No. 15-____

In The
Supreme Court of the United States

RICKY KNIGHT and
BILLY "TWO FEATHERS" JONES, *et al.*,

Petitioners,

v.

LESLIE THOMPSON and
ALABAMA DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ERIC SCHNAPPER
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@uw.edu

MARK SABEL
Counsel of Record
SABEL LAW FIRM, L.L.C.
P.O. Box 231348
Montgomery, AL 36123
(334) 546-2161
mksabel@mindspring.com

PETER FRUIN
MAYNARD, COOPER & GALE, P.C.
1901 6th Avenue North,
Suite 2400
Birmingham, AL 35203
(205) 254-1000

RANDALL C. MARSHALL
AMERICAN CIVIL LIBERTIES
UNION OF ALABAMA, INC.
P.O. Box 6179
Montgomery, AL 36106
(334) 265-2754

ROY S. HABER
570 East 40th Street
Eugene, OR 97405
(541) 485-6418

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

In *Holt v. Hobbs*, 135 S.Ct. 853 (2015), this Court held that the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), renders unlawful an absolute ban on inmates' wearing a beard for religious reasons. The Eleventh Circuit, subsequent to and despite this Court's decision in *Holt*, rejected a RLUIPA challenge to Alabama's similarly inflexible policy prohibiting all male inmates from wearing long hair for religious reasons. A vast majority of states, the District of Columbia, and all federal prisons accommodate inmates whose religious practices include wearing beards or long hair.

The Question Presented is:

Whether Alabama's grooming policy violates RLUIPA, 42 U.S.C. § 2000cc, *et seq.*, to the extent that it prohibits Petitioners from wearing unshorn hair in accordance with their sincerely held religious beliefs.

PARTIES TO THE PROCEEDINGS

The Petitioners are Billy "Two Feathers" Jones, Thomas "Otter" Adams, Douglas "Dark Horns" Bailey, Michael Clem, Franklin "Running Bear" Irvin, Ricky Knight, and Timothy "Grey Wolf" Smith.

The Respondents are Leslie Thompson, State of Alabama Department of Corrections ("ADOC"), Governor Robert Bentley, Attorney General Luther Strange, Tom Allen, Chaplain James Bowen, Eddie Carter, Chaplain Coley Chestnut, Warden Dees, Roy Dunaway, DeWayne Estes, J.C. Giles, Thomas Gilkerson, Michael Haley, Warden Lynn Harrelson, Tommy Herring, Roy Hightower, Warden Ralph Hooks, Willie Johnson, Chaplain Bill Lindsey, James McClure, Billy Mitchem, Warden Gwyn Mosley, Deputy Warden Darrell Parker, Kenneth Patrick, Andrew W. Redd, Neal W. Russell, John Michael Shaver, William S. Sticker, Ron Sutton, Morris Thigpen, J.D. White, Chaplain Steve Walker, Chaplain Willie Whiting, and Officer Wynn. Jefferson S. Dunn, current commissioner of the Alabama Department of Corrections, is a respondent pursuant to Rule 35.3.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Ricky Knight, Billy "Two Feathers" Jones, *et al*., respectfully petition for a writ of certiorari to review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The August 5, 2015, opinion of the court of appeals, which is reported at 796 F.3d 1289 (11th Cir. 2015), is set out at pp. 1a-8a of the Appendix. A second August 5, 2015, opinion of the court of appeals, which is reported at 796 F.3d 934 (11th Cir. 2015), reinstates the original panel opinion previously vacated by this Court and is set out at pp. 9a-37a of the Appendix.[1] The March 8, 2012, opinion of the district court, which is unofficially reported at 2013 WL 777274 (M.D. Ala. March 8, 2012), is set out at pp. 38a-41a of the Appendix. The magistrate's unpublished Recommendation of July 11, 2011, is set out at pp. 42a-76a of the Appendix, and is available at 2011 WL 7477105. The November 4, 2015, order of the court of appeals is set out at pp. 78a-79a of the Appendix.

[1] This 2015 opinion reissued the opinion issued by the Eleventh Circuit in 2013, 723 F.3d 1275 (11th Cir. 2013), adding one sentence and part of another. That slight difference is set out in the Editor's Note at App. 31a.

JURISDICTION

The decisions of the court of appeals were entered on August 5, 2015 (App. 1a & 9a). A timely petition for rehearing and rehearing en banc was denied on November 4, 2015 (*id.* 77a-79a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. 106-274, provides in part:

> (a) General rule
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a).

STATEMENT OF THE CASE

In *Holt v. Hobbs*, 135 S.Ct. 853 (2015), this Court held that Arkansas corrections officials violated the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq.*, when they applied a prohibition against beards to an inmate whose Muslim religious beliefs required that he wear a beard, and who sought to wear a half-inch beard.

The instant appeal concerns an Alabama prison rule that requires all male inmates to wear short hair, a practice that tramples deeply rooted religious traditions of the Native American Petitioners. *See* App. F (photograph of Douglas "Dark Horns" Bailey wearing hair in traditional manner).[2] The case was originally decided by the Eleventh Circuit in July 2013, prior to the decision in *Holt*. Certiorari was sought after review had been granted in *Holt*, and this Court held that petition pending the resolution of *Holt*. The 2013 Eleventh Circuit decision was the most detailed articulation of a narrow interpretation of RLUIPA, and in *Holt* the respondents (and Alabama, in an amicus brief) cited and urged this Court to adopt the standards in that 2013 decision.

The Court in *Holt*, however, adopted a more expansive interpretation of RLUIPA. Following the issuance of that opinion, the Court vacated the 2013

[2] This photograph features Mr. Bailey while not incarcerated.

Eleventh Circuit decision in this case and remanded it for further consideration. 135 S.Ct. 1173 (2015). On remand the Department of Justice filed an amicus brief explaining, as did the plaintiffs, that the standards in the 2013 Eleventh Circuit decision were inconsistent with the subsequent interpretation of RLUIPA in *Holt*.

But the Eleventh Circuit made no effort to conform its pre-*Holt* interpretation of RLUIPA to the standards that had subsequently been announced in *Holt*. Instead, the court below reissued the entire 2013 opinion, without deletion or modification; the reissued opinion differed from its earlier-born twin only with the addition of an inconsequential transitional sentence and phrase. App. 31a, Editor's Note. The 2015 reissued opinion establishes for courts and prisons in the Eleventh Circuit an interpretation of RLUIPA wholly at odds with this Court's decision in *Holt*. Review by this Court is required to bring legal standards in that circuit into line with the federal courts that adhere to *Holt*, and to assure that the religious practices of inmates in that circuit are afforded the same degree of protection under RLUIPA that exists for religious practices in the rest of the Nation.

A. Legal Background

Congress enacted RLUIPA and its sister statute, the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb *et seq.*, "in order to provide very broad protection for religious liberty."

Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2760 (2014). In making RFRA applicable to the states and their subdivisions, Congress relied on Section 5 of the Fourteenth Amendment. But in *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court held that RFRA exceeded Congress's powers under that provision.

Congress responded to *City of Boerne* by enacting RLUIPA, which applies to the states and their subdivisions and invokes congressional authority under the Spending and Commerce Clauses. Section 3 – the provision at issue in this case – governs religious exercise by institutionalized persons. 42 U.S.C. § 2000cc-1. Section 3 mirrors RFRA, and provides that a government may not impose a substantial burden on the religious exercise of a person residing in an institution unless the government demonstrates that the imposition of that burden on that person "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). "Several provisions of RLUIPA underscore its expansive protection for religious liberty." *Holt v. Hobbs*, 135 S.Ct. at 860. "The least-restrictive-means standard is exceptionally demanding," and it requires the government to "sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Hobby Lobby*, 134 S.Ct. at 2780.

B. Pre-*Holt* Proceedings Below

This is an action brought by a group of sincere Native American practitioners challenging the Alabama Department of Corrections ("ADOC") policy that "requires all male prison inmates to wear a 'regular hair cut,' defined as 'off neck and ears.'" App. 11a. Petitioners contend that this policy violates RLUIPA by substantially burdening their religious practices without the type of justification required by that statute. App. 11a. The Department of Justice intervened in the district court litigation, and filed briefs in the court of appeals both in connection with the 2013 opinion, and on remand following *Holt*, arguing that the exemptionless short-haircut rule violated RLUIPA.

(1) The substantial burden imposed by the short-haircut requirement is no longer disputed. "Plaintiffs' expert on Native American spirituality offered extensive, undisputed testimony that long hair has great religious significance for many Native Americans, and each Plaintiff confirmed that his desire to wear unshorn hair stemmed from deep religious convictions." App. 26a. The district court[3]

[3] The case was tried without consent before a Magistrate Judge, whose Recommendation was subsequently adopted by the District Judge. The petition uses the phrase "District Court" to refer to those adopted Recommendations, except in a few instances in which the opinion of the District Judge addresses an issue; in that situation the petition refers separately to the Magistrate and the District Judge.

concluded that "a preference for unshorn hair is a central tenet of Native American spirituality and thus, satisfies the Act's broad definition of a religions exercise." App. 52a; *see id*. 52a, n.7 ("The court finds that long hair has religious significance to American Indians and cutting that hair ... is 'an assault on their sacredness.' "); *id.* at 57a ("the court finds that long hair is a central tenet of Native American spirituality of which the plaintiffs are sincere adherents."). The court of appeals agreed that "wearing long hair is a central tenet of their religious faith." App. 11a.

The courts below recognized that ADOC's short-hair policy substantially burdened the religious practices of the plaintiffs. "Plaintiffs' expert ... gave an uncontradicted opinion that forcing Native Americans to cut their long hair would amount to an 'assault on their sacredness." App. 26a-27a (footnote omitted). "Plaintiffs proffered undisputed testimony regarding the burden that the ADOC hair length policy placed on their religious practices." App. 13a. "Prison regulations requiring short hair diminish the ability of the plaintiffs to approach their Creator with honor. Cutting their hair detracts from their abilities to practice their religion, because when their hair has been cut, they feel separated and disconnected spiritually during their religious ceremonies." App. 53a (footnote omitted). The district court found "that the involuntary cutting of the plaintiffs' hair substantially burdens the practice of their religious exercise." App. 54a; *see* App. 20a, 57a. The court of appeals noted that "[t]he ADOC does not [now] dispute that

its hair-length policy substantially burdens Plaintiffs' religious exercise, nor could it." App. 26a.

Because the plaintiffs met their initial burden of proving that ADOC's short-haircut policy substantially burdened their free exercise of religion, the burden shifted to ADOC to demonstrate both that the policy advanced a compelling governmental interest, and was "the least restrictive means" of furthering that interest. 42 U.S.C. § 2000cc-1(a). In an effort to meet that burden, the ADOC pointed to several asserted purposes, and argued that permitting inmates to grow long hair would interfere with its ability to further those interests. Plaintiffs, on the other hand, relied heavily on evidence that long hair is permitted in prisons in 38 states[4] and the District of Columbia, and by the Federal Bureau of Prisons ("BOP"). P.Ex. 23; 28 C.F.R. § 551.4.[5] "Plaintiffs ... presented undisputed testimony that a strong majority of U.S. jurisdictions permit inmates to wear long hair, either

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[4] Because Arkansas now permits hair length exemptions, the number of states is now 39.

[5] This provision, entitled "Hair length," provides:

> "a. The Warden may not restrict hair length if the inmate keeps it neat and clean.
>
> b. The Warden shall require an inmate with long hair to wear a cap or hair net when working in food service or where long hair could result in increased likelihood of work injury.
>
> c. The Warden shall make available to an inmate hair care services which comply with applicable health and sanitation requirements."

generally or as an accommodation for religious inmates." App. 13a (footnote omitted).[6] The record revealed that in 32 states, the District of Columbia and federal prisons, all inmates are permitted to wear long hair; in 6 states long hair is permitted only as an accommodation to religious beliefs. P.Ex. 23.

(2) The case was tried before a Magistrate Judge. ADOC invoked several interests it claimed to be compelling in nature: identifying inmates, detecting contraband, and preserving hygiene. ADOC also contended that uniformity for its own sake was a compelling governmental interest, so that requiring all male inmates to conform to an identical haircut rule satisfied RLUIPA even if the particular type of haircut required had no intrinsic value. The magistrate treated uniformity per se as a compelling governmental interest under RLUIPA. App. 19a.

The magistrate recognized that a large majority of states and the Bureau of Prisons permit long hair. App. 73a. But although most states have concluded that a short-haircut policy is not necessary to operate a secure prison system, the magistrate believed he

[6] In its new 2015 opinion, the Eleventh Circuit suggested for the first time that it was possible that in "several" of these 40 jurisdictions, prison officials, although permitting long hair, might still require inmates to cut their hair at some point. App. 7a. There is no record evidence that this actually occurs. Regardless, such a practice in a few states would not alter the fact that an overwhelming majority of prison systems do not impose any hair length limitation.

had to defer to the contrary view of Alabama officials. App. 73a. "The court may not substitute its judgment for that of the prison officials." App. 74a.

The District Judge held that the actual practice in the 38 states, the District of Columbia, and all federal prisons was of no moment, stating:

> Most of the Plaintiffs' objections are devoted to a discussion of least restrictive alternatives and the fact that other prisons permit long hair. But, as noted in the Recommendation, context matters and *what happens in other prison systems is beside the point*. What the Plaintiffs want is that the court decouple deference from the least restrictive alternative so that these are considered in isolation. That is inconsistent with RLUIPA.

App. 40a (emphasis added).

(3) In 2013 the court of appeals affirmed the rejection of plaintiffs' RLUIPA claims. Its decision rested on three pivotal interpretations of the statute. First, the Eleventh Circuit held that when most states accommodate a religious practice, a state refusing to accommodate that religious practice need not demonstrate that its prisons are so different from those in other states that an accommodation that worked elsewhere would not work there. Instead, the state can either argue that the policy made its own prisons *comparatively* less risky, or convince the trial court that a prison system in *any* state would be unsafe without the policy in question. App. 34a. Second, the court of appeals concluded that under

RLUIPA a disputed policy may be underinclusive; a state can justify such a policy as eliminating one means by which an inmate could hide contraband or change his appearance, even though the state permits other inmate activities that could give rise to the same problem. App. 14a, 19a. Third, the court of appeals ruled that uniformity per se is a compelling governmental interest, because accommodating a religious inmate – and thus treating him differently from other inmates – would undermine the safe operation of a prison. App. 15a-17a, 28a. That holding did not turn on the nature of the exceptionless rule in question.

After the 2013 Eleventh Circuit decision, but before the plaintiffs had sought review by this Court, certiorari was granted in *Holt v. Hobbs*.

C. The Decision in *Holt*

The plaintiff in *Holt* challenged an Arkansas policy which forbade inmates – except for medical reasons – from growing beards. The Muslim plaintiff in that case established that this policy substantially burdened his religious beliefs, and sought an accommodation that would permit him to wear a half-inch beard. The appeal in *Holt* turned to a significant degree on the same questions of statutory interpretation that had been addressed by the 2013 Eleventh Circuit opinion in the instant case. In *Holt*, Arkansas repeatedly cited and asked this Court to adopt the standard in that Eleventh Circuit 2013 decision.

Alabama filed an amicus brief in *Holt* also relying on the decision below.

In *Holt*, as in the instant case, a large majority of states permitted inmates to engage in the practice forbidden by the defendant. Repeatedly quoting the Eleventh Circuit 2013 decision, Arkansas asked this Court to hold that practices in other states are of little significance because risks are simply a question of degree, and that the different practices in Arkansas and in most other states simply reflected differing views about how much risk a prison system should run. "[T]he RLUIPA does not pit institutions against one another in a race to the top of the risk-tolerance or cost-absorption ladder." Brief for Respondent, *Holt v. Hobbs*, 28 (quoting 2013 Eleventh Circuit opinion). "RLUIPA does not 'force institutions to follow the practices of their less-risk-averse neighbors.'" *Id.* at 60 (quoting 2013 Eleventh Circuit opinion). "[O]ther jurisdictions are simply more willing to tolerate greater risks and costs. RLUIPA does not require Arkansas to incur those same risks and costs just because other states have." *Id.* at 28. Alabama also urged the Court to adopt this part of the 2013 Eleventh Circuit decision. Brief of Alabama, *et al*., as Amici Curiae Supporting Respondents, *Holt v. Hobbs*, 14. This Court rejected these contentions, holding that where a large number of other states do not use a disputed policy, a state which uses that policy must demonstrate that the circumstances in its own prisons are "different from the many institutions" that accommodate the religious exercise at issue. 135 S.Ct. at 853.

In *Holt*, as in the instant case, the state's policy was under-inclusive; the very problems which that policy was intended to address were still presented, as much if not more, by other things inmates were still permitted to do. Arkansas urged this Court to hold that such under-inclusiveness is irrelevant under RLUIPA.[7] This Court, however, concluded that under-inclusiveness of this type weighs heavily against the validity of a disputed policy under RLUIPA. 135 S.Ct. at 865-66.

In the lower court proceedings in *Holt,*[8] and again in its brief in opposition,[9] Arkansas argued that a state's mere desire to have a uniform grooming code was itself a compelling governmental interest, because no-exceptions policies are vital per se for order

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[7] "Courts should ... allow prison officials to address part of a problem.... The fact that contraband can be hidden in a variety of other places on the person (*i.e.*, head hair, shirt pockets, pants cuffs, shoes, body orifices, etc.) does not mean that ADC has no compelling interest in preventing contraband from being transported in a beard...." Brief for Respondents, *Holt v. Hobbs*, 40 (emphasis omitted).

[8] *Holt v. Hobbs*, 2012 WL 994481 at *3 (E.D. Ark. Jan. 27, 2012) ("Warden Lay ... expressed concern for the effect that giving one inmate preferential treatment would have on other inmates. He suggested that inmate could become a target of his fellow inmates.").

[9] Brief Opposing A Writ of Certiorari, *Holt v. Hobbs*, 4-5 ("Lay testified that allowing Petitioner to maintain a beard, while not affording the same opportunity to other inmates, would elevate Petitioner's status above that of other inmates, thereby creating the real possibility of harm to Petitioner as well as others.").

and discipline. Alabama's amicus brief in *Holt* also advanced this argument.[10] This Court held, to the contrary, that RLUIPA does require states to accommodate religious practices that differ from generally applied rules. 135 S.Ct. at 866.

Arkansas insisted at the oral argument in *Holt* that a beard – even a half-inch beard – would pose

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[10] Brief of Alabama, *et al*., as Amici Curiae Supporting Respondents, *Holt v. Hobbs*, 4-5:

> Uniform dress and grooming policies serve state interests in order, discipline and uniform treatment.... Uniform dress and grooming policies ... free guards and chaplains from the difficult task of administering case-by-case exemptions.... A uniform policy also means that religious persons are ensured equal treatment. There is no threat that the prison will accommodate practitioners of mainstream religious and overlook those who practice minority religions.

Id. 19-20:

> Arkansas has an interest in a uniform grooming policy simply because it is *uniform*.... [O]ne of the functions of a uniform dress and grooming policy is to establish order and discipline.... Exemptions to such policies can breed resentment ... among other inmates.... [P]rison officials have an "essential interest in a readily administrable rule".... It is a simple matter to enforce a policy of no beards. It becomes much more complicated to enforce a policy allowing beards of certain shapes and lengths for certain prisoners, and denying them to others. At the very least, chaplains and guards must monitor beard lengths and keep track of exemptions at the expense of their other duties.

(emphasis in original; quoting *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S.Ct. 1510, 1522 (2012)).

significantly greater problems for a prison than long hair.[11] In its amicus brief, Alabama treated hair and beards as presenting the same problem under RLUIPA.[12]

After certiorari had been granted in *Holt*, certiorari was pursued in the instant case. *Knight v. Thompson*, No. 13-955. This Court deferred action on that petition while *Holt* was pending. Following the decision in *Holt*, the Court vacated the 2013 Eleventh Circuit decision, and remanded the case for reconsideration in light of *Holt.* 135 S.Ct. 1173 (2015).

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[11] "[C]orrectional officers very likely will be somewhat reluctant to do a full search of the beard like they would, say, head hair." 2014 WL 7661634 at *47.

> MR. CURRAN: ... [H]ead hair doesn't p[ ]ose the same disguise-related problem as a beard.
>
> JUSTICE ALITO: Why is that? Why is that so? Are you saying that somebody with or without a half inch beard – that's a bigger difference than somebody who has longish hair versus the same person with a shaved head?
>
> MR. CURRAN: In our professional judgment, it is, yes, that's correct. Because you're looking at the essential feature of a person's face, their jawline, their chin and the like, and that's the means by which we identify each other.

2014 WL 7661634 at *33-*34.

[12] Brief of Alabama, *et al*., as Amici Curiae Supporting Respondents, *Holt v. Hobbs*, 25-28.

D. Proceedings on Remand

On remand, the parties and the Department of Justice filed supplemental briefs regarding the significance of *Holt*. The United States pointed out – as did plaintiffs – that the legal standard set out in the 2013 Eleventh Circuit decision was clearly inconsistent with the subsequent decision in *Holt*. "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 [2013] decision in this case conflicts with *Holt* in ... important ways." Supplemental Brief for the United States as *Amicus Curiae* Supporting Plaintiffs-Appellants and Urging Reversal, 6.

The Eleventh Circuit, rather than considering afresh the new standard carefully delineated in *Holt*, simply reissued its earlier 2013 opinion, adding only one minor sentence and an introductory clause to another sentence. App. 3a, 8a, 9a-37a, Editor's Note. A second Eleventh Circuit decision handed down the same day suggested that *Holt* had not established any substantive legal standards at all regarding the meaning or application of RLUIPA, but had only held that courts are not to give blind deference to the views of prison officials. App. 5a-7a. For all practical purposes, the Eleventh Circuit treated this Court's decision in *Holt* as if it had ended after the third paragraph in part IIIA. *See* 135 S.Ct. at 864.

REASONS FOR GRANTING THE WRIT

The January 2015 decision in *Holt v. Hobbs* resolved a number of important problems about the meaning and application of RLUIPA, ending confusion and disagreement among the lower courts concerning those issues. Eight months later, the pair of Eleventh Circuit decisions in this case recreated the very divisions which *Holt* should have put to rest. Anyone who read both *Holt* and the Eleventh Circuit opinion at pages 9a-37a would conclude that the Eleventh Circuit must have written its opinion *before Holt*, because the opinion of the court of appeals is obviously inconsistent with the opinion of this Court. And the reader would be right; that court of appeals opinion was indeed written 18 months before *Holt*.

But in a turn of events that is impossible to understand or defend, the Eleventh Circuit after *Holt* reissued and republished that pre-*Holt* opinion, making it again the binding precedent in that Circuit. The crabbed interpretation of RLUIPA set out by the Eleventh Circuit in its 2013 opinion once again restricts the religious liberties of inmates in Alabama, Georgia, and Florida. Action by this Court is necessary to assure that the holding of *Holt* is the law of the land, not merely the law in 47 states. Given the clarity of the Eleventh Circuit's errors, summary reversal is warranted.

Additionally, this case presents the Court an opportunity to resolve the underlying question of whether Native American inmates are permitted to

wear long hair in conformity with deeply rooted religious tradition, which is an important and recurring issue in a number of outlier prison systems. Whether this ancient and highly personal Native American religious practice is protected by RLUIPA should not vary by the Circuit and geographical location of the prison in which an inmate is held.

I. THE REISSUED ELEVENTH CIRCUIT DECISION IS INCONSISTENT WITH THIS COURT'S DECISION IN *HOLT V. HOBBS*.

(1) One of the most important recurring issues under RLUIPA concerns the significance of a showing that most states (and the Bureau of Prisons) accommodate a religious practice that a handful of outlier states forbid.

The reissued 2015 opinion makes clear that a state in the Eleventh Circuit can render that showing irrelevant in either of two ways. First, a state may seek to persuade federal judges that all those other prison systems have simply made a mistake, not by offering evidence that the accommodation in those states has actually caused any problems, but simply by calling an expert to testify that the accommodation could not work, even if the expert has never heard of religious exemptions to grooming requirements.[13]

[13] Brief for the United States As *Amicus Curiae* Supporting Plaintiffs-Appellants, 20 ("Permitting ... prisoners to wear long hair is now the majority practice in American prisons, yet

(Continued on following page)

That is what occurred here, where the Eleventh Circuit concluded that permitting inmates to wear long hair would be dangerous.

> The ADOC has shown that Plaintiffs' requested exemption poses actual security, discipline, hygiene, and safety risks. That other jurisdictions choose to allow male inmates to wear long hair shows only that they have elected to absorb those risks. The RLUIPA does not force institutions to follow the practices of their less risk-averse neighbors.... The ADOC has shown that its departure from the practices of other jurisdictions stems not from a stubborn refusal to accept a workable alternative, but from a calculated decision not to absorb the added risks that its fellow institutions have chosen to tolerate.

App. 34a.

Second, a state can merely argue that risk, after all, is to some extent a matter of degree, and that the state that refuses to accommodate a religious practice has merely chosen to take a (perhaps slightly) smaller risk.

> Plaintiffs ask us to hold that because many other prison systems have chosen to accept the costs and risks associated with long hair,

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Alabama officials produced literally no evidence that such widespread accommodation of Native American religious liberty has resulted in any problems whatsoever.").

> the ADOC must accept them as well. This we cannot do. Although many well-run institutions have indeed decided that the benefits of giving inmates more freedom in personal grooming outweigh the disadvantage, the RLUIPA does not prevent the ADOC from making its own reasoned assessment. Allowing male inmates to wear long hair carries with it established costs and risks, and the RLUIPA does not require the ADOC to embrace them merely because other institutions have.

App. 36a. That approach may not require any evidence at all.

But under *Holt v. Hobbs*, when an accommodation is accepted in a large majority of states, a state denying that accommodation must offer evidence demonstrating that "its prison system is so *different* from the many institutions that allow [an accommodation that the accommodation] cannot be employed at its institutions." 135 S.Ct. at 865 (emphasis added).

> The Department 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.... "While not controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction." ... [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, and the Department failed to make that showing here.

135 S.Ct. at 866 (quoting *Procunier v. Martinez*, 416 U.S. 396, 414 n.14 (1974)).

What the Department of Justice said after *Holt* about the pre-*Holt* 2013 Eleventh Circuit opinion is necessarily equally true of the identical 2015 post-*Holt* Eleventh Circuit opinion:

> *Holt* ... 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.... 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." ... This reasoning is not what *Holt* requires.

Supplemental Brief for the United States as *Amicus Curiae* Supporting Plaintiffs-Appellants and Urging Reversal, 12-13.

(2) The court of appeals clearly acknowledged that Alabama had not forbidden all inmate activities

that posed the problems with which it was concerned, but instead had chosen to prohibit long hair (a rule that substantially burdened the religious practice of plaintiffs) while permitting other inmate activities that posed similar problems. For example, the court noted that long hair was not the only place an inmate could hide contraband, just an "additional" place; inmates could still hide contraband in their clothes, shoes, or cells. Long hair, in the Eleventh Circuit's words, was merely an "additional location" to hide small items. App. 14a, 19a. Similarly, Alabama forbids long hair, on the theory that long hair could be cut to alter an inmate's appearance, but it permits male inmates to have short hair which could easily be shaved off, with an even more dramatic change in appearance. In the interest of facilitating detection of "infections and infestations" (App. 17a), the state requires men to have short haircuts, but women (not genetically more immune to either) can grow shoulder length hair. In the Eleventh Circuit a prison is free to selectively address an issue in a way that substantially burdens religious belief, while simply ignoring other inmate activities that create the same problem.

Holt forbids such an under-inclusive pick-and-choose approach.

> [T]he Department has not adequately demonstrated why its grooming policy is underinclusive in at least two respects.... [T]he Department permits inmates to grow more than a 1/2 inch of hair on their heads.... [H]air on the head is a more plausible place

> to hide contraband than a 1/2 inch beard – and the same is true of an inmate's clothing and shoes. Nevertheless, the Department does not require inmates to go about bald, barefoot, or naked. Although the Department's proclaimed objectives are to stop the flow of contraband and to facilitate prisoner identification, "[t]he proffered objectives are not pursued with respect to analogous nonreligious conduct," which suggests that "those interests could be achieved by narrower [measures] that burdened religion to a far lesser degree."

135 S.Ct. at 865-66 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993)).

(3) The Eleventh Circuit holds that a prison's interest in uniformity per se is a sufficient justification for subjecting all inmates to a rigid no-exceptions rule. The court of appeals upheld as supported by the record a district court finding that "an exceptionless short-hair policy promotes order and discipline" App. 28a.[14] One warden, the court of appeals noted, insisted that "a generally applicable policy with no exemptions fosters discipline, and if the ADOC were required to grant exemptions, officers would have trouble enforcing the policy due to the difficulty of

[14] App. 66a ("Uniformity within the institutions ... instills discipline and promotes order by exercising control over the inmates").

readily identifying which inmates are entitled to the exemption." App. 15a-16a. Another warden quoted by the Eleventh Circuit testified "that granting religious exemptions to Native American inmates would erode discipline and likely cause the ADOC's over-worked staff to stop enforcing the policy against non-exempt inmates." App. 15a. The court of appeals cited testimony that if religious accommodations were made, "non-exempt inmates might attack exempted inmates out of jealousy for their special long-hair privilege." App. 17a. "[E]xempting only certain inmates from the [short haircut] policy would allow them to identify as a special group, ... eroding order and control." App. 15a.

In *Holt*, however, this Court rejected as insufficient the state's objection that it just did not want to make exceptions to its no-beard rule.

> The Department ... asserts that few inmates require beards for medical reasons while many may request beards for religious reasons.... At bottom, this argument is but another formulation of 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." ... We have rejected a similar argument in analogous contexts, ... and we reject it again today.

135 S.Ct. at 866 (quoting [*Gonzales v.*] *O Centro* [*Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418,] 426 [(2006)]).

A claim under RLUIPA cannot be defeated merely by a state's objection to making exceptions to its rules, because the very purpose of RLUIPA is to require such "granting specific exemptions to particular religious claimants." *Holt*, 135 S.Ct. at 863 (quoting *Hobby Lobby,* 134 S.Ct. at 2779). The Eleventh Circuit's holding that a RLUIPA claim can be defeated by an objection to the very idea of making exceptions for religious practices reprises the constitutional attack on RFRA which this Court rejected in *Cutter v. Wilkinson*, 544 U.S. 709 (2005). *See Cutter v. Wilkinson*, 349 F.3d 257, 266 (6th Cir. 2003); *Madison v. Riter*, 240 F.Supp.2d 566, 578-81 (W.D. Va. 2003). As the United States explained in *Holt*, "prison officials cannot prevail under RLUIPA's compelling-interest/least-restrictive-means standard by appealing to a general need for uniformity." Brief of the United States as Amicus Curiae Supporting Petitioner, *Holt v. Hobbs*, 27.

II. ACTION BY THIS COURT IS REQUIRED TO BRING THE ELEVENTH CIRCUIT INTO COMPLIANCE WITH *HOLT* AND TO PROTECT VITAL RELIGIOUS INTERESTS THROUGHOUT THAT CIRCUIT.

The action of the Eleventh Circuit in reissuing its 2013 pre-*Holt* decision has recreated in that circuit all the problems which the Court sought to resolve in *Holt*. *Holt* did not merely, or primarily, decide whether the particular inmate in that case could grow a 1/2-inch beard. As the Chief Justice explained

at oral argument, a central purpose of the Court's opinion was to establish "a generally applicable legal principle" that would govern future RLUIPA cases in the lower courts. Oral Arg., *Holt v. Hobbs*, 6-7. But lower courts in the Eleventh Circuit are now bound instead by the legal principles in the reissued pre-*Holt* opinion.

Judicial opinions about the standards governing the obligations of states under RLUIPA have immediate practical consequences. Prison authorities look to the courts for guidance about what they can and must do, and state lawyers base their advice on controlling precedents. An attorney in the Eleventh Circuit who relied on the reissued 2015 opinion would tell his or her clients that federal law permits policies which government attorneys in the rest of the country will admonish their clients are impermissible.

The carefully crafted language in *Holt* offered the type of clarity to prison officials and potential litigants alike that was calculated to reduce the risk of half inch by half inch litigation of RLUIPA issues. The Court's clarification of the significance of widespread prison accommodations was especially important. In a circuit which respected that holding, the widespread consensus in favor of permitting inmates to wear long hair would pretermit, or quickly resolve, litigation about that issue. Instead, in the Eleventh Circuit, things are back where they started.

The intransigence with which the Eleventh Circuit has responded to *Holt* invites officials in other

circuits to attempt to revisit the issues this Court thought it had decided. That portends more than just years of unnecessary litigation and wrangling. These decisions have very serious and immediate consequences for inmates whose religious beliefs are trammeled by unnecessary and spiritually damaging prison regulations. For inmates of faith committed to living each day in a manner consistent with their deeply-held religious beliefs, every prison-compelled breach of that obligation causes spiritual harm beyond any form of secular redress.

III. WHETHER RLUIPA ENTITLES NATIVE AMERICAN INMATES TO FULFILL THEIR RELIGIOUS OBLIGATION TO WEAR THEIR HAIR LONG IS AN IMPORTANT AND RECURRING ISSUE THAT WARRANTS THIS COURT'S REVIEW.

This case presents an opportunity to resolve the underlying question of whether Native American inmates are permitted to wear long hair in conformity with deeply rooted religious tradition, which is an important and recurring issue in a number of outlier prison systems. Whether this ancient and highly personal Native American religious practice is protected by RLUIPA should not vary by the Circuit and geographical location of the prison in which an inmate is held.

Wearing one's hair in the sacred, traditional manner is an issue vital to Native American culture and to the rehabilitation of Native American inmates.

Approximately 29,700 American Indian and Alaska Natives are incarcerated in the United States. Bureau of Statistics, Office of Justice Programs, U.S. Dep't of Justice, NCJ 238978, *Jails in Indian Country, 2011* (2012), *available at* http://bjs.gov/content/pub/pdf/jic11.pdf. Native inmates are "important human and cultural resources, irreplaceable to their Tribes and families. When they are released, it is important to the cultural survival of [ ] Native communities that returning offenders be contributing, culturally viable members." Walter Echo-Hawk, *Native Worship in American Prisons*, 19.4 CULTURAL SURVIVAL Q. (1995). Hair is of religious significance for all Native Tribes, communities, and families. Yet, inmates throughout the Eleventh Circuit must endure the continuing indignity of forced haircuts.

Given that this important, recurring issue remains unresolved even in light of *Holt*, the instant Petition presents an ideal vehicle for protecting paramount religious rights of highly vulnerable prison populations. The Eleventh Circuit squarely held that RLUIPA does not require prison officials to consider and distinguish the less restrictive measures of other systems, even in the presence of widespread, time-tested prison policies, and the Eleventh Circuit continues to acknowledge that its interpretation of RLUIPA conflicts with decisions in other Circuits. App. 32a-33a. This case, therefore, presents an issue of tremendous religious importance to Native American

communities and to Native-American inmates seeking to wear their hair in the traditional manner.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment below summarily reversed. Alternatively, the petition should be granted and the case set for briefing and argument.

Respectfully submitted,

ERIC SCHNAPPER
University of Washington
School of Law
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@uw.edu

MARK SABEL
Counsel of Record
SABEL LAW FIRM, L.L.C.
P.O. Box 231348
Montgomery, AL 36123
(334) 546-2161
mksabel@mindspring.com

PETER FRUIN
MAYNARD, COOPER & GALE, P.C.
1901 6th Avenue North, Suite 2400
Birmingham, AL 35203
(205) 254-1000

RANDALL C. MARSHALL
AMERICAN CIVIL LIBERTIES UNION
OF ALABAMA, INC.
P.O. Box 6179
Montgomery, AL 36106
(334) 265-2754

ROY S. HABER
570 East 40th Street
Eugene, OR 97405
(541) 485-6418

Counsel for Petitioners

February 2, 2016

APPENDIX

APPENDIX A

796 F.3d 1289
United States Court of Appeals,
Eleventh Circuit.

Ricky **KNIGHT**, Franklin Irvin, et al.,
Plaintiffs-Appellants,

Thomas Otter Adams, suing individually and on behalf of a class of persons similarly situated, Billy Two Feathers Jones, suing individually and on behalf of a class of persons similarly situated, et al., Consol. Plaintiffs-Appellants,

v.

Leslie THOMPSON, in his individual capacity, Donald Parker, et al., Defendants-Appellees, William S. Stricker, et al. individually and in their official capacity, Consol. Defendants-Appellees.

No. 12-11926.

|

Aug. 5, 2015.

Attorneys and Law Firms

Mark Sabel, Sabel Law Firm, LLC, Montgomery, AL, Peter Sean Fruin, Maynard Cooper & Gale, PC, Birmingham, AL, for Plaintiff-Appellant.

Joseph D. Steadman, Dodson & Steadman, PC, Mobile, AL, Kim Tobias Thomas, Alabama Department of Corrections, Luther J. Strange, III, Alabama Attorney General's Office, Andrew Weldon Redd, Alabama Department of Transportation, Montgomery, AL, for Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Alabama.

Before HULL and ANDERSON, Circuit Judges, and SCHLESINGER* District Judge.

Opinion

PER CURIAM:

Plaintiffs, male inmates of the Alabama Department of Corrections ("ADOC"), brought this suit under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq.*, to challenge the ADOC's "short-hair policy." The short-hair policy forbids Plaintiffs from wearing their hair unshorn in accordance with the dictates of their Native American religion. In our previous opinion, we affirmed the district court's entry of judgment in favor of the ADOC. *See Knight v. Thompson*, 723 F.3d 1275, 1276-77 (11th Cir.2013) ("*Knight I*").[1] On January 26, 2015, the Supreme Court vacated our previous opinion and remanded for further consideration in light of *Holt v. Hobbs*, 574 U.S. ___, 135 S.Ct. 853, 190 L.Ed.2d 747 (2015).

We asked the parties to file supplemental briefs addressing the issue on remand. The parties have done so. Having considered both the briefs and *Holt*,

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* Honorable Harvey E. Schlesinger, United States District Judge for the Middle District of Florida, sitting by designation.

[1] The lengthy procedural history and factual background of Plaintiffs' case are provided in our previous opinion.

we conclude that *Holt* does not dictate a change in the outcome of this case. We reinstate our prior *Knight I* opinion with revisions only to Part III.B.ii, which we set forth below, and we add, with this opinion in *Knight II*, a discussion of the Supreme Court's decision in *Holt* and why it does not affect the outcome in our prior decision.

In *Holt*, the Supreme Court considered a RLUIPA challenge to the Arkansas Department of Correction's ("the Department") "no-beard policy." The no-beard policy prohibited inmates from wearing facial hair other than a neatly trimmed mustache. *Holt*, 574 U.S. at ___, 135 S.Ct. at 860. The policy made no exception for inmates who objected on religious grounds but did allow inmates with diagnosed dermatological problems to wear a ¼-inch beard. *Id.*

Plaintiff Gregory Holt, an Arkansas inmate and devout Muslim, sought permission to grow a ½-inch beard in accordance with his religious belief. *Id.* at – –, 135 S.Ct. at 859, 861. After the Department denied Holt's requested exemption, he filed suit under RLUIPA. *Id.* at ___, 135 S.Ct. at 861. Following an evidentiary hearing, the district court dismissed Holt's RLUIPA complaint for failure to state a claim on which relief can be granted, and the Eighth Circuit affirmed. *Id.* On certiorari review, the Supreme Court reversed, holding that the Department's grooming policy violated RLUIPA insofar as it prevented Holt from growing a ½-inch beard in accordance with his religious beliefs. *Id.* at ___, 135 S.Ct. at 867.

Plaintiffs here raise three arguments worth addressing for why *Holt* changes the outcome in their case. First, Plaintiffs argue that, like the lower courts in *Holt*, the district court in this case failed to engage in a "focused inquiry." We disagree. In *Holt*, in relevant part, the Department argued that its grooming policy represented the least restrictive means of furthering a broadly formulated interest in prison safety and security. *Id.* at ___, 135 S.Ct. at 863. The Supreme Court cautioned, however, that RLUIPA demands "a more focused inquiry and requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to . . . the particular claimant." *Id.* (quotations omitted). Thus, RLUIPA requires a court to "scrutinize the asserted harm of granting specific exemptions to particular religious claimants and to look to the marginal interest in enforcing the challenged government action in that particular context." *Id.* (quotations omitted and alteration adopted).

While Holt sought to grow a ½-inch beard, such that the Department had to show how denying him a ½-inch beard actually furthered its compelling interests, the Plaintiffs here request a complete exemption of long, unshorn hair from the ADOC's short-hair policy. *See Knight I*, 723 F.3d at 1276-77, 1277 n. 1. Therefore, RLUIPA requires us to scrutinize the asserted harm of granting that specific exemption of long, unshorn hair and to look to the marginal interest in enforcing the short-hair policy in that particular context. That is exactly the focused inquiry that

this Court and the district court applied. *See, e.g.*, *id.* at 1280 ("[The magistrate judge] found that inmates can use long hair to alter their appearances, long hair impedes the ability of officers to quickly identify inmates in the prisons, and inmates can use long hair to identify with special groups, including gangs."); *id.* at 1285 ("Plaintiffs have not presented any less restrictive alternative that can adequately contain the risks associated with long hair. . . ."); *id.* at 1286 ("The ADOC has shown that Plaintiffs' requested exemption poses actual security, discipline, hygiene, and safety risks.").

Second, the Plaintiffs claim that the district court applied "unquestioning deference" to prison officials' testimony. In *Holt*, the Supreme Court admonished the lower courts for engaging in "unquestioning deference" to the Department's assertion that allowing Holt to grow a ½-inch beard would undermine its compelling interest instead of requiring the Department "to *prove* that denying the exemption is the least restrictive means of furthering a compelling governmental interest." *Holt*, 574 U.S. at ___, 135 S.Ct. at 863-64 (emphasis added). Notably, the prison officials in *Holt* provided largely conclusory and speculative testimony in justification of their no-beard policy; for example, they could point to no instance in Arkansas or elsewhere where an inmate had hidden contraband in a ½-inch beard, and they could not explain why a dual-photo method could not be employed to address the concern of an escaped

inmate shaving his beard to disguise his appearance. *See id.* at ___, 135 S.Ct. at 861.

Here, in contrast, the district court made various factual findings concerning inmates' hair length based on the ADOC's witnesses' "elucidating expert opinions, lay testimony, and anecdotal evidence based on their decades of combined experience as corrections officers." *Knight I*, 723 F.3d at 1278. As we explained in our previous decision, "the detailed record developed during the trial of this case amply supports the [d]istrict [c]ourt's factual findings about the risks and costs associated with permitting male inmates to wear long hair." *Id.* at 1284. The ADOC's witnesses offered more than "speculation, exaggerated fears, or post-hoc rationalizations," *id.* (quotation omitted), and the type of "unquestioning deference" that concerned the *Holt* Court simply did not occur in this case. In other words, the ADOC did *prove* that denying Plaintiffs' specific exemption is the least restrictive means of furthering its compelling governmental interests.

Third, the Plaintiffs contend that, in light of *Holt*, the district court erred in disregarding the evidence presented below that the prison systems of 39 other states "would allow the religious accommodation Plaintiffs request." Holt presented evidence that "the vast majority of States and the Federal Government permit inmates to grow ½-inch beards, either for any reason or for religious reasons." *Holt*, 574 U.S. at ___, 135 S.Ct. at 866. The Supreme Court concluded that the Department failed to show, in the face of this

evidence, why it could not do the same. *Id.* The Supreme Court explained that "when so many [other] prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course, and the Department failed to make that showing here." *Id.*

As an initial matter, on this record, it is not apparent that the Plaintiffs presented evidence that all of these 39 other prison systems would allow their *specific* requested accommodation – long, unshorn hair. *Compare id.* ("[T]he Department failed to show . . . why the vast majority of States and the Federal Government permit inmates to grow ½-inch beards . . . but it cannot."). For instance, while several of the written policies of other prison systems proffered by Plaintiffs indicate that inmates generally have freedom in choosing their hair length, the policies make clear that the chosen hair length cannot pose risks for health, safety, hygiene, order, or security. Thus, it is not clear that these policies would allow for entirely unshorn hair.

In any event, unlike in *Holt*, the district court here did not defer to the ADOC's "mere say-so" that it could not accommodate Plaintiffs' requested accommodation even though other prison systems offer such an accommodation. *See id.* As already discussed, the "detailed record developed" below distinguishes this case from *Holt*, where the lower courts gave "unquestioning deference" to prison officials' conclusory and speculative assertions. As we stated in our previous opinion, the ADOC has "shown that Plaintiffs'

requested exemption poses actual security, discipline, hygiene, and safety risks" and neither we nor Plaintiffs can "point to a less restrictive alternative that accomplishes the ADOC's compelling goals." *Knight I*, 723 F.3d at 1285-86.

Therefore, we reinstate our *Knight I* opinion with revisions only in Part III.B.ii on pages 1284 to 1286. We file that reinstated opinion with those revisions, contemporaneously with this opinion.

We affirm, once again, the district court's judgment in favor of the ADOC after our reconsideration in light of *Holt*, pursuant to the Supreme Court's mandate.

OPINION REINSTATED WITH MODIFICATIONS; AFFIRMED.

APPENDIX B

797 F.3d 934
United States Court of Appeals,
Eleventh Circuit.

Ricky KNIGHT, Franklin Irvin, et al.,
Plaintiffs-Appellants,
Thomas Otter Adams, suing individually and
on behalf of a class of persons similarly situated,
Billy Two Feathers Jones, suing individually
and on behalf of a class of persons
similarly situated, et al., Consol.,
Plaintiffs-Appellants,
v.
Leslie THOMPSON, in his individual
capacity, Donald Parker, et al.,
Defendants-Appellees,
William S. Stricker, et al. individually and in their
official capacity, Consol., Defendants-Appellees.

No. 12-11926.
|
Aug. 5, 2015.

Attorneys and Law Firms

Mark Sabel, Sabel Law Firm, LLC, Montgomery, AL, Peter Sean Fruin, Maynard Cooper & Gale, PC, Birmingham, AL, for Plaintiffs-Appellants.

Joseph D. Steadman, Dodson & Steadman, PC, Mobile, AL, Kim Tobias Thomas, Luther J. Strange, III, Alabama Department of Corrections, Andrew Weldon Redd, Alabama Department of Transportation, Montgomery, AL, for Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama.

Before HULL and ANDERSON, Circuit Judges, and SCHLESINGER* District Judge.

Opinion

SCHLESINGER, District Judge:

Plaintiffs-Appellants (hereinafter "Plaintiffs") are male inmates in the custody of the Alabama Department of Corrections ("ADOC"). They wish to wear their hair unshorn in accordance with the dictates of their Native American religion, but an ADOC policy forbids them from doing so. Plaintiffs brought this suit against the ADOC and several other defendants (collectively "ADOC"), challenging the ADOC's hair-length policy on various constitutional grounds and under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq*. The United States has intervened on Plaintiffs' behalf. After a full evidentiary hearing and bench trial, the District Court made several findings of fact and entered judgment in favor of the ADOC. Because the ADOC carried its RLUIPA burden to demonstrate that its hair-length policy is the least restrictive means of furthering its compelling governmental interests, we affirm.

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* Honorable Harvey E. Schlesinger, United States District Judge for the Middle District of Florida, sitting by designation.

I. BACKGROUND

The ADOC requires all male prison inmates to wear a "regular hair cut," defined as "off neck and ears." Dkt. 471. The ADOC does not grant any exemptions to this policy, religious or otherwise. Dkt. 474 p. 146. Plaintiffs seek a complete religion-based exemption to the male hair-length policy.[1] Plaintiffs seek this exemption because wearing long hair is a central tenet of their religious faith. No plaintiff is a maximum-security inmate.

A. Procedural History

This is the third time that this case has come before this Court. Plaintiffs initially filed suit on November 24, 1993, challenging on various constitutional grounds and under the Religious Freedom Restoration Act ("RFRA") the ADOC's policies restricting hair length and prohibiting sweat lodge ceremonies. After entry of summary judgment for the ADOC, Plaintiffs appealed to this Court. Dkt. 218.

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[1] Three of Plaintiffs seek, in the alternative, a more narrow exemption to wear a kouplock – a two-inch wide strip of hair beginning at the base of the skull and stretching down the back. However, because Plaintiffs first raised their kouplock argument in their objections to the magistrate judge's report and recommendation, and because the District Court did not consider the kouplock argument when it ruled on the report and recommendation, Plaintiffs have waived the issue. *Williams v. McNeil*, 557 F.3d 1287, 1291 (11th Cir.2009) (district courts have discretion to decline to consider arguments that are not presented to the magistrate judge).

During that appeal's pendency, Congress responded to the Supreme Court's partial invalidation of the RFRA by enacting the RLUIPA, and this Court therefore remanded this case to allow Plaintiffs to amend their complaint. Dkt. 235. After Plaintiffs amended the complaint to add claims under the RLUIPA and the Parties engaged in a brief period of additional discovery, the District Court again granted summary judgment to the ADOC. Dkt. 317.

Plaintiffs appealed again, and this Court affirmed the judgment of the District Court as to all but Plaintiffs' hair-length restriction claims. As to the hair-length claims, however, this Court concluded:

> [O]n the present record factual issues exist as to whether, *inter alia*, the defendants' total ban on the wearing of long hair and denial of an exemption to the plaintiffs based on their Native American religion is "the least restrictive means of furthering [the defendants'] compelling governmental interest[s]" in security, discipline, hygiene and safety within the prisons and in the public's safety in the event of escapes and alteration of appearances. In addition, we note that the evidentiary record relating to the hair-length claims is over ten years old and that, in the intervening time, prison staffing and administration, prison safety and security, and the prison population in Alabama have changed.

Lathan v. Thompson, 251 Fed.Appx. 665, 667 (11th Cir.2007) (internal citation omitted, second and third alterations in original). This Court, therefore, vacated

the District Court's judgment as to the hair-length claims and remanded the case for a full evidentiary hearing and bench trial, "following which the district court shall make detailed findings of fact and conclusions of law." *Id.*

B. The Evidentiary Hearing and Bench Trial on Remand

On remand, Magistrate Judge Charles S. Coody held an evidentiary hearing and bench trial. Dkts. 471, 474-76. Plaintiffs proffered undisputed testimony regarding the burden that the ADOC hair-length policy placed on their religious practices. They also presented undisputed testimony that a strong majority of U.S. jurisdictions permit inmates to wear long hair, either generally or as an accommodation for religious inmates.[2] A witness for Plaintiffs skilled in the use of Photoshop, a computer program used to digitally alter images, testified that corrections officers could easily be trained to alter inmate images to assist in the identification of escaped long-haired inmates. Finally, George Sullivan, Plaintiffs' main witness, testified that his tours and audits of 170 correctional facilities and extensive past employment experience in several prison systems that permit long hair led him to conclude that the ADOC does not need

[2] These jurisdictions are: the Federal Bureau of Prisons, the correctional systems of approximately 38 states, and the District of Columbia Department of Corrections. Dkt. 475 at p. 133.

to deny religious exemptions to accomplish its stated goals for its short-hair policy. In support of his conclusion, Sullivan opined that inmates have many other locations where they can more easily store contraband (e.g., socks, stitching areas in clothes, gloves, jackets, etc.), long hair does not impede inmate identification, and long hair does not pose any health risks if inmates follow basic hygiene procedures. Dkt. 474 at pp. 121-38, 143-44; Dkt. 475 at pp. 6-29, 118-58; Dkt. 476 at pp. 7-9, 11-29.

The ADOC's witnesses nonetheless asserted that its policy is necessary to accomplish several compelling goals, including the prevention of contraband, facilitation of inmate identification (both during the usual course of prison business and after escapes), maintenance of good hygiene and health, and facilitation of prison discipline through uniformity. Aside from figures demonstrating that Alabama's prisons have become increasingly over-crowded, under-funded, and under-staffed in recent years, the ADOC's witnesses offered little statistical evidence to support their claims. But they did offer elucidating expert opinions, lay testimony, and anecdotal evidence based on their decades of combined experience as corrections officers.

For example, Warden Grantt Culliver testified that permitting long hair would slow the process of searching inmates for contraband, increase the risk that inmates could grab each other by the hair during fights, and give inmates an additional location to hide small items like handcuff keys on their person. He

also testified that granting religious exemptions to Native American inmates would erode discipline and likely cause the ADOC's over-worked staff to stop enforcing the policy against non-exempt inmates. As to hygiene, Culliver recounted an incident in which an inmate developed a fungus on his scalp that remained hidden from view until his hair was cut. Dkt. 474 at pp. 124-32, 144-46, 162-68.

Gwendolyn Mosley, institutional coordinator of the ADOC's southern region and past warden of various ADOC institutions, similarly testified that the hair-length restrictions reduce inmates' ability to hide contraband, assist inmate identification, reduce the time and difficulty of conducting shake-downs and searches, and prevent inmates from pulling each other's hair during fights. She further testified that exempting only certain inmates from the policy would allow them to identify as a special group and form gangs, eroding order and control. Finally, like Warden Culliver, Mosley testified that the grooming policy promotes health and hygiene. Dkt. 475 at pp. 5-10, 16-38.

Warden Tony Patterson echoed many of Culliver's and Mosley's concerns about Plaintiffs' requested exemption from the short-hair policy. Patterson testified that the hair-length policy facilitates the detection of contraband and assists with prompt inmate identification, both during day-to-day operations and in the event of an escape. He further testified that a generally applicable policy with no exemptions fosters discipline, and if the ADOC were

required to grant exemptions, officers would have trouble enforcing the policy due to the difficulty of readily identifying which inmates are entitled to the exemption. Finally, Patterson testified concerning a September 2008 escape of two inmates, whose subsequent capture was accomplished by distributing pictures of the inmates to the public. Dkt. 475 at pp. 92-97, 103-05.

However, it was Ronald Angelone, former director of several state prison systems, who provided the most thorough defense of the ADOC's hair length policy. While serving as the director of Virginia's then-chaotic prison system, Angelone had begun enforcing, in response to security and health concerns, an exceptionless grooming policy for male inmates that required all haircuts to be one inch or shorter.[3] Angelone specified several reasons for why he chose to enforce the grooming policy, chief among which was the 1999 escape of a "very dangerous" Virginia prison inmate who had cut his hair to alter his appearance. The inmate was discovered three or four days after his escape, but the haircut had so significantly changed his appearance that Angelone would not have been able to identify him from the photograph that the prison released to local police departments. Angelone also testified that a review of institutional reports confirmed that inmates had hidden ice picks, handcuff

[3] The policy had allowed female inmates to wear shoulder-length hair, however, on the rationale that they posed a lesser risk of violence and escape than male inmates.

keys, wires, bolts, and other contraband items in their hair. He further recounted one incident in which prison staff cut their hands on a hidden razor blade while searching an inmate's hair. Angelone testified that the short-hair policy reduced the time needed to search inmates, and inmates were aware that officers often will not run their hands through their hair for fear of sharp objects. Angelone further asserted that inmates can grab each other by the hair during fights, and non-exempt inmates might attack exempted inmates out of jealousy for their special long-hair privilege. Turning to the asserted health and hygiene hazards of long hair, he described an incident in which a black widow spider wove a nest in an inmate's dreadlocks, and he noted that long hair had also concealed some inmates' scalp sores, cysts, and tumors. In sum, Angelone opined that his short-hair policy was a factor in his successful restoration of order and control in Virginia's prison system. Dkt. 475 at pp. 46-54, 64-68, 73-74.

Although the ADOC's witnesses combined to offer a strong defense of the short-hair policy, they did make several concessions on cross-examination. They admitted that the ADOC allows female inmates to wear shoulder-length hair. They also conceded that they had never worked in – or reviewed the policies of – prison systems that allow long hair, either generally or as a religious exemption. Finally, none of the ADOC's witnesses could point to any instances where an inmate had attacked an exempted long-haired

inmate out of jealousy or grabbed long hair during a fight. Dkt. 475 at pp. 46-54, 64-68.

C. The District Court's Decision

After the evidentiary hearing and bench trial, Magistrate Judge Coody issued a report and recommendation ("R & R") that recommended entry of judgment in favor of the ADOC. Dkt. 530. On the basis of exhibits admitted during the trial and in accordance with this Court's directions on remand, the Magistrate Judge made several factual findings that painted the current context of this case. First, he found that in September 2008, the ADOC housed 25,303 inmates – almost 189% of the statewide design capacity of the ADOC's facilities. Second, he found that disciplinary actions increased by 62% in 2007 alone, and nearly 50% of the ADOC's inmates were serving time for felonies against persons. Third, he found that the ADOC's overcrowded prisons are also under-staffed and under-funded, with approximately one in every four correctional personnel positions remaining vacant. Finally, he found that between 1997 and 2007, the number of admissions to the ADOC outpaced the number of releases by almost 5000 inmates each year, except for the years 2000 and 2004.

Judge Coody also made specific factual findings with regard to male inmates' hair length, resolving disputes largely in the ADOC's favor. He found that inmates can use long hair to alter their appearances, long hair impedes the ability of officers to quickly

identify inmates in the prisons, and inmates can use long hair to identify with special groups, including gangs. Implementing a Photoshop program for logging and manipulating digital photographs of inmates would raise practical concerns of cost and training, he found, and in any event would not assist in the identification of inmates inside the prisons. He further found that long hair provides an additional location for inmates to conceal weapons and contraband, and correctional officers risk injury from hidden weapons when searching long hair. He also found that inmates can manipulate self-searches of their hair, and permitting inmates to have long hair would make searches for contraband more difficult and more lengthy. In addition, he found that uniformity within the ADOC's institutions instills discipline and promotes order by allowing officers to exercise control over inmates, and maintaining discipline and order is important because violence is prevalent in the ADOC's prisons. He specifically found, quoting Mosley's conclusory testimony, that the inmates incarcerated in the ADOC today are "younger, bolder and meaner" than those of previous years. He concluded that inmates can grab other inmates' long hair during fights. All these security problems are worse for male inmates than female inmates, he found, because male facilities are more over-crowded than female facilities, and males pose greater security risks than females. Finally, Judge Coody found that requiring inmates to keep their hair short enables corrections officers to more easily detect infections and infestations and prevent their proliferation.

As to his conclusions of law, Judge Coody concluded that the ADOC's hair-length policy substantially burdens Plaintiffs' religious exercise. He went on to conclude, however, that the ADOC had carried its RLUIPA burden and shown that its hair-length policy is the least restrictive means of furthering its compelling interests in security, safety, control, order, uniformity, discipline, health, hygiene, sanitation, cost-containment, and reducing health care costs. That conclusion was compelled, he reasoned, by this Court's decision in *Harris v. Chapman*, 97 F.3d 499 (11th Cir.1996), which upheld a Florida Department of Corrections short-hair policy under the statutory predecessor to the RLUIPA. Judge Coody additionally noted that several of our sister circuits have, in a variety of contexts, sustained prison grooming regulations in the face of RLUIPA challenges. Magistrate Judge Coody then rejected Plaintiffs' argument that the widespread adoption of permissive grooming policies in other jurisdictions should, by itself, invalidate the ADOC's grooming policy. He reasoned that the practices of other jurisdictions are *some* evidence – but are by no means *dispositive* evidence – of the feasibility of less restrictive measures, and the Supreme Court has cautioned lower courts to defer to the reasoned judgments of prison officials when applying the RLUIPA.

The District Court adopted Magistrate Judge Coody's Report and Recommendation ("R & R") and overruled Plaintiffs' objections, noting that "context

matters," "what happens in other prison systems is beside the point," and Judge Coody appropriately took into account staffing and funding shortages as part of the "context" of the case. Dkt. 549 at pp. 2-3. Furthermore, according to the District Court, Plaintiffs' heavy reliance on the practices of other jurisdictions mistakenly "decouple[s] deference [to prison officials] from [the RLUIPA's] least restrictive alternative" prong. *Id.* at 2. The District Court therefore adopted the R & R and entered judgment in favor of the ADOC. Dkts. 549, 550. Plaintiffs then initiated this appeal. Dkt. 556.

II. STANDARDS OF REVIEW

We review the District Court's factual determinations for clear error and its legal conclusions *de novo.* In particular, we will conduct a *de novo* review of the District Court's overall legal determination that the ADOC's hair policy comports with the RLUIPA. *Cf. Lawson v. Singletary*, 85 F.3d 502, 511-12 (11th Cir.1996) ("Whether the Rule comports with [the Religious Freedom Restoration Act] is a pure question of law, and is subject to *de novo* review by this Court."); *accord Hamilton v. Schriro*, 74 F.3d 1545, 1552 (8th Cir.1996); *Hoevenaar v. Lazaroff*, 422 F.3d 366, 368 (6th Cir.2005); *McRae v. Johnson*, 261 Fed.Appx. 554, 557 (4th Cir.2008); *United States v. Friday*, 525 F.3d

938, 949 (10th Cir.2008); *Garner v. Kennedy*, 713 F.3d 237, 242 (5th Cir.2013).[4]

A factual finding is clearly erroneous "if the record lacks substantial evidence to support it" or we are otherwise "left with the impression it is not the truth and right of the case" – "a definite and firm conviction that a mistake has been committed." *Lincoln v. Bd. of Regents of Univ. Sys. of Georgia*, 697 F.2d 928, 939-40 (11th Cir.1983) (internal quotation marks omitted). As to the weighing of evidence, a District Court may weigh competing expert testimony but may not arbitrarily ignore expert testimony; rather, "some reason must be objectively present for ignoring expert opinion testimony." *United States v. Hall*, 583 F.2d 1288, 1294 (5th Cir.1978).[5] In addition, an evidentiary error is harmless if it "had no substantial influence on the

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[4] We acknowledge that *Lawson* identified a policy's validity under the statutory predecessor to the RLUIPA as a "pure question of law." *Lawson*, 85 F.3d at 512. In this appeal, however, Plaintiffs attack not only the District Court's overall legal determination that the ADOC's short-hair policy comports with the RLUIPA, but also the factual findings upon which the District Court rested its ultimate legal conclusion. This appeal, therefore, presents a mixed question of law and fact, and we will review the District Court's factual findings for clear error and its application of the law to those facts *de novo*. *Accord Garner*, 713 F.3d at 242; *Hamilton*, 74 F.3d at 1552; *McRae*, 261 Fed.Appx. at 557; *Fegans v. Norris*, 537 F.3d 897, 905 & n. 2 (8th Cir.2008).

[5] *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

outcome and sufficient evidence uninfected by error supports the verdict." *United States v. Dickerson*, 248 F.3d 1036, 1048 (11th Cir.2001) (internal quotation marks omitted).

III. DISCUSSION

A. The RLUIPA Standard

Congress enacted the RLUIPA as a response to the Supreme Court's decisions in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), and *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). In *Smith*, the Court held that the Free Exercise Clause typically does not shield religiously motivated conduct from the burdens of generally applicable laws. 494 U.S. at 878-79, 110 S.Ct. 1595. Congress responded three years later by enacting the Religious Freedom Restoration Act ("RFRA"). In an effort to restore the level of protection that religious observances enjoyed before *Smith*, the RFRA commanded that "government" – including state and local governments – "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless such a burden met a "compelling governmental interest" and "least restrictive means" test. 42 U.S.C. § 2000bb-1. In *Flores*, the Supreme Court declared the RFRA's application to the States unconstitutional because it exceeded Congress's

Fourteenth Amendment enforcement power. 521 U.S. at 532-36, 117 S.Ct. 2157.

Mindful of the adage "where there's a will, there's a way," Congress responded to *Flores* with the RLUIPA, predicating its enactment not only on its power to enforce the Fourteenth Amendment, but also on its Spending and Commerce powers. Less sweeping than the RFRA, the RLUIPA targets only two areas: land-use regulation and institutions that receive federal funds. Borrowing the RFRA standard almost entirely, with respect to its protection of institutionalized persons, the RLUIPA commands that:

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a). The Act broadly defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A). Under the RLUIPA, the plaintiff bears the burden to prove that the challenged law, regulation, or practice substantially burdens his exercise of religion. Once a plaintiff

has made this *prima facie* showing, the defendant bears the burden to prove that the challenged regulation is the least restrictive means of furthering a compelling governmental interest. *Id.* § 2000cc-2(b); *Smith v. Allen*, 502 F.3d 1255, 1276 (11th Cir.2007), *abrogated on other grounds by Sossamon v. Texas*, 563 U.S. 277, 131 S.Ct. 1651, 179 L.Ed.2d 700 (2011).

Although the RLUIPA protects, to a substantial degree, the religious observances of institutionalized persons, it does not give courts carte blanche to second guess the reasoned judgments of prison officials. Indeed, while Congress enacted the RLUIPA to address the many "frivolous or arbitrary" barriers impeding institutionalized persons' religious exercise, it nevertheless anticipated that courts entertaining RLUIPA challenges "would accord 'due deference to the experience and expertise of prison and jail administrators.'" *Cutter v. Wilkinson*, 544 U.S. 709, 716-17, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (*quoting* 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sens. Hatch and Kennedy on the RLUIPA)). The 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," and "an accommodation must be measured so that it does not override other significant interests." *Id.* at 722, 125 S.Ct. 2113. The Court further instructed:

> We have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to

> security concerns. While the Act adopts a "compelling governmental interest" standard, context matters in the application of that standard. Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions. They anticipated that courts would apply the Act's standard with due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.

Id. at 722-23, 125 S.Ct. 2113 (internal quotation marks and citations omitted). This deference is not, however, unlimited, and "policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements." *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 533 (11th Cir.2013) (internal quotation marks omitted).

B. Application of the RLUIPA Standard to this Case

The ADOC does not dispute that its hair-length policy substantially burdens Plaintiffs' religious exercise, nor could it. Plaintiffs' expert on Native American spirituality offered extensive, undisputed testimony that long hair has great religious significance for many Native Americans, and each Plaintiff confirmed that his desire to wear unshorn hair stemmed from deep religious convictions. Plaintiffs' expert further

gave an uncontradicted opinion that forcing Native Americans to cut their long hair would amount to an "assault on their sacredness." The sincerity of these firmly-held beliefs – and the gravity of preventing their exercise – should come as no surprise to anyone familiar with Biblical Scripture.[6]

It is also beyond dispute that the ADOC has compelling interests in security, discipline, hygiene, and safety within its prisons and in the public's safety in the event of escapes and alteration of appearances. *Lathan*, 251 Fed.Appx. at 667. The crux of this appeal, then, is simply whether the ADOC's blanket short-hair policy furthers those goals and is the least restrictive means of doing so.

i. In Furtherance of a Compelling Governmental Interest

As to the first RLUIPA prong, Plaintiffs merely mount an attack on the District Court's factual findings and choice to credit the testimony of the ADOC's witnesses. This attack must surely fail, as the detailed

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[6] *See, e.g.*, Judges 16:4-30 (chronicling Delilah's betrayal of Samson, the forced cutting of Samson's hair in contravention to his Nazirite vow, and Samson's subsequent destruction of the Philistine temple); Numbers 6:1-21 (describing the Nazirite vow, which included a promise to refrain from cutting one's hair unless it became defiled by a sudden death that occurred in the Nazirite's presence, and which entailed the shaving of one's head and sacrifice of the hair at the close of one's period of dedication).

record developed during the trial of this case amply supports the District Court's factual findings about the risks and costs associated with permitting male inmates to wear long hair. Ronald Angelone described specific incidents in which male inmates had used long hair to conceal weapons and contraband, as well as a situation in which a male inmate had cut his long hair to significantly change his appearance after a successful escape. Angelone further testified that prison staff have cut their hands on hidden razors when searching male inmates' long hair. In addition, Angelone and Grantt Culliver testified that long hair had concealed male inmates' fungus outbreaks, sores, cysts, and tumors, and even a spider's nest. The ADOC's witnesses also offered credible opinions, based on decades of combined correctional experience, that inmates can grab long hair during fights, long hair impedes the ability of prison staff to readily identify inmates inside the prison, and an exceptionless short-hair policy promotes order and discipline while removing a physical characteristic that inmates can use to form gangs. Plainly, the ADOC's witnesses offered more than simply "speculation, exaggerated fears, or post-hoc rationalizations." Rather, they offered a reasoned and fairly detailed explanation of how the ADOC's short-hair policy addresses genuine security, discipline, hygiene, and safety concerns.

Plaintiffs point out that their witnesses offered competing testimony, but the District Court, as the finder of fact, remained free to reject it. We cannot

say that the District Court clearly erred in its material factual findings with regard to male inmate hair-length.[7] Nor can we say that it arbitrarily ignored the testimony of Plaintiffs' expert when the ADOC's witnesses contradicted his testimony.[8] Given the District Court's factual findings, it is apparent that the ADOC's short-hair policy furthers its compelling interests in security, discipline, hygiene, and safety within its prisons and in the public's safety in the event of escapes and alteration of appearances.

ii. Least Restrictive Means of Furthering the Interest

Plaintiffs cannot prevail on their RLUIPA claim because the ADOC has shown that its exceptionless

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[7] Plaintiffs direct their most vociferous objection toward the District Court's somewhat conclusory finding that the ADOC's current inmate population is "younger, bolder and meaner" than in previous years. We cannot say that this finding was wholly unsupported by the record, since the District Court also found that disciplinary actions increased markedly in 2007. But to the extent that the record was insufficient to support this particular factual finding, the error was harmless because it had no substantial influence on the outcome and sufficient evidence uninfected by error supports the District Court's determination that the ADOC's policy furthers compelling governmental interests. *Dickerson*, 248 F.3d at 1048.

[8] As the ADOC points out in its brief, the District Court may have chosen to discredit George Sullivan's testimony because he has testified in many prisoner religious rights cases, but never on behalf of a prison system, and because he admitted a lack of familiarity with the ADOC's prisons.

short-hair policy for male inmates is the least restrictive means of furthering the compelling governmental interests that we have mentioned. The ADOC has shown that Plaintiffs' proposed alternative – allowing an exemption for Native American inmates, requiring exempted inmates to search their own hair, and using a computer program to manipulate inmate photographs – does not eliminate the ADOC's security, discipline, hygiene, and safety concerns. As the District Court found, inmates can manipulate searches of their own hair to conceal weapons and contraband, and using a computer program to alter photographs does nothing to address the impediments that long hair causes for the identification of inmates within the prisons.

Alternatively, even assuming that the proposed alternative could eliminate the ADOC's concerns as to concealment of weapons and contraband and inmate identification, Plaintiffs' proposed alternative does nothing to assuage the ADOC's concerns about gang-formation and hair-pulling during fights, or the concealment of infections and infestations. Thus, based on these concerns, the ADOC has shown, at the very least, that its short-hair policy, as applied to Plaintiffs, is the least restrictive means of furthering its compelling interests in safety and hygiene. Plaintiffs cannot point to a less restrictive alternative that accomplishes the ADOC's compelling goals, and neither

can we. The ADOC has carried its burden on both RLUIPA prongs.*

We agree with the District Court that *Harris v. Chapman*, 97 F.3d 499 (11th Cir.1996), compels the foregoing analysis. In *Harris*, this Court confronted a Rastafarian inmate's RFRA challenge to the Florida DOC's grooming policy, which, like the policy at-issue here, categorically forbade male inmates from wearing long hair.[9] This Court upheld the short-hair policy, reasoning in regards to the first RFRA prong that "[i]t is well established that states have a compelling interest in security and order within their prisons," and "[t]his general interest in security clearly includes other specific interests . . . such as the identification of escapees and the prevention of the secreting of contraband or weapons in hair or beards." *Id.* at 504. This Court then held that "a reasonable hair length regulation satisfies the least restrictive means test" because neither we nor the plaintiff could conceive of any lesser means that would satisfy these compelling interests. *Id.* So it is in this case. Plaintiffs have not presented any less restrictive alternative that can adequately contain the risks associated with long hair; they have merely argued that the ADOC should volunteer to assume

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* [Editors Note. The 2013 court of appeals opinion does not include the first twenty-two words of the first sentence or the entire second sentence of this paragraph.]

[9] As already mentioned, the RLUIPA essentially borrowed the RFRA standard, and the reasoning in Harris therefore applies with equal force in the RLUIPA context.

those risks. The RLUIPA places upon the ADOC no such duty.

In response, Plaintiffs make three arguments that are worth addressing. First, they argue that the ADOC has failed to satisfy the "least restrictive means" standard because all its witnesses admitted that the ADOC never considered any less restrictive alternatives to its short-hair policy before adopting it. Second, Plaintiffs argue that the widespread adoption of permissive grooming policies in other jurisdictions demonstrates the viability of a religious exemption as a less restrictive alternative. Third, Plaintiffs argue that the ADOC's choice to allow female inmates to wear shoulder-length hair proves that it is able to accommodate their requested religious exemption. All of these arguments are unavailing, and we respond to them in turn.

It is true, as Plaintiffs point out, that some of our sister courts have focused on the RLUIPA's command that prison administrators "demonstrate" the lawfulness of their policies and have held that notwithstanding *Cutter's* deference mandate, prison administrators must show that they "actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *See, e.g.*, *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir.2005); *Spratt v. Rhode Island Dep't of Corr.*, 482 F.3d 33, 41 (1st Cir.2007) (adopting *Warsoldier's* heightened proof requirement); *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir.2007) (same). This, however, is not the law in this circuit, and none of this Court's

cases have adopted *Warsoldier's* more strict proof requirement. The language of the RLUIPA directs us to inquire merely whether the policy under review is the least restrictive means of furthering a compelling governmental interest. It is certainly possible – though perhaps relatively less common – for prison administrators to promulgate an appropriately tailored policy without first considering and rejecting the efficacy of less restrictive measures. The RLUIPA asks only whether efficacious less restrictive measures actually exist, not whether the defendant considered alternatives to its policy. As already explained, the ADOC has shown that no efficacious less restrictive measures exist and has therefore carried its RLUIPA burden.

Plaintiffs' heavy fixation on the policies of other jurisdictions similarly misses the mark. While the practices of other institutions are relevant to the RLUIPA analysis, they are not controlling – the RLUIPA does not pit institutions against one another in a race to the top of the risk-tolerance or cost-absorption ladder. *See Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 534 (11th Cir.2013) (practices of other institutions are relevant but not controlling); *see also Daker v. Wetherington*, 469 F.Supp.2d 1231, 1239 (N.D.Ga.2007) (interpreting the RLUIPA to leave "room for a particular prison to decline to join the 'lowest common denominator' when, in the discretion of its officials, the removal of a challenged restriction poses an appreciable risk to security"). The ADOC has shown that Plaintiffs' requested exemption poses

actual security, discipline, hygiene, and safety risks. That other jurisdictions choose to allow male inmates to wear long hair shows only that they have elected to absorb those risks. The RLUIPA does not force institutions to follow the practices of their less risk-averse neighbors, so long as they can prove that they have employed the least restrictive means of furthering the compelling interests that they have chosen to address. The ADOC has 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. This cannot amount to an RLUIPA violation.

Finally, Plaintiffs' focus on the ADOC's different grooming standards for female inmates ignores the District Court's factual finding – supported by Ronald Angelone's testimony – that men pose greater safety and security risks than women in prison populations. We are not the first court of appeals to uphold a grooming policy that treats male and female inmates differently when the record shows that there are valid reasons for the different treatment. *See, e.g.*, *Fegans v. Norris*, 537 F.3d 897, 905 (8th Cir.2008). Given the District Court's finding that male inmates pose a greater threat than female inmates, the RLUIPA does not require the ADOC to enforce a sex-blind hair-length policy.

C. Plaintiffs' Additional Legal Rights

In a mere two pages at the end of their initial brief, Plaintiffs assert that the ADOC's hair-length restrictions violate their "additional legal rights." Specifically, Plaintiffs claim that the ADOC's hair-length policy violates their free exercise and freedom of association rights under the First Amendment, their constitutional rights to due process and equal protection of the laws, the Establishment Clause of the First Amendment, and their rights under 42 U.S.C. § 1985. Except for their equal protection claim, Plaintiffs provide no supporting discussion and have therefore abandoned these additional issues in this appeal. *See Rowe v. Schreiber*, 139 F.3d 1381, 1382 n. 1 (11th Cir.1998) (issues mentioned in passing but without supporting argument or discussion are abandoned).

Plaintiffs do present a cursory equal protection argument, but it is wholly meritless. Plaintiffs claim that the ADOC's hair-length policy treats them differently than other inmates on the basis of race, religion, and sex. There 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. Furthermore, while the policy does establish different standards for male and female inmates, the record unmistakably shows that the ADOC has valid reasons for the different hair-length standards and the regulations are not arbitrary or unreasonable. *See Hill v. Estelle*, 537 F.2d 214, 215-16 (5th Cir.1976) (upholding differential prison grooming

regulations against an equal protection challenge because "[t]he disparity between the regulations for male and female inmates is not so grievous as to make them arbitrary or unreasonable, cruel or unusual, and the wisdom of the disparate regulations will be left to the judgment of state penologists"); *accord Fegans*, 537 F.3d at 906 (upholding differential prison grooming regulations against an equal protection challenge under a "reasonableness" standard).

IV. CONCLUSION

In the end, Plaintiffs ask us to hold that because many other prison systems have chosen to accept the costs and risks associated with long hair, the ADOC must accept them as well. This we cannot do. Although many well-run institutions have indeed decided that the benefits of giving inmates more freedom in personal grooming outweigh the disadvantages, the RLUIPA does not prevent the ADOC from making its own reasoned assessment. Allowing male inmates to wear long hair carries with it established costs and risks, and the RLUIPA does not require the ADOC to embrace them merely because other institutions have.

The ADOC may, of course, decide in the future that these costs and risks might be worth absorbing, especially in view of the high value that long hair holds for many religious inmates. And the ADOC might also find persuasive James Madison's admonition that "[i]t is the duty of every man to render to the Creator such homage and such only as he believes

to be acceptable to him," and "[t]his duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society." James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), *in* 5 THE FOUNDERS' CONSTITUTION, at 82 (Philip B. Kurland & Ralph Lerner eds., 1987). But that is a decision that the RLUIPA leaves to the discretion of the ADOC's policymakers.

For the foregoing reasons, the judgment of the District Court is

AFFIRMED.

APPENDIX C

2012 WL 777274
Only the Westlaw citation is currently available.

United States District Court,
M.D. Alabama,
Northern Division.

Ricky KNIGHT, et al., Plaintiffs,
v.
Leslie THOMPSON, et al., Defendants.
Native American Prisoners of Alabama – Turtle Wind Clan, et al., Plaintiffs,
v.
State of Alabama Department of Corrections, et al., Defendants.

Civil Action Nos. 2:93cv1404-WHA, 2:96cv554-WHA.
|
March 8, 2012.

Attorneys and Law Firms

Mark Wayne Sabel, Jr., Sabel & Sabel, P.C., Montgomery, AL, Peter Sean Fruin, Maynard Cooper & Gale, PC, Birmingham, AL, Roy S. Haber, Attorney at Law, Eugene, OR, for Plaintiffs.

Joseph David Steadman, Dodson & Steadman, PC, Mobile, AL, Kim Tobias Thomas, Andrew Weldon Redd, Alabama Department of Corrections, James Joseph Dubois, Stephen Michael Doyle, Patricia A. Watson, Peter D. Keisler, U.S. Attorney's Office, Montgomery, AL, Jonathan Eli Zimmerman, Theodore Charles Hirt, Deena S. Fox, US Department of Justice, Washington, DC, for Defendants.

ORDER

W. HAROLD ALBRITTON, Senior District Judge.

This case is before the court on the Recommendation of the Magistrate Judge (Doc. # 530), entered on July 11, 2011, the Plaintiffs' Objection thereto (Doc. # 539), and the Defendants' Response (Doc. # 546).

The court has conducted an independent evaluation and *de novo* review of the file in this case and, having done so, concludes that the objections are not well-taken and are due to be overruled.

The Plaintiffs complain that the Magistrate Judge incorrectly deferred to prison officials in a manner inconsistent with the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) and *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006), in concluding that the Defendants carried their burden to demonstrate the existence of a compelling interest in requiring that inmates' hair be cut short. "The compelling interest standard-under both RLUIPA and the Constitution – is not one of deference but one of proof." (Pl. Objections at 4-5) Of course, the Defendants have a burden of proof on the compelling interest requirement, and the Recommendation fully discussed that. The Plaintiffs' reliance on *Gonzales* is misplaced. The question in that case was whether the Religious Freedom Restoration Act (RFRA) prohibited the government from applying the Controlled Substances Act to ban a religious sect's use of hoasca, a tea containing a hallucinogen, in religious

ceremonies. The Court found, as did the courts below, that the government failed to meet its burden of proof to demonstrate a compelling interest. But *Gonzales* did not involve prisons, and the Plaintiffs ignore the fact that both RFRA and RLUIPA specifically require a court to defer to prison administrators in considering claims of prisoners.

Much of the Plaintiffs' objections are devoted to a discussion of least restrictive alternatives and the fact that other prisons permit long hair. But, as noted in the Recommendation, context matters and what happens in other prison systems is beside the point. What the Plaintiffs want is that the court decouple deference from least restrictive alternative so that these are considered in isolation. That is inconsistent with RLUIPA.

Much of the Plaintiffs' objections are devoted to a demonstration that other prisons have different regulations and that none of the Alabama Department of Corrections's officials' concerns are valid. For the reasons stated in the Recommendation, the fact that other prison officials handle these questions differently is not determinative.

The Plaintiffs argue that the Alabama Department of Corrections' argument premised on lack of staff is "chutzpah." ((Pl. Objections at 49) Put another way, the Plaintiffs argue that the Defendants' lack of ability and money is no reason to violate their rights under RLUIPA. Of course, lack of funding is not an excuse for a denial of rights, but here that is not the

question. Rather, the question is whether the Defendants' hair regulations survive scrutiny under the RLUIPA tests. In applying those tests, the court must do so in a manner which takes into account the reality of Alabama prisons which are facts, not excuses. Those facts inform the answer to whether the regulation meets the compelling interest and least restrictive means requirements. The court agrees with the conclusion of the Magistrate Judge, based on the facts, that the Alabama Department of Corrections' regulations restricting inmate hair length do not violate the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq*.

Accordingly, it is hereby ORDERED as follows:

1. Plaintiffs' Objections are OVERRULED.

2. The Recommendation of the Magistrate Judge is ADOPTED.

3. Final Judgment will be entered in favor of the Defendants and this case DISMISSED with prejudice.

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JAMES LIMBAUGH, et al., Plaintiffs, vs. LESLIE THOMPSON, et al., Defendants.	CIVIL ACTION NO. 2:93cv1404-WHA (WO)
NATIVE AMERICAN PRISONERS OF ALABAMA – TURTLE WIND CLAN, et al., Plaintiffs, vs. STATE OF ALABAMA DEPARTMENT OF CORRECTIONS, et al., Defendants.	CIVIL ACTION NO. 2:96cv554-WHA

RECOMMENDATION OF THE MAGISTRATE JUDGE

I. INTRODUCTION AND PROCEDURAL HISTORY

The plaintiffs in this case[1] are prisoners incarcerated in the Alabama Department of Corrections

[1] The court consolidated this case with one initially filed in the Northern District of Alabama entitled, *Native American*

(Continued on following page)

("ADOC") who are adherents of Native American religion and are challenging, pursuant to 42 U.S.C. § 1983, the ADOC's policies restricting inmate hair length.

This is not the first time these plaintiffs have been before this court. The plaintiffs initially filed suit on November 24, 1993. An evidentiary hearing was held on February 9, 1998, and concluded on February 13, 1998. After the 1998 hearing, the parties announced to the court that they had settled all issues except for the ban on sweat lodges and the ADOC's hair length regulations. *See* Doc. # 193. On June 12, 2000, the court adopted the Report and Recommendation of the Magistrate Judge and entered judgment in favor of the defendants on the sweat lodge and hair length issues. *See* Doc. # 214. The plaintiffs appealed this decision[2] to the Eleventh Circuit Court of Appeals. *See* Doc. # 218.

During the pendency of the appeal, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000, ("RLUIPA"), 42 U.S.C. § 2000cc,

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Prisoners of Alabama v. Alabama Department of Corrections, 94-U-186-NE. *See* Docs. # 92 & 135. The inmate organization which filed this lawsuit objected to the Alabama Department of Corrections ("ADOC's") refusal to provide them with a ceremonial ground, a sweat lodge, sacred plants, and other objects necessary to the practice of their Native American spirituality.

[2] *See* the September 10, 1999 Recommendation of the Magistrate Judge (Doc. # 192) and the district court's June 12, 2000 order adopting the Magistrate Judge's Recommendation (Doc. # 214).

et seq. Based on the potential applicability of RLUIPA to this case, the Eleventh Circuit granted the plaintiffs' motion to remand "to permit the district court to determine whether the new federal statute entitles plaintiffs to the relief that they seek." *See* Doc. 235.

The court allowed the plaintiffs to amend their complaint to add claims under RLUIPA. *See* Doc. # 255. After a brief period of discovery, the defendants filed a motion for summary judgment and supporting brief. *See* Docs. # 281 & 282. The parties also stipulated that additional evidentiary hearings were not necessary. *Id.* The court then affirmed its conclusion that the ADOC's restriction on inmate hair length was the least restrictive means of furthering its compelling governmental interests in prison safety and security, and granted the defendants' motion for summary judgment on this issue. *See* Docs. #309 and 317.

The plaintiffs again appealed this decision to the Eleventh Circuit Court of Appeals. *See* Doc. # 408. The Eleventh Circuit subsequently remanded this case for further development of the record.

> With regard to plaintiffs' hair-length-restriction claims, we conclude that on the present record factual issues exist as to whether, *inter alia*, the defendants' total ban on the wearing of long hair and denial of an exemption to the plaintiffs based on their Native American religion is "the least restrictive means of furthering [the defendants'] compelling governmental interest[s]"

> in security, discipline, hygiene and safety within the prisons and the public's safety in the event of escapes and alteration of appearances. *See* 42 U.S.C. § 2000cc-1(a)(2). In addition, we note that the evidentiary record relating to the hair-length claims is over ten years old and that, in the intervening time, prison staffing and administration, prison safety and security, and the prison population in Alabama have changed. We, thus, vacate and remand to the district court 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 Fed. Appx. 665, 666 (11th Cir. 2007).[3]

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[3] On April 21, 2011, the United States Supreme Court decided *Sossamon v. Texas* ___ U.S. ___, 131 S.Ct. 1651 (2011). On April 22, 2011, the court directed the parties to brief the effect, if any, *Sossamon*, *supra* has on the issues pending before the court. After careful review and consideration, the court concludes that *Sossamon*, *supra*, has no impact on the issues before the court. *Sossamon* concluded that States that accept federal funds do not waive their sovereign immunity for the purpose of monetary damages claims under RLUIPA, 565 U.S. at, 131 S.Ct. at 1655. Consequently, the defendants are immune from monetary damages in their official capacities.

More importantly, however, all of the plaintiffs' claims for monetary damages have previously been dismissed.

> As to plaintiffs' claims for monetary relief, defendants are entitled to qualified immunity in their individual capacities because RLUIPA was not enacted until long after this lawsuit began and the law with regard

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The sole remaining issue before the court in this most recent chapter of this litigation is whether the ADOC's policies restricting inmate hair length pass muster under RLUIPA.[4] The defendants argue that the policies restricting hair length are in furtherance of and are the least restrictive means of furthering their compelling governmental interests in security, order, safety, and health. The inmates argue that the record clearly supports the conclusion that the ADOC's policies are not the least restrictive means of furthering those compelling governmental interests.

After a lengthy evidentiary hearing and careful review of the briefs and evidence filed in support of and in opposition, the court concludes that the plaintiffs have made a prima facie showing that they are

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> to Native American inmates' rights to hold sweat lodge ceremonies under RLUIPA or the Constitution was not clearly established at the time the sweat-lodge ban was implemented. Furthermore, the defendants are entitled to sovereign immunity with regard to plaintiffs' official capacity claims.

Lathan, 251 Fed. Appx. at 666. For the same reasons, the defendants are entitled to qualified immunity with regard to the plaintiffs' hair length claim.

[4] None of the plaintiffs' constitutional claims remain before the court. Even if the constitutional claims remained, the plaintiffs would be entitled to no relief. Because the regulations survive RLUIPA, they also survive a constitutional challenge. "If a prison regulation passes muster under RLUIPA, however, it will perforce satisfy the requirements of the First Amendment, since RLUIPA offers greater protection to religious exercise than the First Amendment offers." *Smith v. Allen*, 502 F.3d 1255, 1264 fn 5 (11th Cir. 2007).

sincere adherents of Native American spirituality whose religious exercise has been substantially burdened by the ADOC's policies restricting inmate hair length. The court further finds 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.

III. [sic] **LEGAL STANDARDS**

The substantive portions of RLUIPA provide that "[n]o government shall impose a substantial burden on the religious exercise" of prisoners unless the government can demonstrate that the burden both serves a compelling governmental interest and is the least restrictive means of advancing that interest. 42 U.S.C. § 2000cc-1(a). *See also Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005).

> To establish a prima facie case under Section 3, a plaintiff must show: (1) that he engaged in a religious exercise, and (2) that the religious exercise was substantially burdened by a government practice. *See* [*Smith v. Allen*, 502 F.3d 1255], 1276 [(11th Cir. 2007)]. "The plaintiff bears the burden of persuasion on whether the government practice that is challenged by the claim substantially burdens the exercise of religion." *See id.* (quotation marks, alteration, and ellipsis omitted). If the plaintiff establishes a prima facie case, the government must show that the challenged government practice is "in furtherance of a compelling governmental interest"

> and "is the least restrictive means of furthering that compelling governmental interest." *Id.* (quoting 42 U.S.C. §§ 2000cc-1(a), 2000cc-2(b)). Context matters in the application of the compelling governmental interest standard. *Cutter v. Wilkinson*, 544 U.S. 709, 723, 125 S.Ct. 2113, 2123, 161 L.Ed.2d 1020 (2005). The standard is applied with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Id.*

Muhammad v. Sapp, 388 Fed. Appx. 892, 895 (11th Cir. 2010).

The plaintiffs bear the initial burden of demonstrating that by maintaining and wearing their hair long, they are engaged in a religious exercise, and that the defendants' grooming policies substantially burden that exercise. If the court determines that the challenged prison regulations substantially burden an inmate's religious expression, the burden then shifts to the defendants to prove that the regulations further a compelling governmental interest. *See* 42 U.S.C. § 2000cc-1(a)(1). The defendants must first establish the existence of a compelling governmental interest. The court then evaluates whether a defendant's policies satisfy RLUIPA's requirement that they be the least restrictive means of furthering that compelling governmental interest. *See* 42 U.S.C. § 2000cc-1(a)(2).

Although the defendants bear the burden of proof on the compelling interests and the least restrictive means prongs of the Act, the law is well established that prison officials are entitled to deference on issues relating to good order, security and discipline.[5]

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[5] The standard of review of the defendants' regulations has evolved since the inception of this lawsuit. When the activities which ultimately resulted in the filing of this lawsuit occurred, the rational-basis test outlined in *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987), was the indisputable standard for evaluating prison regulations which affected a prisoner's ability to freely practice his or her religion. The *O'Lone* standard permits the promulgation of policies restricting a prisoner's free exercise of religion if the regulation is "reasonably related to legitimate penological interests." 482 U.S. at 349.

Shortly before this lawsuit was filed, Congress enacted the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et. seq*. Congress' stated purpose in enacting this legislation was to create a more favorable standard of review for plaintiffs challenging policies burdening the free exercise of religion. Under the standard outlined in RFRA, prison officials could promulgate policies which substantially burden the free exercise of religion only if the regulation was "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. Thereafter, the Supreme Court, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), declared RFRA unconstitutional and resurrected the rational basis test articulated in *O'Lone.*

Congress, in response, enacted RLUIPA and adopted the "compelling governmental interest and least restrictive means" standard emphasizing the need to "apply the Act's standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures, to maintain good order, security and discipline,

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> We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override significant interests. . . . While the Act adopts a "compelling governmental interest" standard, see *supra*, at 2118, "[c]ontext matters" in the application of that standards. See *Grutter v. Bollinger*, 539 U.S. 306, 327, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions. See, *e.g.*, 139 CONG. REC. 26190 (1993) (remarks of Sen. Hatch). They anticipated that courts would apply the Act's standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures, to maintain good order, security and discipline, consistent with consideration of costs and limited resources." JOINT STATEMENT 16699 (quoting S. REP. NO. 103-111, at 10, U.S. CODE CONG. & ADMIN. NEWS 1993, pp 1892, 1899, 1900).

Cutter, 544 U.S. at 722-23 (footnotes omitted) (alterations in original).

The court is mindful of its responsibility to avoid substituting its own judgment for that of prison

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consistent with consideration of costs and limited resources." *Cutter*, 544 U.S. at 723.

administrators. It is not the court's duty to select on its own the least restrictive alternative but rather to defer, within reason, to the judgment of prison administrators. *DeMoss v. Crain*, 636 F.3d 145 (5th Cir. 2011). *See also Beard v. Banks*, 548 U.S. 521, 528 (2006) ("As *Overton* [*v. Bazzetta*, 539 U.S. 126 (2003)], . . . pointed out, courts owe "substantial deference to the professional judgment of prison administrators.")

IV. [sic] **DISCUSSION**

(1) Jurisdictional Requirement

One method of satisfying RLUIPA's jurisdictional requirement involves a determination of whether the allegedly substantially burdensome prison regulations are imposed in a "program or activity" which receives federal financial assistance.[6] *See* 42 U.S.C. § 2000cc-1(b)(1). The parties do not dispute that the ADOC receives a percentage of funding from the federal government for various programs and projects implemented in the prison system. Consequently, the court finds that the plaintiffs' claims fall within RLUIPA's jurisdictional ambit.

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[6] Because jurisdiction is established under 42 U.S.C. § 2000cc-1(b)(1), the court does not address the alternate method of establishing jurisdiction under 42 U.S.C. § 2000cc-1(b)(2).

(2) The Prima Facie Case

(a) Religious exercise. The plaintiffs resist cutting their hair on religious grounds. Consequently, the plaintiffs are required to demonstrate that their preference for unshorn hair is a religious exercise of Native American spirituality which is substantially burdened by the ADOC' s policies. *See* 42 U.S.C. § 2000cc-2(b). RLUIPA defines the term "religious exercise" as including "*any exercise of religion*, whether or not compelled by, or central to, a system of religious belief." 42 U. S.C. § 2000cc-5(7)(A) (emphasis added). *See also Smith v. Allen*, 502 F.3d 1255, 1276-77 (11th Cir. 2007) ("religious exercise" broadly defined). In this case, the unrebutted testimony demonstrates, and the court finds, that a preference for unshorn hair is a central tenet of Native American spirituality and thus, satisfies the Act's broad definition of a religious exercise. Relying on Deward Walker ("Walker"), the plaintiffs' proffered expert on Native American religious practices, the court finds that unshorn hair is of utmost importance to those adhering to a traditional Native American lifestyle.[7] Plaintiffs Douglas Darkhorns Bailey and Michael Clem

[7] Although Walker indicated that not all Native Americans wear their hair long, he also testified that "forcible cutting of a contemporary American Indian's hear would be about as severe a threat to the person as you can possibly imagine." (Evid. Hrg. Tr., Jan. 21, 2009, R. 91). The court finds that long hair has religious significance to American Indians and cutting that hair, as Walker testified, is "an assault on their sacredness." (*Id.* at 92, 100).

testified at the 2009 evidentiary hearing. After careful consideration of their testimony, the court makes the following findings of fact. Cutting of Native Americans' hair has spiritual and religious significance. Prison regulations requiring short hair diminish the ability of the plaintiffs to approach their Creator with honor.[8] Cutting their hair detracts from their abilities to practice their religion, because when their hair has been cut, they feel separated and disconnected spiritually during their religious ceremonies. (Evid. Hr'g. Tr. at 9-11, 28). For example, one plaintiff cut his hair very short as a sign of mourning when his mother died. (*Id.* at 27).

The defendants do not challenge the centrality of these religious beliefs nor do they question the plaintiffs' sincerity. Moreover, the record clearly supports, and the court finds, that unshorn hair cannot reasonably be interpreted as merely a preference which the plaintiffs have conveniently labeled as religious for purposes of this litigation. Based on RLUIPA's expansive definition of religious exercise and the testimony in this case which establishes that the plaintiffs sincerely believe that unshorn hair is integral to the practice of their religion, the court concludes that the ADOC regulations at issue in this case affect the plaintiffs' exercise of religion.

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[8] *See* Evid. Hrg. Tr., Douglas Darkhorns Bailey, Jan. 21, 2009, R. 9-13; Evid. Hrg. Tr., Thomas Adams, Jan. 21, 2009, R. 45-47; Evid. Hrg. Tr., Franklin Running Bear Irvin, Jan. 21, 2009, R. 52-54.

(b) Substantial burden. The next question for the court is whether the prison regulations "substantially burden" the inmates' religious exercise. In *Midrash Sephardi, Inc.*, the Eleventh Circuit explained that

> "substantial burden" requires something more than an incidental effect on religious exercise. . . . [A] "substantial burden" must place more than an inconvenience on religious exercise; a "substantial burden" is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.

Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004). Stated another way, "the governmental action must significantly hamper one's religious practice." *Smith*, 502 F.3d at 1277.

The court finds that the involuntary cutting of the plaintiffs' hair substantially burdens the practice of their religious exercise. (Evid. Hr'g Tr., Thomas Otter Adams, R. 46). Plaintiff Adams described the cutting of his hair as "severely" impacting his ability to practice his religion. (*Id.* at 47).

> . . . [W]hen we set there in ceremony and our effort is to get a prayer through with a prayer pipe, all of our ceremonies are connected. All way of living, our religion, beliefs that it's

> the circle. If there is part of that missing, when we meet the Creator then we stand before Him with shame on our face. I don't want to meet my Creator with that shame on my face.
>
> It's that way in the prisons. I don't want to meet my Creator with that shame on my face. That I haven't lived the truth. That I haven't lived the traditional way of life. I may never get out of prison again. This is my only chance. . . . There are great consequences, eternal consequences, Eternal consequences for not doing that.

(*Id.*)

Plaintiff Michael Clem testified that cutting his hair was a substantial burden on the practice of his religious exercise.

> Q: And how serious a burden is it for you and your religious practices to have to cut your hair?
>
> A: Well, I'm cutting off a part of myself. I mean, the Creator, GOD, give me the hair for me, to help in my spirituality. It's part of my condition, not just with God, but with everything, all creation. If I start cutting my hands off, my toes, my feet, the same with my hair.
>
> Q: But does your hair have – that has an additional significance, an additional spiritual religious significance to you, is that correct?

> A: Well, its hard to explain, actually, the symbolics of it, because like I said, it's like my energy source. It's how I connect with everything. It's like if somebody asks me to do a sweat, I tell them I am not capable of doing it. I mean, instead of doing a two hour ceremony I may do it fifteen minutes because I have so much negative, I have so much animosity.

(*Id.* at 29).

Plaintiff Franklin Running Bear Irvin testified that "the growing of our hair in the spiritual sense is a connection between us and Our Creator and the spirit world. To sever that connection would hinder and burden because it would sever that spiritual connection, just like the cutting of Mother Earth's hair." (*Id.* at 53). Thus, the court finds that cutting the hair of adherents of Native American religion substantially burdens the practice of their religious exercise.

The defendants argue that prison regulations restricting inmate hair length are not substantially burdensome because the ADOC permits Native American inmates to participate in a panoply of other religious practices. In short, the ADOC argues that the substantial burden inquiry does not focus on a specific or isolated religious practice, like hair length, but on whether the plaintiffs' ability to *comprehensively practice* their Native American spirituality is substantially burdened.

As already noted, the court finds that long hair is a central tenet of Native American spirituality of which the plaintiffs are sincere adherents. Additionally, the court finds that the ADOC's restrictive policies prevent the plaintiffs from exercising fundamental religious beliefs. Accordingly, the court concludes that, as a matter of law, the ADOC's curtailment of these religious practices substantially burden the plaintiffs' Native American spirituality.

In reaching this conclusion, the court rejects the ADOC's position that the plaintiffs are not substantially burdened because prison officials allow them to exercise their Native American spirituality through other means. This argument is based on an assumption that all aspects of Native American spirituality are interchangeable and of equal importance. This assumption is clearly unsupported by the record, and contrary to the court's findings of fact. The ADOC's interpretation of the "substantial burden standard," which would permit prison officials with limited knowledge and familiarity with Native American spirituality to unilaterally determine the interchangeability of various religious practices despite expert testimony to the contrary, is inconsistent with RLUIPA's purpose of prohibiting frivolous or arbitrary rules restricting inmate religious practices. *See* S. REP. NO. 57775 (July 27, 2000). The existence of alternate expressions of Native American spirituality does not obviate the centrality of the religious practices at issue in this case. *Cf., Blanken v. Ohio Dep't of Rehab. & Corr.*, 944 F. Supp. 1359, 1365-1366 (S.D.

Ohio 1996) (rejecting defendant's claim that plaintiff was not substantially burdened based on the availability of other religious practices).

Consequently, the court concludes that the plaintiffs have satisfied their prima facie burden of demonstrating that the ADOC's regulations restricting hair length substantially burdens the practice of their Native American spirituality.

3. Application of the Compelling Interests and Least Restrictive Means Prongs

With the plaintiffs having established that the ADOC's policies substantially burden the plaintiffs' exercise of their religion, the burden now shifts to the defendants. They must prove that the grooming restrictions further a compelling governmental interest and that those restrictions are the least restrictive means of furthering those compelling interests. *See* 42 U.S.C. § 2000cc-1(a)(1)(2).

a. Compelling Interests. The ADOC identified several compelling interests that are furthered by enforcing hair length restrictions including security and order, discipline, safety, health, hygiene and sanitation, and prevention of the introduction of contraband.

In accordance with the Eleventh Circuit's remand, the court held an evidentiary hearing on

January 21, 22 and 23, 2009.[9] Based on the testimony at the hearing and the evidence presented, the court makes the following findings of fact which establish the context for applying the laws. In September 2008, the jurisdiction population[10] of the ADOC was 29,959 inmates.[11] *See* Defs' Ex. 8.[12] The ADOC houses 25,303

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[9] At the conclusion of the hearing, the parties requested additional time to file post-hearing briefs. Thereafter, *Thunderhorse v. Pierce*, 364 Fed. Appx. 141 (5th Cir. 2010), a RLUIPA case involving forced hair cuts, was appealed to the United States Supreme Court. The case was held over and the Solicitor General's opinion was sought before *certiorari* was denied. ___ U.S. ___, 131 S.Ct. 896 (Jan. 10, 2011).

Also pending before the United States Supreme Court was *Sossamon v. Texas*, ___ U.S. ___, 130 S.Ct. 3319 (May 24, 2010). On April 21, 2011, the United States Supreme Court decided *Sossamon v. Texas*, concluding that States that accept federal funds do not waive their sovereign immunity for the purpose of monetary damages claims under RLUIPA, 565 U.S. ___, ___, 131 S.Ct. 1651, 1655 (2011).

[10] Jurisdictional population is defined as "all inmates serving time within ADOC facilities/programs, as well as in the custody of other correctional authorities, such as county jails, other State DOCs, Community Correction Programs, Federal Prisons, and Privately Leased Facilities." *See* Page 1, Alabama Department of Corrections, Monthly Report, Legend.

[11] According to their website, the inmate population of the ADOC on June 15, 2011, was 28,043 male inmates and 2332 female inmates for a total of 30,375 inmates. (http://www.doc.state.al.us/inmsearch.asp).

[12] Defendants' Exhibit 8 is the ADOC's September 2008 Monthly Statistical Report. It was admitted into evidence at the hearing without objection. The ADOC also publishes on its website current monthly reports. The February 2011 monthly report indicates a jurisdictional population of 31,885, with 26,628 inmates in custody and 25,320 inmates housed in ADOC

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inmates.[13] *Id.* ADOC facilities are designed to hold 13,403 inmates. (*Id.*). Consequently, the number of inmates being housed by the ADOC exceeds the statewide design capacity by 188.8%. At the end of 2007, "all correctional institutions housed nearly double the number of inmates that the facilities were designed to hold." (Defs' Ex. 9 at 19, Evid. Hr'g.). The statewide overcrowding index was at 196.5%. (*Id.*) In addition, disciplinary actions increased by 62% in 2007; there were 18,226 disciplinaries issued that year. (*Id.* at 20).

While the prisons remained overcrowded, the ADOC was also understaffed. Although the ADOC added 440 correctional personnel during 2007, it also lost 332 officers. (*Id.* at 33). In 2007, the ADOC was authorized 3672 correctional officers but could only fill 2675 positions. Consequently, the ADOC was operating at a shortfall of 997 correctional personnel which equates to a vacancy in one of every four positions. (*Id.* at 34).

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facilities. (http://www.doc.state.al.us/docs/MonthlyRpts/2011-02.pdf) A review of the monthly reports from 2009 until February 2011 demonstrate that the number of inmates housed by the ADOC has increased during that time period. (http://www.doc.state.al.us/reports.asp)

[13] Inmates housed by the ADOC are those inmates in custody and located within correctional facilities owned and operated by the ADOC. *See* Page 1, Alabama Department of Corrections, Monthly Report, Legend.

Between 1997 and 2007, the inmate population of the ADOC increased by 23%; it added 6478 inmates.[14] Except for the years 2000 and 2004, the number of admissions to the ADOC outpaced the number of releases by almost 5000 offenders. (*Id.* at 35). Finally, almost 50% of inmates were incarcerated for felonies against persons. (*Id.*)

The law is well established that security, order, and discipline are compelling governmental interests. *See Cutter*, 544 U.S. at 722-23 (security concerns constitute compelling governmental interests); *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989) (security, order and rehabilitation are compelling governmental interests); *Johnson v. California*, 543 U.S. 499, 512 (2005) (prison security and discipline are compelling governmental interests).

The defendants first argue that the compelling governmental interest in security is furthered by being able to quickly and correctly identify inmates. The hair length restrictions promote and are necessary to enable the defendants to maintain this security interest. Based on the evidence presented, the court finds that long hair can be used by inmates to alter

[14] The only year the population of the ADOC did not increase was 2004, and the reason for that decrease was the convening of a second parole board charged with increasing the number of non-violent offenders on parole. (Defs' Ex. 9, at 35, Evid. Hr'g).

their appearance to prevent or hinder identification.[15] Long hair impedes the ability of officers to quickly identify inmates moving through the prison yard, dining halls and dormitory areas. Officers are better able to correctly identify inmates when their hair is shorter. (Evid. Hr'g Tr. at 61). The need to identify inmates quickly and accurately is heightened when the prisons are operating with a shortage of correctional officers. Additionally, the court finds that hair length can be used by inmates to identify with "special groups" including gangs. (*Id.* at 26). The grooming policies enable prison administrators to reduce gang association by requiring all inmates to have short hair. Thus, the court concludes that the defendants have demonstrated a compelling governmental interest in security[16] that is furthered by the accurate and swift identification of inmates.

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[15] The plaintiffs argued extensively that a less restrictive means of furthering the compelling governmental interest of identification would be through the purchase and use of the Photoshop computer program which allows a user to manipulate a digital photograph. According to the plaintiffs, Photoshop would allow the ADOC to manipulate inmate photographs to predict any potential alteration to an inmate's appearance in the case of escape. Beyond the practical matters of cost and training, the use of Photoshop does not alleviate the ADOC's compelling governmental interest in swift, accurate identification of inmates who are incarcerated.

[16] In *Cutter*, the Court found that preventing violence in prisons is a compelling governmental interest. 544 U.S. at 723, fn. 11. Gang affiliations often result in violence. Thus, the hair length restrictions, which impede the inmates' abilities to

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The defendants also argue that preventing weapons and other contraband from entering the prisons promote the compelling governmental interests of security and order. The court finds that long hair can be used as a means of hiding weapons[17] or other contraband. There is an increased likelihood that inmates with long hair could more easily conceal in their hair weapons including pieces of razors or wires, as well as other types of contraband. Requiring correctional officers to search long hair for contraband or weapons constitutes a safety and health hazard to the correctional officers. The court also finds that requiring inmates to search their own hair does not assuage this concern because an inmate

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associate with gangs, further the compelling governmental interest of preventing violence.

[17] During the evidentiary hearing, counsel for the plaintiffs brought out evidence that the hair length regulation was different for women prisoners than men. The plaintiffs argue that sex based differential application of a hair length regulation demonstrates that any asserted security reason is false. The plaintiffs ignore testimony presented during the hearing which shows that male prisoners constitute a greater threat than female prisoners. Furthermore, the female inmate population is significantly lower than the male inmate population. For example, the Julia Tutweiler Prison for Women housed 729 female inmates in 2007 while the majority of male inmate facilities each exceeded 1000 inmates. (Defs' Ex. 8, Evid. Hr'g).

Both the Third and Sixth Circuits have concluded that differential hair length regulations in prisons are constitutionally permissible. *Dreibelbis v. Marks*, 742 F.2d 792, 795-96 (3rd Cir. 1984); *Pollock v. Marshall*, 845 F.2d 656, 659-60 (6th Cir. 1988).

secreting contraband in long hair can manipulate the search to avoid detection of the contraband. Long hair exacerbates the difficulty of and length of time necessary to search for contraband, which is of particular concern to the ADOC because of their reduced number of correctional officers. The court therefore concludes that the defendants have demonstrated that the compelling governmental interests in security and order are furthered by the hair length restrictions which prevent "the secreting of contraband or weapons in hair or beards." *Harris v. Chapman*, 97 F.3d 499, 504 (11th Cir. 1996).

Based on the record before the court, including the testimony of Gwendolyn Mosley, the Institutional Coordinator for the ADOC, Ronald Angelone, the defendants' expert witness, and Warden Culliver, the court finds that hair length restrictions further the compelling governmental interest in security by allowing the defendants to maintain control, order, and discipline in the prisons.

> Order is the fabric that any system runs by . . . The strands that bring it together are the policies and procedures that are put into place for safety, security and health reasons to be able to run that environment so that everyone, from every waking moment that an individual is living there or working there, they know exactly what to expect, and then they make their own individual decisions on how they are going to react to those policies and procedures. And by reacting correctly in a mature manner, whether its those

> living there or those working there, is able to provide an orderly system for people to exist in a safe environment.

(*Id.* at 45).

The plaintiffs suggest in their brief that the defendants did not introduce evidence that security concerns support the hair length regulations. This suggestion is simply incorrect. The court finds that inmates today are "younger, bolder and meaner" and it is necessary to instill discipline and order to control these inmates because violence is prevalent in prisons. (Evid. Hr'g Tr. at 29). Furthermore, the court finds that long hair is a danger because it can be used in a fight. For example, an inmate could "grab a handful" of hair, pull and cause serious injury. (*Id.* at 69). Mosley testified that "long hair creates problems . . . [in] fights, [inmates] can pull the hair." (*Id.* at 27). Angelone testified that long hair is a safety and security concern during fights. (*Id.* at 52).

The court also finds that ADOC is presently understaffed and overcrowded.[18] Mosley testified that the ratio of correctional officers to inmates is presently 10 to 1. (*Id.* at 28). In light of staff shortfalls, the court finds that maintaining order and discipline in the prisons is critical to ensuring safety for staff and

[18] Although the parties argued about the methodology and applicability of staffing studies, it was undisputed that Alabama prisons are overcrowded and understaffed.

inmates.[19] Uniformity within the institutions also instills discipline and promotes order by exercising some control over the inmates. (*Id.* at 146, 148, 153, 158).

> We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it *does not override* other significant interests.

Cutter, 544 U.S. 722 (emphasis added).

The court concludes therefore that the ADOC has demonstrated a compelling governmental interest in security and order that encompasses maintaining a safe and controlled environment.

The court also finds that the ADOC's grooming policies promote health, hygiene and sanitation which further compelling governmental interests in cost containment and health care costs which are a significant concern in the current economic environment.[20]

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[19] As previously noted, in 2007, the ADOC personnel had initiated 18,226 disciplinary actions against inmates.

[20] The court can take judicial notice of the current economic climate, including the budgetary woes of the State of Alabama. "A fact may be judicially noticed only if it is not subject to reasonable dispute, either because it is generally known within the district court's territorial jurisdiction or because it can be accurately and readily determined using sources whose accuracy cannot reasonably be questioned." *United States v. Gregory*, 2009 WL 205549, *2 (11th Cir. 2009). *See also* FED.R.EVID. 201(b) ("A judicially noticed fact must be one not subject to

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See Muhammad, 388 Fed. Appx. at 896-97. *See also DeMoss*, 636 F.3d at 153. The court finds that the hair length restrictions promote cleanliness and reduce health care costs. Angelone testified that inmates with long hair have found cysts and sores on their heads, and on at least one occasion, an inmate found a spider living in his hair. (*Id.* at 52). The court finds that short hair promotes health and hygiene by making it easier to detect infections and infestations as well as reduce the spread of infections and infestations. (*Id.* at 33). Reduced infections and infestations also reduce the ADOC's health care costs. Thus, the court concludes that the hair length restrictions further the compelling governmental interests in cost containment and health care costs.

Clearly, Alabama has compelling governmental interests in security and safety in their correctional facilities. The grooming policies that restrict hair length further those interests by maintaining order and discipline, preventing violence, hindering the introduction of contraband into the prisons, and enabling the prompt and accurate identification of inmates. The hair length restrictions also promote the health, hygiene and sanitation of its inmates which reduces health care costs and furthers the defendants' compelling governmental interest in cost containment and reducing health care costs. These policies are especially compelling in the context of

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reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court . . . ")

prisons which are overcrowded and understaffed. Thus, the court concludes that the ADOC has demonstrated compelling governmental interests in the areas of security and order, and cost containment and reduction of health care costs.

It may appear to some that it is ironic for the court to conclude that overcrowding in Alabama's prisons is in part a justification for holding that the plaintiffs' rights under RLUIPA may be curtailed. In other words, it is ironic that a constitutional violation can justify a statutory violation. But the irony would truly exist only if overcrowding alone were a constitutional violation. Plainly it is not. Overcrowding of prisons is not per se unconstitutional. *See Rhodes v. Chapman*, 452 U.S. 337, 347-50 (1981); *Collins v. Ainsworth*, 382 F.3d 529, 540 (5th Cir. 2004).

> Some conditions of confinement may establish an Eighth Amendment violation "in combination" when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise – for example, a low cell temperature at night combined with a failure to issue blankets.

Wilson v. Seiter, 501 U.S. 294, 304 (1991).

Brown v. Plata, ___ U.S. ___, 131 S.Ct. 1910 (2011), is not to the contrary. *Plata* cannot be read to hold that overcrowding alone is a violation of the Eighth Amendment. The three judge panel's order

affirmed by the Court required a reduction in California's prison system's population to 137.5% of design capacity. Had the Court found overcrowding itself to be a Constitutional violation, it could not have approved a remedy that permitted continued overcrowding.

Rather, the Court found that medical and mental health care in California's prisons were Constitutionally inadequate and that efforts to remedy that violation were frustrated by overcrowding.

> Overcrowding has overtaken the limited resources of prison staff; imposed demands well beyond the capacity of medical and mental health facilities; and created unsanitary and unsafe conditions that make progress in the provision of care difficult or impossible to achieve. The overcrowding is the "primary cause of the violation of a Federal right," 18 U.S.C. § 3626(a)(3)(E)(I), specifically the severe and unlawful mistreatment of prisoners through grossly inadequate provision of medical and mental health care.

Plata, ___ U.S. ___, 131 S.Ct. at 1923.

Indeed, *Plata's* litany of the ills suffered by California's prison system supports the court's conclusion in the instant case. The consequences of overcrowding in California's prisons include (1) increased, substantial risk for transmission of infectious illness, (2) a suicide rate approaching an average of one per week, (3) failure to provide even

minimal treatment to mentally ill inmates, and (4) severely deficient medical treatment for physical illnesses including the infliction of unnecessary pain. *Plata* holds that overcrowding in California's prisons was the cause of these unconstitutional conditions and prevented implementing a remedy for them. As the court has explained, the overcrowded and understaffed prisons in Alabama increase the difficulties prison guards face daily in controlling inmates and securing order within the prisons. Adopting the plaintiffs' position could exacerbate the consequences of overcrowding by placing increased pressure on already strained security measures. Congress through RLUIPA surely did not intend such a result.

b. Least restrictive means. Finally, the court concludes that the defendants have demonstrated that the grooming policies are the least restrictive means to further the compelling governmental interests in security and order and cost containment and reduction in health care costs. Courts have consistently held that prison grooming regulations restricting inmate hair length are the least restrictive means of advancing compelling governmental interests in maintaining prison security and order. *See Brunskill v. Boy*, 141 Fed. Appx. 771 (11th Cir. 2005) (prison policies requiring plaintiff to cut hair did not violate RLUIPA); *Harris*, 97 F.3d at 504. The hair length restrictions are the least restrictive means of maintaining uniformity, impressing order and discipline on prison inmates, preventing gang affiliation and reducing prison violence, hindering the introduction

of contraband into the prisons, and enabling the prompt and accurate identification of inmates. The hair length restrictions are also the least restrictive means of promoting the health, hygiene and sanitation of its inmates and furthers the defendants' compelling governmental interest in cost containment and reducing health care costs.

More importantly, the court is bound by the Eleventh Circuit's holding in *Harris v. Chapman*, *supra*. *Harris* was decided under RFRA, but RLUIPA essentially adopts RFRA's compelling interest/least restrictive means standard, and the plaintiffs have not otherwise distinguished the facts of this case. The court is compelled to follow *Harris* and other cases applying RFRA to regulations as well as RLUIPA cases. In *Harris*, the court upheld the Florida Department of Corrections policy which mandated that all inmates have their hair cut short to medium length. *Id.* In explaining its reasoning, the court indicated "we are unable to suggest any lesser means than a hair length rule for satisfying these interests. . . . we thus join these courts in finding that a reasonable hair length regulation satisfies the least restrictive means test." *Harris*, 97 F.3d at 504.

In addition, *Harris's* holding is consistent with decisions of other courts which hold that prison grooming regulations restricting inmate hair length are the least restrictive means of advancing the substantial governmental interest in maintaining

prison security and order. Almost every court[21] that has considered hair length restrictions have upheld prison hair length restrictions as permissible under RLUIPA. *See DeMoss*, *supra* (Texas state prison grooming policies do not violate RLUIPA); *Thunderhorse*, *supra* (hair length policies were least restrictive means of protecting State's compelling interest in maintaining security, and thus, did not violate RLUIPA); *Williams v. Snyder*, 367 Fed. Appx. 679 (7th Cir. 2010) *cert denied,* ___ U.S. ___, 131 S.Ct. 343 (2010); *Smith v. Ozmint*, 396 Fed. Appx. 944 (4th Cir. 2010) (grooming policy least restrictive means to further compelling governmental interest); *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008) (hair length policies for men do not violate RLUIPA); *Hamilton v. Schriro*, 74 F.3d 1545, 1555, n. 12 (8th Cir. 1996) (collecting cases); *Longoria v. Dretke*, 507 F.3d 898 (5th Cir. 2007) (prison system's hair length policies do not violate RLUIPA). *See generally Smith v. Kyler*, 295 Fed. Appx. 479, 483 (3rd Cir. 2010) ("DOC has demonstrated that the restrictions [regarding paid chaplains to certain groups] are the least restrictive means of advancing a compelling governmental

[21] In *Warsoldier v. Woodford*, the Ninth Circuit held that the California Department of Corrections' grooming policy "intentionally puts significant pressure on such inmates as [the plaintiff] to abandon their religious beliefs by cutting their hair, [and thus,] . . . imposes a substantial burden on [the plaintiff's religious practice." 418 F.3d 989, 996 (9th Cir. 2005). This case is inapposite to the case at bar. The parties do not argue in the case before the court that the ADOC grooming policies pressure inmates to abandon their religious beliefs.

interest"); *Gooden v. Crain*, 353 Fed. Appx. 885 (5th Cir. 2009) (grooming regulations requiring inmates to be clean shaven are least restrictive means of furthering compelling governmental interest in security and do not violate RLUIPA); *Couch v. Jabe*, 5:10cv72 (W.D. Va. Apr. 21, 2011) (same).

The plaintiffs argue that numerous other jurisdictions and the Federal Bureau of Prisons permit long hair.[22] The fact that other jurisdictions permit long hair is insufficient by itself to demonstrate that the ADOC's grooming policies are not the least restrictive means of furthering compelling governmental interests in this state.

> Although prison policies from other jurisdictions provide some evidence as to the feasibility of implementing a less restrictive means of achieving prison safety and security, it does not outweigh the deference owed to the expert judgment of prison officials who are infinitely more familiar with their own institutions than outside observers.

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[22] On April 8, 2011, the United States filed a Statement of Interest (doc. # 523) urging the court to require the defendants to "formulate a new policy that accounts for Defendants' obligations under RLUIPA." (Doc. # 523 at 2). The court notes that the United States filed its Statement of Interest over two years after the evidentiary hearing, and almost a year after briefing was complete. However, the United States simply regurgitates the plaintiffs' arguments, referencing the parties' briefs. Argument of counsel is of course not a substitute for evidence.

Hamilton, 74 F.3d at 1557 n. 15 (8th Cir. 1996); *Fegans*, 537 F.3d at 905.

The court must apply RLUIPA "in an appropriately balanced way, with particular sensitivity to security concerns." *Cutter*, 544 U.S. at 722. "Context matters" when determining whether the defendants have demonstrated that the hair length restrictions are the least restrictive means of further compelling governmental interests being "mindful of the urgency of discipline, order, safety, and security in penal institutions." *Id.* at 723. Here, the context is what occurs in Alabama's prisons, not prisons in other places. The court has carefully considered the evidentiary material, arguments and briefs of the parties, and finds that the ADOC's grooming regulations are the least restrictive means to further the compelling governmental interests in security and order in Alabama's overcrowded, understaffed and underfunded prisons.

In reaching this conclusion, the court is cognizant of its duty to accord "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Id.* The court may not substitute its judgment for that of the prison officials. *See Hoevenaar v. Lazaroff*, 422 F.3d 366, 370-71 (6th Cir. 2005). Accordingly, the court concludes, as a matter of law, that the ADOC's regulations restricting inmate hair length do not violate RLUIPA.

IV. CONCLUSION

Based on the foregoing analysis, the RECOMMENDATION of the Magistrate Judge is as follows:

1. That the Court find that the Alabama Department of Corrections' policies restricting inmate hair length does not violate the Religious Land Use and Institutionalized Persons Act of 2000.

2. That the Court enter judgment in favor of the defendants and against the plaintiffs; and

3. That the Court dismiss this action with prejudice.

It is further

ORDERED that the parties shall file any objections to the said Recommendation on or before July 25, 2011. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation to which the party objects. Frivolous, conclusive or general objections will not be considered by the District Court. The parties are advised that this Recommendation is not a final order of the court and, therefore, it is not appealable.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a de novo determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of

plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982). *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981, *en banc*), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Done this 11th day of July, 2011.

/s/ Charles S. Coody
CHARLES S. COODY
UNITED STATES
MAGISTRATE JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 12-11926-DD

MATTHEW LATHAM, et al.,

Plaintiffs,

RICKY KNIGHT,
FRANKLIN IRVIN,
TIMOTHY GRAY WOLF SMITH,
DOUGLASS DARK HORNS BAILEY,

Plaintiffs-Appellants,

THOMAS OTTER ADAMS,
suing individually and on behalf of a class of persons similarly situated,
BILLY TWO FEATHERS JONES,
suing individually and on behalf of a class of persons similarly situated,
MICHAEL CLEM,

Consol. Plaintiffs-Appellants,

NATIVE AMERICAN PRISONERS OF ALABAMA – TURTLE/WIND CLAN, et al., suing individually and on behalf of a class of persons similarly situated,

Consol. Plaintiffs,

UNITED STATES OF AMERICA,

Intervenor Plaintiff-Interpleader,

versus

LESLIE THOMPSON,
in his individual capacity,
DONALD PARKER,
CHAPLIN,
WILLIE JOHNSON,
DEWAYNE ESTES, et al.,

Defendants-Appellees,

WILLIAM S. STRICKER,
BILLY MITCHEM,
LT. ESTES,
NEAL W. RUSSELL, et al.,
individually and in their official capacity,

Consol. Defendants-Appellees.

ON SUPREME COURT REMAND

Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed Nov. 4, 2015)

BEFORE: HULL and ANDERSON, Circuit Judges, and SCHLESINGER*, District Judge.

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* Honorable Harvey E. Schlesinger, United States District Judge for the Middle District of Florida, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ FRANK M. HULL
UNITED STATES CIRCUIT JUDGE

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APPENDIX F