro*, 74 F.3d 1545, 1556 (8th Cir.), cert. denied, 519 U.S. 874, 117 S. Ct. 193 (1996). The prisoner bears the burden of demonstrating "what, if any, less

restrictive means remain unexplored." *Ibid.* But once the prisoner produces evidence that less restrictive alternatives exist, prison officials must at least show that they have "actually considered and rejected the efficacy of" those alternatives. *Warsoldier* v. *Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); see, *e.g.*, *Washington* v. *Klem*, 497 F.3d 272, 284 (3d Cir. 2007) (prison "must consider and reject other means before it can conclude that the policy chosen is the least restrictive means"); *Spratt* v. *Rhode Island Dep't of Corrs.*, 482 F.3d 33, 41 (1st Cir. 2007) (same); *Couch* v. *Jabe*, 679 F.3d 197, 203 (4th Cir. 2012) (same); *Murphy* v. *Missouri Dep't of Corrs.*, 372 F.3d 979, 989 (8th Cir.) (remanding where it was "not clear that [the defendant] seriously considered any other alternatives, nor were any explored before the district court"), cert. denied, 543 U.S. 991, 125 S. Ct. 501 (2004).

Where prison officials do familiarize themselves with and seriously consider proffered alternatives, and nonetheless reject them, they are entitled to the deference that their expertise and experience warrant. Congress, in enacting RLUIPA, was "mindful of the urgency of discipline, order, safety, and security in penal institutions." *Cutter*, 544 U.S. at 723, 125 S. Ct. at 2123. Accordingly, it expected courts applying RLUIPA to "continue the tradition of giving due deference to the experience and expertise of prison and jail administrators." 146 Cong. Rec. 16,698, 16,699 (2000) (joint statement of Sen. Hatch and Sen.

Kennedy). At the same time, the Senate sponsors of RLUIPA clarified, "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice." *Ibid.* (citation omitted).

Accordingly, defendants must "*demonstrate*, and not just assert, that the rule at issue is the least restrictive means of achieving a compelling governmental interest." *O'Bryan* v. *Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003). A court's obligation is to "ensure that the record supports the conclusion that the government's chosen method of regulation is least restrictive and that none of the proffered alternative schemes would be less restrictive while still satisfactorily advancing the compelling governmental interests." *United States* v. *Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011). A prison's claim that its policy is the least restrictive means of advancing compelling governmental interests necessarily is undermined if other prisons with the same compelling interests accommodate the religious practice at issue. See *Warsoldier*, 418 F.3d at 1000. In particular, as RLUIPA's drafters well knew, the federal Bureau of Prisons has operated since 1993 under RFRA's comparable requirement to accommodate religion "without compromising prison security," see *Cutter*, 544 U.S. at 725, 125 S. Ct. at 2124, and that federal experience should inform interpretation of States' obligations under RLUIPA.

Additionally, a prison may not pursue its compelling interest in an "arbitrary" or discriminatory manner. See *Cutter*, 544 U.S. at 716, 125 S. Ct. at 2119. That is, it may not preclude religious activity, purportedly to further a compelling interest, while permitting another activity with the same effect on that interest. See *Warsoldier*, 418 F.3d at 1000 (hair-length rule applied only to male inmates was not least restrictive means to achieve compelling interests in inmate health and security, which applied equally to male and female inmates); *Washington*, 497 F.3d at 285 (limit of ten books in a cell was arbitrary, because prison allowed inmates to keep four storage boxes of personal property and allowed more than ten books for educational purposes); cf. *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 366-367 (3d Cir.) (police department violated free exercise clause of First Amendment by refusing religious exemptions from prohibition against officers wearing beards, while allowing medical exemptions from same prohibition), cert. denied, 528 U.S. 817, 120 S. Ct. 56 (1999).

Uniformity is not, by itself, a compelling interest that defeats a claim for a religious exemption under RLUIPA. If it were, no RLUIPA claim for religious accommodation ever could prevail, since uniformity suffers every time such an exemption is made. See *Gonzalez* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435-436, 126 S. Ct. 1211, 1223 (2006) (in suit under

RFRA, rejecting defense of need for uniformity "that could be invoked in response to any RFRA claim for an exception to a generally applicable law"). As the Supreme Court observed in *Gonzalez*, such an argument "echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Id.* at 436, 121 S. Ct. at 1223. In enacting RFRA and RLUIPA, which specifically require that exceptions be made to generally applicable rules, Congress rejected that argument. It determined instead that whatever interest prison officials might have in uniformity for its own sake must give way to the needs of religious liberty unless prison officials can demonstrate that religious accommodation threatens some other, more tangible interest.

2. Applying those principles to this case, Alabama has failed to demonstrate that refusing to allow adherents of Native American religion a religious exemption from its short-hair policy is the least restrictive way of furthering its compelling interests. Permitting such prisoners to wear long hair is now the majority practice in American prisons, yet Alabama officials produced literally no evidence that such widespread accommodation of Native American religious liberty has resulted in any problems whatsoever. Rather, they offered only speculation about the dire effects permitting long hair might cause by witnesses who, by their own admission, had no knowledge about the subject matter and could not rebut Sullivan's informed

testimony. While the plaintiffs did not bear the ultimate burden of proof on this point, Sullivan's extensive and specific testimony regarding the feasibility of permitting long hair requires a response in kind, whether or not such a showing would be required in its absence. Cf. *Kuperman* v. *Wrenn*, 645 F.3d 69, 80 (1st Cir. 2011) (deferring to prison officials' affidavits about feasibility of implementing accommodation to beard restriction where plaintiff "submitted no admissible evidence to counterbalance Prison Officials' affidavits"). And while RLUIPA requires courts to defer to the expertise of prison officials, the officials who testified here demonstrated no expertise regarding the subject at hand to which to defer. On this record, there simply is no basis to conclude that Alabama's policy is based upon anything more than "mere speculation, exaggerated fears, or post-hoc rationalizations."[4]

a. Where so many other prison systems – including the federal Bureau of Prisons[5] – grant the requested accommodation without incident pursuant to well

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[4] Because no record evidence supports the district court's conclusions, this Court need not determine what level of deference they should receive. Moreover, while facts found after a bench trial are subject only to clear error review, see, *e.g.*, *Proudfoot Consulting Co.* v. *Gordon*, 576 F.3d 1223, 1230 (11th Cir. 2009), it does not appear that the magistrate explicitly resolved any relevant factual disputes.

[5] See 28 C.F.R. 551.4(a) (providing that a warden "may not restrict hair length if an inmate keeps it neat and clean"). This regulation has been in place since 1979. See *Final Rules: Control, Custody, Care, Treatment, and Instruction of Inmates*, 44 Fed. Reg. 38,236 (June 29, 1979). And the federal practice of

(continued…)

established procedures, the defendants must produce actual evidence that denying the same accommodation genuinely furthers their compelling interests. To be sure, "[t]he fact that other jurisdictions permit long hair is insufficient *by itself*" to defeat Alabama's policy. See Doc. 530 at 24-25 (emphasis added); accord *Fowler* v. *Crawford*, 534 F.3d 931, 941 (8th Cir. 2008), cert. denied, 129 S. Ct. 1585 (2009); *Spratt*, 482 F.3d at 42. But it is powerful "evidence as to the feasibility of implementing a less restrictive means of achieving prison safety and security," *Hamilton*, 74 F.3d at 1557 n.15, necessarily increasing defendants' burden to submit countervailing evidence. While prison officials may not need to make such a particularized evidentiary showing to deny novel or obviously dangerous accommodations, they were required to do so here to justify their refusal to make such a commonplace accommodation. Cf. *Turner* v. *Safley*, 482 U.S. 78, 93, 107 S. Ct. 2254, 2263 (1987) (upholding restriction in part because "[o]ther well-run prison systems, including the Federal Bureau of Prisons, have concluded that substantially similar restrictions on inmate correspondence were necessary to protect institutional order and security").

(…continued)
permitting long hair predated that regulation. See *Teterud* v. *Burns*, 522 F.2d 357, 361 n.9 (8th Cir. 1975).

Alabama officials could, for example, have attempted to point to "significant differences" between their prisons and others' that would "render * * * unworkable" in their prisons a policy that is quite workable in others. *Spratt*, 482 F.3d at 42.[6] Instead, they introduced only evidence that their prisons are overcrowded – a fact that hardly differentiates their prisons from many others that successfully permit long hair as a religious accommodation. Alternatively, Alabama officials could have pointed to real problems other prisons have experienced in permitting long hair as a religious accommodation. Instead, they pointed only to problems encountered by Virginia prisons that permitted long hair unintentionally. At most, the defendants demonstrated the dangers of a dysfunctional prison that is incapable of enforcing its own policies and has no established protocols for searching long hair.

Either way, Alabama was required to, at the very least, produce witnesses familiar with the policies and practices of the majority of prisons that permit long hair. Cf. *Shakur* v. *Schriro*, 514 F.3d 878, 889-890 (9th Cir. 2008) (giving no weight to testimony regarding annual cost to provide Halal or Kosher meals that was not based upon witness's personal knowledge). Instead, Alabama's witnesses

[6] Of course, attempting such a fact-specific showing would be complicated by the fact that Alabama refuses to permit long hair across the board, without taking account of such seemingly salient details as the differing levels of security of its prisons.

acknowledged that they had no knowledge of such practices and hence no basis for their speculation that Alabama would not be able to make the same accommodations made by state and federal prisons around the country. Cf. *Fegans* v. *Norris*, 537 F.3d 897, 904-905 (8th Cir. 2008) (deferring to prison officials' conclusion that they could not accommodate request to grow long hair where officials testified that they had tried unsuccessfully to permit long hair). And they acknowledged that Alabama officials made no good-faith inquiry into the feasibility of the requested accommodation. Cf. *id.* at 905 n.3 (prison system prepared "a memorandum detailing the hair and grooming policies of five other States and the Federal Bureau of Prisons," used it "in formulating the ADC policy," and "considered other alternatives during their deliberations").

To be sure, granting the requested accommodation likely would increase a prison's security concerns and administrative burdens by at least some *de minimis* degree. But so does every liberty granted to a prisoner. The defendants made no attempt to reconcile their failure to make this well-established accommodation to religious liberty with other policies that would appear to pose similar threats to the same compelling interests. For example, Alabama permits inmates to wear articles of clothing that pose at least as much challenge to a quick search as does long hair. It permits prisoners to wear religious icons, such as crosses, that presumably can be

grabbed in a fight as readily as long hair and are just as inconsistent with a culture of uniformity. And it permits female prisoners to grow their hair long.

The question is not whether it is plausible that granting the requested accommodation will to some degree affect the workings of Alabama prisons, for "[a]ny restriction on [religion] could be justified under that analysis." *Ashcroft*, 542 U.S. at 666, 124 S. Ct. at 2791. Rather, the question is whether defendants satisfied their burden of proving that, without following a practice that substantially burdens the plaintiffs' religious liberties, they have no alternative means of "satisfactorily advancing" their compelling interests. *Wilgus*, 638 F.3d at 1289. On this record, it cannot be concluded that defendants have done so.

b. Because the defendants failed to satisfy their obligations under RLUIPA, their conclusory views as to the feasibility of the requested accommodation are not entitled to deference. This case presents no occasion to consider what deference might be due to state prison officials who reasonably conclude, after adequate consideration of alternative policies successfully instituted elsewhere, that it is not feasible to permit adherents to Native American religion to wear long hair.

As RLUIPA's drafters and the Supreme Court have made clear, there is a distinction between "giving due deference to the experience and expertise of prison and jail administrators" and rubber-stamping "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-

hoc rationalizations." See 146 Cong. Rec. 16,699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy) (citation omitted); accord *Cutter*, 544 U.S. at 723, 125 S. Ct. at 2123. Under RLUIPA, prison administrators must do more than show that they have some rational basis for believing that a religious accommodation may pose a security risk. They must actually evaluate the available alternatives and apply their expertise to the problem, such that a court has a reasoned judgment to which to defer. See *Lovelace* v. *Lee*, 472 F.3d 174, 190 (4th Cir. 2006) (where defendants failed to "present any evidence with respect to the policy's security or budget implications," court could not defer to their judgment); *Spratt*, 482 F.3d at 42 ("[B]efore we can evaluate whether deference is due, we require that prison administrators explain in some detail what their judgment is."); accord *Couch*, 679 F.3d at 203; cf. *Singson* v. *Norris*, 553 F.3d 660, 663 (8th Cir. 2009) ("The prison's security concerns, *supported by expert testimony*, receive deference.") (emphasis added).

3. The district court and magistrate did not seriously engage in a least-restrictive-alternative analysis, instead finding that this Court's precedent controlled. But this Court has not ruled that no challenge to a hair-length policy can succeed, nor could it, given the fact-specific nature of RLUIPA claims. Rather, it denied one such challenge based on a very different record.

In *Harris* v. *Chapman*, 97 F.3d 499, 501-502 (11th Cir. 1996), this Court affirmed the denial of a RFRA claim brought by a Rastafarian who had his hair cut pursuant to a Florida requirement that inmates' hair be "short to medium length." The inmate was housed at a "close custody" facility for "extremely violent offenders." *Id.* at 504. There is no indication that plaintiff's attorney put on evidence of the success other facilities have had in permitting long hair. Rather, this Court stated: "[W]e are unable to suggest any lesser means than a hair length rule for satisfying [the State's compelling] interests, nor could Harris's counsel at oral argument." *Ibid.*

Harris thus establishes that a district court may deny a RLUIPA hair-length claim brought by an inmate housed in a facility for extremely violent offenders, where the plaintiff makes no showing that the prison can accommodate him while still satisfying its compelling interest in security. Here, however, the plaintiffs are not at such a facility, and they have made such a showing. Nothing in *Harris* purports to control a case with such a different record.

Far from adhering to this Court's precedent, the district court's determination is inconsistent with this Court's earlier holding in this very case. In 2007, this Court correctly declined to affirm dismissal of plaintiffs' claims as barred by *Harris*. Instead, it remanded "for a full evidentiary hearing and bench trial, following which the district court shall make detailed findings of fact and

conclusions of law." *Lathan* v. *Thompson*, 251 F. App'x 665, 666 (11th Cir. 2007). This Court's determination that further factual development was necessary cannot be squared with the district court's holding that, following *Harris*, no case-specific analysis is required to resolve cases involving similar claims.

There is nothing anomalous about RLUIPA challenges to hair-length requirements being decided differently based on case specifics that affect the feasibility of making the requested accommodation. In applying the compelling governmental interest standard, "[c]ontext matters." *Cutter*, 544 U.S. at 723, 125 S. Ct. at 2123 (brackets in original) (quoting *Grutter* v. *Bollinger*, 539 U.S. 306, 327, 123 S. Ct. 2325, 2338 (2003)). For example, the prison's level of security may be relevant. So may the specific hairstyle the plaintiff wishes to wear.[7] And courts certainly should treat a requested accommodation differently depending on whether it appears to be novel at the time of the RLUIPA claim or, instead, is granted routinely by other correctional institutions.

Above all else, a RLUIPA challenge must be adjudicated on the record before the court. And here the defendants put forth no evidence demonstrating that they could not accommodate plaintiffs. Instead, having been asked to do no more

[7] In particular, the plaintiffs suggest a compromise whereby they may wear a kouplock, which is a narrow strip of long hair. See, *e.g.*, Doc. 539 at 14-16. It does not appear that the district court considered the feasibility of such a limited accommodation.

than follow well-established practices adopted by the majority of the nation's prisons, they put on witnesses with no knowledge of those practices and offered only speculation as to the difficulties compliance might cause them. This appeal thus does not require this Court to determine whether it would it would be possible for the defendants to satisfy their burden of proof under RLUIPA in a different hair-length case. Rather, it requires only a determination that they have not done so here.

CONCLUSION

This court should reverse the district court's judgment and find that the defendants failed to establish that their refusal to grant the requested religious accommodation was the least restrictive means of furthering their compelling interests.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF OF THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS:

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because it contains 6720 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

Dated: August 27, 2012

s/Sasha Samberg-Champion
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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2012, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I further certify that seven copies of the same brief were mailed to the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by certified U.S. mail, postage prepaid.

I further certify that on August 27, 2012, the foregoing brief was mailed to the following counsel by certified U.S. mail, postage prepaid:

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