No. 12-11926-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

Plaintiffs-Appellants

v.

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

Defendants-Appellees

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

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# SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS AND URGING REVERSAL

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

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for *amicus curiae* United States of America adopts the appellants' certificate of interested persons filed with its Supplemental Appeal Brief and certifies that the following additional persons may have an interest in the outcome of this case:

1. Anderson, April J., Civil Rights Division, United States Department of Justice, counsel for *amicus curiae* United States
2. Gross, Mark L., Civil Rights Division, United States Department of Justice, counsel for *amicus curiae* United States
3. Gupta, Vanita, Principal Deputy Assistant Attorney General, United States Department of Justice, counsel for *amicus curiae* United States

In addition, please note that Thomas E. Perez no longer has an interest in this appeal.

Date: April 20, 2015

s/ April J. Anderson
APRIL J. ANDERSON
Attorney

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## STATEMENT OF THE ISSUE

Whether this Court's decision upholding the district court's denial of inmates' request to wear long hair in observance of their Native American faith conflicts with the Supreme Court's recent decision in *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015), and fails to properly apply the least restrictive means requirement of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc-1(a).

## INTEREST OF THE UNITED STATES

The Department of Justice is charged with enforcing RLUIPA, see 42 U.S.C. 2000cc-2(f), and has an interest in courts' implementation of the statute.

## STATEMENT OF THE CASE

The United States set out the relevant facts and procedural history in its prior amicus brief filed August 27, 2012 (U.S. Br.). This brief provides only a short summary, together with some additional facts that may aid in this Court's application of the principles the Supreme Court established in *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015).

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). Plaintiffs claim Alabama's prison grooming rules that require them to cut their hair violate RLUIPA. They presented expert testimony that a short hair requirement was not necessary for prison security and evidence that their Native American religious traditions require long hair. See, *e.g.*, Doc. 474-2 at 8-9, 26-28, 45-46, 52-53, 68-118.[1] Additionally, the plaintiffs showed that the federal Bureau of Prisons (BOP), approximately 38 States, and the District of Columbia permit long hair either for all prisoners or as a religious accommodation. See 475-2 at 133, 143; see also 28 C.F.R. 551.4(a) (BOP regulation providing that a warden "may not restrict hair length if an inmate keeps it neat and clean").

The defendants asserted that their rules are essential to accomplishing several compelling interests, including preventing contraband; facilitating identification; ensuring good hygiene; and fostering prison discipline through uniformity. Doc. 530 at 13. The prison rules allow hair on one's head up to one inch long, and permits mustaches. Doc. 475-2 at 49. They require inmates to shave, but allow inmates with dermatological conditions to grow a 1/8-inch beard. Doc. 474-2 at 144-146. None of the defendants' witnesses said they were familiar with the practices of the federal prisons, and many other States' prisons, that

[1] "Doc. _" refers to documents filed in the district court by docket number.

accommodate long hair. Defendants did not offer evidence showing that allowing long hair would be unworkable in Alabama. See, *e.g.*, Doc. 475-2 at 10, 37, 104.

Inmates in Alabama's women's prisons are permitted to grow shoulder-length hair. Doc. 475-2 at 5. Although contraband has been found on female prisoners, there was no evidence of contraband being hidden in hair. Doc. 475-2 at 6, 8-9; Doc. 474-2 at 132. Women, like men, are subject to search, including searches of hair. Doc. 475-2 at 8-10. While one prison witness said that "[h]istorically women throughout time have not been a violent population inside prisons" (Doc. 475-2 at 50), there was no testimony that Alabama's women's prisons have fewer problems than men's prisons with contraband. The prison's expert stated that, in his view, "in female prisons short hair looks to most individuals working in a prison that that female inmate is homosexual," and he would "not want to force that type of restriction on all females." Doc. 475-2 at 50.

Women sometimes escape from prison. Doc. 475-2 at 6 (acknowledging escapes from three Alabama women's prisons). As at men's prisons, Alabama's women's prisons use razor wire, guard towers, and armed guards to secure prisoners. Doc. 475-2 at 9. For transport, female prisoners are guarded under the same protocols used for male prisoners, with the same number of armed guards. Doc. 475-2 at 8-9. Some women, like some men, are classified as security risks. In addition, there are women classified for maximum security, women in prison for

violent crimes including assault and murder, and women on Alabama's death row. Doc. 475-2 at 7-8. Women also commit assaults within Alabama prisons. Doc. 475-2 at 8-9.

2. The magistrate judge recommended judgment for the defendants (see Doc. 530), and the district court adopted the magistrate's recommendation in full. Doc. 549. The court stated that "RLUIPA specifically require[s] a court to defer to prison administrators in considering claims of prisoners." Doc. 549 at 2. It adopted the magistrate's findings that "male prisoners constitute a greater threat than female prisoners." Doc. 530 at 16 n.17. In considering other prisons' widespread accommodation of long hair, the court said, "what happens in other prison systems is beside the point." Doc. 549 at 2.

This Court upheld the district court's decision, explaining that "[t]he Supreme Court has cautioned that '[w]e do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety.'" *Knight* v. *Thompson*, 723 F.3d 1275, 1284-1285 (11th Cir. 2013) (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 722, 125 S. Ct. 2113, 2123 (2005)), vacated, 135 S. Ct. 1173 (2015). "RLUIPA does not force institutions to follow the practices of their less risk-averse neighbors," this Court explained, and Alabama prisons could decide "not to absorb the added risks that its fellow institutions have chosen to tolerate." *Knight*, 723 F.3d at 1286. Furthermore, this

Court said, the prisoners' "requested exemption poses actual security, discipline, hygiene, and safety risks." *Ibid*. The Court also rejected plaintiffs' arguments regarding Alabama's practice of allowing female prisoners to wear shoulder-length hair because a prison expert had testified "that men pose greater safety and security risks than women in prison populations." *Ibid*.

On January 20, 2015, the Supreme Court issued its decision in *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015). On January 26, 2015, the Supreme Court granted prisoners' petition for certiorari in this case, vacated this Court's opinion, and remanded for further proceedings consistent with its recent decision in *Holt*. See *Knight* v. *Thompson*, No. 13-955 (S. Ct.).

3. In *Holt*, the Court unanimously reversed an Eighth Circuit decision rejecting a Muslim inmate's request to wear the 1/2-inch beard his faith required. Among other things, the Supreme Court found that the lower courts had exaggerated the deference owed prison officials. The Court rejected arguments that courts "were bound to defer to the [prison's] assertion that allowing petitioner to grow such a beard would undermine its interest in suppressing contraband." *Holt*, 135 S. Ct. at 864. The Court explained that RLUIPA does not permit "unquestioning deference," and that it was "the obligation of the courts to consider whether exceptions are required under the test set forth by Congress." *Ibid.* (quoting *Gonzales* v. *O Centro Espírita Beneficente Uniõ do Vegetal*, 546 U.S.

418, 434, 1265 S. Ct. 1211, 1222 (2006)). The Court described the deference due prison officials as "respect" for their "expertise," but cautioned that such respect "does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard." *Ibid.*

In addition to rejecting the lower courts' overly deferential analysis of the prison's justifications for its restrictions, the Court also recognized the importance of other prisons' policies. "[W]hen so many prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course," the Court explained. *Holt*, 135 S. Ct. at 866. The Court also held that a prison may not bar a religious practice if it permits that same practice for non-religious reasons. In *Holt*, the prison allowed inmates with certain dermatological conditions to grow a 1/4-inch beard. 135 S. Ct. at 860-861, 865.

## SUMMARY OF ARGUMENT

The Supreme Court's decision in *Holt* establishes that Alabama has failed to demonstrate that its absolute ban on long hair is the least restrictive means of furthering its compelling interests. The panel's decision in this case conflicts with *Holt* in three important ways. First, in *Holt*, the Court curtailed the unquestioning deference that many courts, including the panel here, have afforded prison officials when assessing the availability of less restrictive alternatives. Alabama had the opportunity to justify its grooming requirements at an evidentiary hearing. The

State's prison officials, like those in *Holt*, offered only speculation, as opposed to evidence, that that the Native American prisoners here must cut their hair to ensure prison security. In *Holt* the Supreme Court stated that a court may not appropriately defer to "prison officials' mere say-so" where they bear the burden of proof under RLUIPA. *Holt*, 135 S. Ct. at 866.

Second, *Holt* requires prison officials to explain why they cannot adopt accommodations that are widely available in other prisons. Because prison officials must show that their rules are the least restrictive ones feasible, *Holt* requires them to demonstrate with persuasive evidence that the hair length policies used by these other correctional institutions are unworkable in Alabama as an accommodation for the Native American plaintiffs in this case. *Holt*, 135 S. Ct. at 866.

Third, *Holt* required close examination of any non-religious exemption to the challenged policy, and proof that the prison could not grant a similar exemption for religious reasons. Here, where the prisons have allowed female prisoners to grow long hair, and women's prisons have similar security issues as men's prisons, they must explain why it is infeasible to grant Native American male prisoners a religious-based exemption from the general prohibition on wearing long hair. *Holt*, 135 S. Ct. at 865-866.

## ARGUMENT

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

Section 3 of RLUIPA requires prison administrators to demonstrate that a policy that burdens religious liberty is the least restrictive means of accomplishing a compelling interest. RLUIPA requires careful scrutiny of such decisions. *Holt*'s application of RLUIPA's strict scrutiny requirement calls for a critical and searching analysis of prison grooming rules that burden religious practices.

1. RLUIPA requires that courts give "due deference to the experience and expertise of prison and jail administrators." *Cutter* v. *Wilkinson*, 544 U.S. 709, 717, 125 S. Ct. 2113, 2119 (2005) (quoting S. Rep. No. 111, 103d Cong., 1st Sess. 10 (1993)). Before *Holt*, some courts, including the panel in this case, had applied that deference too broadly. Here, this Court found it adequate that the prison officials had testified about potential problems and "ha[d] shown that Plaintiffs' requested exemption poses actual security, discipline, hygiene, and safety risks." *Knight* v. *Thompson*, 723 F.3d 1275, 1286 (11th Cir. 2015), vacated, 135 S. Ct. 1173 (2015). But it did not assess plaintiffs' evidence that these risks can be minimized. Evidence showed, for example, that multiple photographs could be used for identification, that there were ways to search hair, that other variations in grooming (such as hairstyles and mustaches) are permitted without disciplinary

problems, and that other means of maintaining hygiene, such as compelling inmates to shower, are already used.

In *Holt*, the Supreme Court insisted that RLUIPA does not permit "unquestioning deference" to prison officials, stating that judges "must hold prisons to their statutory burden." *Holt* v. *Hobbs*, 135 S. Ct. 864, 863, 866 (2015). *Holt* established that a prison may not "merely * * * explain why it denied the exemption," as the panel here accepted. *Id.* at 864. To the contrary, RLUIPA's test "is exceptionally demanding," *Holt* said, and it "requires the government to show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion." *Holt*, 135 S. Ct. at 864 (alterations, citation, and internal quotations marks omitted). Prisons must provide evidence and *prove* that there are no less restrictive alternatives. If "a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Ibid.* (citation and internal quotation marks omitted). And courts "must not assume a plausible, less restrictive alternative would be ineffective." *Id.* at 866 (citation and internal quotation marks omitted).

2. In *Holt*, the prison officials stated that allowing Holt's 1/2-inch beard would cause problems with identification, administrative and disciplinary difficulties, and potential trouble with search procedures. 135 S. Ct. at 866. But their fears were belied by the record. For example, the prison in *Holt* claimed it

banned beards to prevent smuggling of contraband, but the evidence showed contraband could also be hidden in an inmate's hair (even in the short, above-the-ear hairstyles the prison permitted) and in clothing, and could *not* likely be hidden in a 1/2-inch beard. *Id.* at 861, 866. And while the prison in *Holt* claimed that beards would make identification more difficult should the inmate shave and try to escape, the prison allowed mustaches and hair on the head, which could also be changed to alter a prisoner's appearance. *Id.* at 865. The prison effectively administered an exemption, allowing inmates to grow beards for medical reasons. *Id.* at 860-861.

In this case, the prison officials have not rebutted evidence of less restrictive alternatives to its absolute denial of long hair. For identification, as *Holt* explained, a prison could keep two pictures of an inmate – here, one with short hair and one with long hair. 135 S. Ct. at 864, 865; Doc. 474-2 at 19-21, 137, 169. Similarly, prison officials could require hair be kept "neat and clean" through showers and combing, as the Federal Bureau of Prisons requires. 28 C.F.R. 551.4(a); see also Doc. 474-2 at 140 (noting that inmates may be ordered to shower if needed for hygiene).[2] And, presumably, the prisons have found such a solution to maintain health and hygiene among women with long hair.

[2] The prisons here did not explain why, if fungus, insects, or lesions are really a problem of any significance (see Doc. 474-2 at 156; Doc. 475-2 at 89),

(continued…)

The prisons can similarly combat contraband by using existing search procedures. The State has not explained, for example, why it cannot search inmates' hair just as it searches inmates' clothing. It could also use the search procedures it employs for women with long hair. Doc. 475-2 at 8-10. That the prisons allow women to grow long hair suggests that a one-inch hair length is not required to promote uniformity and discipline. See U.S. Br. 19-20. Indeed, permitting men to wear mustaches, a variety of hairstyles up to one inch in length, and short beards where medically necessary also suggests grooming rules are not essential for uniformity and discipline.

The prison claims that allowing some men to wear long hair will destroy prison discipline and that an exception given only to certain prisoners is difficult to administer. It could, however, use the administrative methods it already uses to permit a medical shaving exemption. Doc. 474-2 at 146. There is no evidence that the shaving exemption given to some inmates and not others has undermined discipline or proven to be administratively unworkable. The prisons in this case have not met their burden by merely identifying "actual security, discipline,

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(…continued)
they have not required shaved heads. These problems can occur in short hair (Doc. 474-2 at 171; Doc. 476-2 at 12, 50), and apparently the prisons control them through showers and basic medical care. Furthermore, the prison allows inmates to wear mustaches and a variety of hairstyles under one inch, belying its claim that it cannot allow any variation in grooming practices for fear of gang associations. See Doc. 475-2 at 25-26; Doc. 476-2 at 23-24; Doc. 530 at 16.

hygiene, and safety risks," *Knight*, 723 F.3d at 1286, without addressing contrary evidence or proposed alternatives to the grooming rules for the Native American prisoners whose religious beliefs require them to grow long hair.

3. *Holt* also seriously undermines the *Knight* panel's decision that Alabama's prisons may prevail because they can choose not "to follow the practices * * * their less risk-averse neighbors" have employed to lessen burdens on religious exercise. *Knight*, 723 F.3d at 1286. *Holt* required the prison in that case to rebut evidence that many state prisons, and the federal Bureau of Prisons, allow 1/2-inch beards. The Supreme Court held that the prison "failed to show, in the face of petitioner's evidence, why the vast majority of States and the Federal Government permit inmates to grow 1/2–inch beards, either for any reason or for religious reasons, but it cannot." *Holt*, 135 S. Ct. at 866. "[W]hen so many prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course." *Ibid.* Here, the "vast majority of States and the Federal Government" allow prisoners to grow long hair. *Holt*, 135 S. Ct. at 866; U.S. Br. 17-24; see also Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 955-956, 964-972 (2012) (compiling state prison grooming rules and concluding most would allow long hair). RLUIPA's drafters based the law in part on the federal Bureau of Prisons' experience with and ability to accommodate religious observance, see

*Cutter*, 544 U.S. at 725. Here, where the Bureau of Prisons permits long hair in all of its prisons, that experience suggests a total ban on long hair is not necessary. In this case, the panel did not consider whether the prison had given any reasons, or provided evidence to prove why the Alabama prisons were unique and could not adopt similar policies to permit religious-based exemptions for Native American prisoners. Instead, the panel held that the prisons could make "a calculated decision not to absorb the added risks that its fellow institutions have chosen to tolerate." *Knight*, 723 F.3d at 1286. This reasoning is not what *Holt* requires.

4. Finally, *Holt* held that the prison's medical exceptions to its no-beard rule weighed against its claim that it must ban beards worn for religious reasons. The prison in *Holt* accommodated medical needs for an exemption by allowing inmates with dermatological conditions to grow 1/4-inch beards. 135 S. Ct. at 866. The exemption, the Supreme Court held, seriously undermined the prison's arguments that plaintiff's beard could not be permitted; the Court said the prison had not "establish[ed] * * * a meaningful increase in security risk" between 1/2-inch and 1/4-inch beards. *Ibid.* The Court held that the prison could not bar Holt's beard when it allowed other prisoners to wear beards for non-religious reasons.

Similarly, here, Alabama prisons allow female prisoners to maintain shoulder-length hair. To explain this, prison officials asserted, and the district and this Court simply accepted that "male prisoners constitute a greater threat than

female prisoners." Doc. 530 at 16 n.17. This Court noted a prison official's testimony "that men pose greater safety and security risks than women in prison." *Knight*, 723 F.3d at 1279 & n.2, 1286.

*Holt* requires more than "prison officials' mere say-so" on such an issue. *Holt*, 135 S. Ct. at 866; see also U.S. Br. 25-26. Officials must "*demonstrate*[] why [their] grooming policy" cannot allow some men the long hair that it allows women, and must "*establish* * * * a meaningful increase in security risk" between allowing some Native American men to wear long hair as a religious accommodation and allowing all women to wear long hair. *Holt*, 135 S. Ct. at 865-866 (emphasis added). Defendants' burden requires more than a "generalized statement of interests, unsupported by specific and reliable evidence." *Davila* v. *Gladden*, 777 F.3d 1198, 1206 (11th Cir. 2015), petition for cert. docketed, No. 14A1001 (filed Mar. 26, 2015).

Alabama officials here have not offered evidence, beyond prison officials' "mere say-so," that allowing a religious exemption for plaintiffs presents greater risks than allowing all female prisoners, regardless of how dangerous they may be, to have long hair. Alabama did not provide adequate evidence for the magistrate judge, district court, or this Court to evaluate the risks and decide, for example, whether men present greater risks for smuggling, escape, and hygiene problems, requiring a ban on long hair. The State allows even women with high security

classifications to wear long hair. Even if there is slightly greater risk, the prison officials must show that granting a religious-based exemption would create a "*meaningful* increase in security risk" in. *Holt*, 135 S. Ct. at 866 (emphasis added).

In the United States' view, as expressed in our original amicus brief, the prisons failed to meet their burden under RLUIPA's compelling interest standard. *Holt*'s holding in the context of prison grooming standards strongly reinforces this view. The United States believes that this failure is apparent from a review of the record. At the very least, however, this Court must remand for additional factual findings regarding potential less restrictive alternatives before it may conclude that the prisons have met their burden under RLUIPA after *Holt.*

## CONCLUSION

For the foregoing reasons, and for the reasons stated in our original brief, this court should reverse the district court's judgment.

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## CERTIFICATE OF COMPLIANCE

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

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because it contains 15 pages, 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: April 20, 2015

s/ April J. Anderson
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## CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2015, I electronically filed the foregoing SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS AND URGING REVERSAL 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 April 20, 2015, the foregoing brief was mailed to the following counsel by certified U.S. mail, postage prepaid:

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