No. 13-6827

In The
Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A ABDUL MAALIK MUHAMMAD,

Petitioner,

v.

RAY HOBBS, DIRECTOR, ARKANSAS
DEPARTMENT OF CORRECTION, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit**

BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS AND HUY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Arkansas Department of Correction's grooming policy violates the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et seq. (2006), to the extent that it prohibits Petitioner from growing a one-half-inch beard in accordance with his religious beliefs.

PARTIES TO THE PROCEEDINGS

Petitioner is Gregory Houston Holt, a/k/a Abdul Maalik Muhammad. Respondents are six employees of the Arkansas Department of Correction:

Director Ray Hobbs

Chief Deputy Director Larry May

Warden Gaylon Lay

Major Vernon Robertson

Captain Donald Tate

Sergeant Michael Richardson

All respondents are sued in their official capacities only.

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The National Congress of American Indians and Huy respectfully submit this *amici curiae* brief in support of Petitioner.[1]

INTERESTS OF *AMICI CURIAE*

Amicus Curiae National Congress of American Indians (NCAI) is the oldest and largest national organization representing the interests of American Indians and Alaska Natives, with a membership of more than 250 American Indian tribes and Alaska Native villages. NCAI was established in 1944 to protect the rights of Indian tribes and to improve the welfare of American Indians, including religious and cultural rights. In courtrooms around the nation and within the halls of Congress, NCAI has vigorously advocated for Native American religious freedom, including passage of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et seq. (RFRA) and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc et seq. (RLUIPA).

[1] Pursuant to Rule 37.3 of the Rules of the Supreme Court, this brief is filed with the blanket consent of both parties to the filing of *amicus curiae* briefs in support of either party or of neither party. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Amicus Curiae Huy is a nationally recognized non-profit organization established to enhance religious, cultural, and other rehabilitative opportunities for imprisoned American Indians, Alaska Natives and Native Hawaiians (collectively hereafter referred to as "Native" or "Native People"). In the traditional Coast Salish language known as Lushootseed, the word huy (pronounced "hoyt"), means: "See you again/we never say goodbye." Huy's directors include, among others, the President of the National Congress of American Indians, elected chairpersons of federally recognized tribal governments, a former Washington State legislator, and the immediate past Secretary of the Washington State Department of Corrections. In addition to funding and supporting Native prisoner religious programs, Huy advocates for Native prisoners' religious rights in federal courts, state administrative rulemakings, and through testimony and reports to the United Nations.

This case presents issues vital to Native cultural survival. As the American Indian Religious Freedom Act acknowledged, "[T]he religious practices of the American Indian . . . are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems." 42 U.S.C. § 1996. As such, religious practice is the cornerstone of Native culture and has held Native communities together for centuries. Walter Echo-Hawk, *Native Worship in American Prisons*, 19.4 CULTURAL SURVIVAL Q. (Winter 1995), *available at* http://www.culturalsurvival.org/ourpublications/csq/article/

native-worship-americanprisons. At the same time, approximately 29,700 American Indian and Alaska Natives are incarcerated in the United States. Todd D. Minton, JAILS IN INDIAN COUNTRY, 2011 (Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice) Sept. 2012, *available at* http://bjs.gov/content/pub/pdf/jic11.pdf. Native People in the United States have the highest per capita incarceration rate of any racial or ethnic group, at 38 percent higher than the national rate. Christine Wilson Duclos & Margaret Severson, *American Indian Suicides in Jail: Can Risk Screening be Culturally Sensitive?*, RESEARCH FOR PRACTICE (Nat'l Inst. of Justice, Office of Justice Programs, U.S. Dep't of Justice) June 2005, *available at* https://ncjrs.gov/pdffiles1/nij/207326.pdf; Lawrence A. Greenfeld & Steven K. Smith, AMERICAN INDIANS AND CRIME (Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice) Feb. 1999, *available at* http://bjs.gov/content/pub/pdf/aic.pdf. This stands in stark contrast to historical accounts from the 1700s and 1800s detailing Native communities virtually devoid of crime and where prisons were non-existent. *See* Sharon O'Brien*, The Struggle to Protect the Exercise of Native Prisoner's Religious Rights*, 1:2 INDIGENOUS NATIONS STUDIES J. 29, 31 (Fall 2000).

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." Echo-Hawk, *supra*. For these reasons, Tribal governments share with federal, state and local governments the penological goals of repressing criminal activity and facilitating rehabilitation in order to prevent habitual criminal offense. *See* National Congress of American Indians Res. No. REN-13-005 (June 27, 2013).[2]

Much like the Muslim prisoner in the case *sub judice*, prison grooming policies are a persistent, undue barrier for Native prisoners' religious practice. Like the beard sought by Petitioner here, wearing unshorn hair is an ancient and significant religious practice for Native People. However, by implementing grooming policies that mandate short hair, devoid of religious exemptions, some prison officials force Native inmates to make a Hobson's choice: abandon their sacred religious practice, or undergo either forced haircuts or punishment for non-compliance with grooming policies.

[2] No other group faces more regulation in the time, place, and manner of religious exercise than Native People. While most Americans are very accustomed to free access to their churches and places of worship, Native People have the opposite experience. For Native People, certain prayers and ceremonies must be held in sacred places, which are often located on Federal lands and Natives must seek permission to access those places for ceremony. Echo-Hawk, *supra*. Moreover, use and possession of sacred objects, such as eagle feathers, peyote and animal parts is often the subject of comprehensive federal and state laws and regulations. *Id*.

One such case is currently pending on a Petition for Writ of Certiorari, *Knight v. Thompson*, 13-955 (Petition for Cert. filed Feb. 6, 2014). There, inmates are prevented from wearing long hair consistent with their Native religion, despite the fact that female inmates may wear long hair and more than 80 percent of prison systems accommodate the religious practice of unshorn hair in a less restrictive manner than an exemptionless ban. *See* Dawinder Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 955 (2012); *see also Cutter v. Wilkinson,* 544 U.S. 709, 725 (2005) ("For more than a decade, the Federal Bureau of Prisons has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners.") (quoting brief for the United States).

Thus, as the Court decides the instant case, addressing how a prison grooming policy must be tailored to meet RLUIPA's strict scrutiny standard, *Amici* NCAI and Huy step forward to provide critical context and information to the Court on the impacts of prison grooming policies on Native prisoners and the preservation of Native religious practice.

SUMMARY OF THE ARGUMENT

Judicial application of strict scrutiny is essential to ensuring the rights of minority religious practitioners in prisons, especially Native prisoners. This standard, codified in RLUIPA, has ensured important protections for prisoners seeking relief in the courts where prison officials impose regulations unduly restricting their religious practices. Much like the Muslim prisoner seeking to wear a beard in this case, grooming policies have been particularly burdensome for Native prisoners because hair is a basic feature of their religious practice, especially long hair. In fact, the centrality of hair to Native religion made it a target of federal policies explicitly aimed at eliminating Native religion and culture altogether. Forced haircuts feature prominently in this unfortunate history and became particularly pronounced in state prisons, where intolerance persisted even after the United States abandoned its official "civilization" policies for Natives.

Prison officials have long repeated the same justifications for restrictive grooming policies: "safety, security and hygiene." These justifications have remained largely the same throughout the decades, only the standard by which they are judged has shifted. In the 1970s, when Native prisoners began challenging these policies, courts applying strict scrutiny recognized them as pretextual and based merely in fear and speculation. As more institutions were forced to accommodate Native religious practice, some began to recognize the benign, non-threatening

nature of long hair and voluntarily relaxed their policies.

However, when the Court handed down *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), which articulated a rational basis standard rather than strict scrutiny for prisoner religious rights claims, many prison systems swiftly began constricting minority religious practices again. Importantly, when the restrictions were challenged, courts applying the extremely deferential rational basis standard were forced to accept the same "safety, security and hygiene" rationalizations that were largely regarded as pretextual prior to *O'Lone*.

As the initial cases applying the *O'Lone* rational basis test were reported, prison officials became increasingly brazen in erecting barriers for minority religious practitioners. Additionally, decisions in *Employment Division v. Smith,* 494 U.S. 872 (1990) and *Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1988), made clear that the same low bar would be set for government burdens on religious practice outside of prison walls. Thus, after years of hearings, Congress became increasingly concerned about the undue barriers erected by prison officials and provided a statutory means to obtain strict scrutiny review by enacting RFRA and RLUIPA. Since their passage, the vast majority of prisons have tailored grooming policies in order to accommodate practices such as long hair and beards and have done so without interfering with penological interests. Nevertheless, a small number of prison officials, like

Respondents here and in *Knight*, continue to perpetuate penological myths, sounding a false alarm of "safety, security and hygiene," even though those penological interests are achieved when applying non-religious exemptions. Moreover, the concerns claimed by Arkansas and Alabama prison officials have simply not been a reality in the jurisdictions where long hair and beards are allowed. Most concerning, several courts within the Eighth and Eleventh Circuits are misapplying RLUIPA, reducing its strict scrutiny mandate to rational basis, thereby subverting RLUIPA's purpose: providing protection for minority religious practitioners to the maximum extent possible. The detrimental effects of restrictive grooming policies and misapplication of RLUIPA are felt especially in Native communities, who have the highest per capita incarceration rates, have suffered extraordinary religious discrimination and, therefore, depend on the rehabilitative aspects of Native religious practice to return Native prisoners to their communities as productive and culturally viable. In order for the Congressional intent of securing minority religious practice in the prison context to be fully realized, this Court should reverse.

ARGUMENT

I. JUDICIAL APPLICATION OF STRICT SCRUTINY WAS ESSENTIAL TO ENSURING THE RIGHT OF MINORITY RELIGIOUS PRACTICE IN PRISONS, ESPECIALLY FOR NATIVE PEOPLE, AND *O'LONE* RESULTED IN DRASTIC RESTRICTIONS BY PRISON OFFICIALS.

In 1987, this Court handed down the landmark decision in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). Just a few days before, in *Turner v. Safley*, 482 U.S. 78 (1987), a case addressing a prisoner's right to marry and engage in prisoner-to-prisoner correspondence, the Court held that lower courts had erred in applying a strict scrutiny test to prison regulations restricting the fundamental rights of prisoners. *Turner*, 482 U.S. at 81. In reviewing a claim by New Jersey Muslim prisoners seeking access to Jumu'ah, a Muslim prayer service held on Friday afternoon, *O'Lone* further made clear that lower courts also erred by applying strict scrutiny when prisons restricted the religious exercise of prisoners with generally applicable regulations. *O'Lone*, 482 U.S. at 344-45. Instead, the *O'Lone* Court held the proper test was the rational basis standard. *O'Lone*, 482 U.S. at 344-45.

The *O'Lone* decision was a watershed moment for minority religious practitioners imprisoned throughout the United States, who had come to rely upon courts to apply strict scrutiny in protection of their religious rights. This was especially true of

Native People, who had fended off an oppressive weight of religious discrimination for centuries and continued to encounter severe restrictions on their religious practices in prison. In the years that followed, application of *O'Lone*, particularly with regard to prison grooming policies, rolled back much of the protections afforded to religious minorities in prison, especially Native People.

A. Restriction of Native prisoners' religious exercise was a vestige of historic discrimination against Native People and Native prisoners had secured substantial judicial relief prior to *O'Lone*.

The *O'Lone* decision dramatically weakened progress made by Native prisoners seeking accommodations of their unique religious practices. The plight of Native prisoners was due to the United States' shameful legacy of religious discrimination against Native People that had become particularly entrenched in state prison systems. In a scholarly review of the ways in which the United States "legally" discriminated against Native religion, Senator Daniel K. Inouye, then-Chairman of the Senate Committee on Indian Affairs, described this discrimination as "commonplace." Senator Daniel K. Inouye, *Discrimination and Native American Religion*, 23 UWLA L. REV. 3, 13 (1992).

Ever since the Republic's founding, forced haircuts and imprisonment have been specific modes of governmental religious discrimination against Native

People. Recognizing the centrality of religious life to Native People, the United States targeted and outlawed specific religious practices in an effort to control individual Natives and eradicate Tribes. John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13, 22-23 (1991). In a calculated effort to extinguish Native culture, the United States historically outlawed traditional practices and ceremonies, punishing practitioners with imprisonment and starvation. *See* Inouye, *supra*, at 3, 13-14.

Hair is an ancient and deeply rooted facet of Native religion. *See Warsoldier v. Woodford*, 418 F.2d 989, 999 (9th Cir. 2005); *Hamilton v. Schriro,* 74 F.3d 1545, 1547 (8th Cir. 1996); *Iron Eyes v. Henry*, 907 F.2d 810, 813 (8th Cir. 1990); *Kemp v. Moore,* 946 F.2d 588 (8th Cir. 1991); *Teterud v. Burns*, 522 F.2d 357, 359-60 (8th Cir. 1975); *see also* Expert Report of Deward Walker, Ph.D. (*Knight v. Thompson*, No. 2:93cv1404-WHA) (M.D. Ala. 2008) (R471-PEX 2) at ¶¶ 4-8 (hereafter "Walker Report"). It has religious significance for all Native groups and uncut hair is of particular religious significance. Walker Report, *supra*, ¶¶ 4-8. Uncut hair symbolizes and embodies the knowledge a person acquires during a lifetime and may be cut only upon the death of a close relative. *Warsoldier*, 418 F.2d at 999; *Teterud*, 522 F.2d at 359-60; O'Brien, *supra*, at 39. Hair is braided to express the integration of mind, body and spirit. O'Brien, *supra,* at 39. Also, it is common for specific hair preparations to be part of Native religious rituals and ceremonies. Walker Report, *supra*. Therefore,

unshorn hair is not only an important practice in and of itself, it is also required to participate in other religious rites, such as the sacred observance of a loved one's death, when the hair is cut ceremonially. Thus, when a Native's hair is cut involuntarily, it prevents him from practicing many facets of his religion. Moreover, forced haircutting desecrates the body and spirit and is the supreme confiscation of personal dignity. *See* O'Brien, *supra*, at 39.

Due to its religious significance, United States officials implementing an explicit "kill the Indian, in order to save the man" federal policy, utilized forced haircutting to coerce Native People away from their traditional religion, even into the Twentieth Century. Walker Report, *supra*, at ¶ 5; *see also* Jill E. Martin, *Constitutional Rights and Indian Rites: An Uneasy Balance*, 3:2 WESTERN LEGAL HISTORY 245, 248 (Summer/Fall 1990); *Let All That is Indian Within You Die!*, 38(2) Native Am. Rts. Fund Legal Rev. (Summer/Fall 2013), at 5-7.[3] This ethnocentric

[3] These overtly discriminatory policies ended in the mid-Twentieth Century, but infringement on Native religious liberty persisted, necessitating a succession of laws in the latter Twentieth Century crafted to protect Native religion and culture. Among these was the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1993 amendments at 42 U.S.C. § 1996a), which explicitly recognized that First Amendment religious liberty protection had never worked for Native People, thus requiring a specific federal law preserving their religious rights. Other laws crafted to remedy this shameful legacy include, the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001 et seq., the Indian Arts and

(Continued on following page)

approach of "helping" Natives manifested in prisons as well, where rehabilitation of Native prisoners meant stripping them of cultural identity and religion in favor of mainstream Christian religion and assimilation into the majority society. Echo-Hawk, *supra*.

Maltreatment of Native prisoners' religious practice only began to shift in the early 1970's as the result of voluminous litigation. Echo-Hawk, *supra; see, e.g., Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975) (holding Native prisoner has a first amendment right to exercise his religion by wearing his hair long); *Gallahan v. Hollyfield*, 516 F. Supp. 1004 (E.D. Va. 1981) (same), *aff'd*, 670 F.2d 1345 (4th Cir. 1982). The genesis of that litigation was the wearing of traditional hairstyles in Nebraska prisons. In 1972, Nebraska prisons, like many others at the time, provided no accommodation for Native religious practices. When a deputy warden was offended by Native prisoners cutting their hair into traditional Mohawk styles, the Native prisoners were threatened with solitary confinement unless they cut their hair. Elizabeth S. Grobsmith, INDIANS IN PRISON: INCARCERATED NATIVE AMERICANS IN NEBRASKA 38 (1994). The inmates filed a class action lawsuit, *Indian Inmates of the Nebraska Penitentiary v. Vitek*, CV 72-L-156 (D. Neb. filed April 12, 1972), and the resulting consent

Crafts Act of 1990, 25 U.S.C. §§ 3005 et seq., the National Historic Preservation Act, 16 U.S.C. §§ 470 et seq., and the Archeological Resource Protection Act, 16 U.S.C. §§ 470aa et seq., RFRA and RLUIPA.

decree, issued in 1974, became a touchstone for how prison officials elsewhere could accommodate the religious needs of Native inmates. Judgment and Decree, *Indian Inmates of the Nebraska Penitentiary v. Vitek*, CV 72-L-156 (D. Neb.) (docketed October 31, 1974), reprinted in Grobsmith, *supra*, at Appx. A.

Over the decade-and-a-half following the *Vitek* case, courts substantially increased protections for traditional Native religious practices in prison. Another case, filed the year after the *Vitek* consent decree, illustrates the typical arguments of prison officials restricting unshorn hair and how courts disposed of the cases. Jerry Teterud, who was Cree, challenged Iowa's prison regulations requiring short hair. *Teterud v. Burns*, 522 F.2d 357, 358-59 (8th Cir. 1975); *see also* O'Brien, *supra*, at 39 (analyzing *Teterud* within the context of Native prisoner First Amendment cases). Iowa claimed that short hair was necessary for sanitary food preparation, safe operation of machinery, easy identification, prevention of contraband smuggling and personal hygiene. *Teterud*, 522 F.2d at 361. The Eighth Circuit found that the prison officials' claims were devoid of substance and overly broad. *Id.* The court pointed out that there were a variety of less restrictive means to achieve these interests: hair nets, rules requiring hair to be kept neat and clean, re-photographing inmates for identification and body searches. The court pointedly concluded, "Justifications founded only on fear and apprehension are insufficient. . . ." *Id.* at 361-62.

Moreover, as both the benefits and benign nature of Native religious practices became better understood, several jurisdictions provided improved accommodations voluntarily. *See* Echo-Hawk, *supra*. Even the warden-defendant in the landmark Nebraska case began testifying in support of Native prisoners seeking religious accommodations. His statements in a 1985 Utah case, *Roybal v. Deland*, Nos. C-87-0208A & C-87-8208G (D. Utah 1989), about his experience in Nebraska after the consent decree bears particular significance in light of present prison claims regarding grooming policies:

> [W]hat I did see specifically . . . [was] that a lot of Indians, not all of them, developed a great deal of self-esteem and pride in themselves. *There was an apparent increase in what I call good grooming*, the clothing, . . . there seemed to be a prideful thing that was kind of fun to watch. Sense of identity if you will.

Motion for Leave to File Brief *Amicus Curiae*, *Roybal v. Deland*, Nos. C-87-0208A & C-87-8208G (D. Utah 1989) (filed Jan. 31, 1989).

Given all the progress made in securing respect and accommodation for their traditional religious practices, Native prisoners and their supporters were put on their heels by *O'Lone*. Unfortunately, as the next six years would demonstrate, their fears were well justified.

B. *O'Lone* resulted in prison officials resuming past restrictions on the religious practices of Native prisoners.

Emboldened by *O'Lone*, prison officials began reinstating previous restrictions on Native religious practices with impunity. Native prisoners attempting to wear long hair or engage in other traditional practices, such as sweat lodge, were routinely subjected to egregious and unnecessary treatment by their jailors and afforded no judicial protection. The detrimental application of rational basis was particularly pronounced in the Eighth Circuit, as vividly demonstrated in two cases from the post-*O'Lone* period, *Iron Eyes v. Henry*, 907 F.2d 810 (8th Cir. 1990) and *Kemp v. Moore*, 946 F.2d 588 (8th Cir. 1991).

Robert Iron Eyes, a Standing Rock Sioux, had only five haircuts in his twenty-seven years: three in mourning for the death of a loved-one and two at the hands of his jailors. *Iron Eyes*, 907 F.2d at 811. He was raised in the ways of the Sioux culture and had followed the traditional practices of Sioux religion since his youth. *Id.* As such, he believed that his hair was a gift from the Great Spirit, and that cutting it was an offense to the Creator, except when done so in mourning. *Id.*

When he entered Missouri's Farmington Correctional Facility on a parole violation in October 1987, prison officials ordered him to get a haircut, although he was never ordered to do so during a previous one-year term. *Id*. at 812. When Iron Eyes refused, he

was sent to disciplinary segregation, where he was shackled, handcuffed and subjected to a forced haircut. *Id.* at 812, 816. Iron Eyes described the experience:

> Just before Christmas Maj. Harris, Capt. Rosenburg and about 9 or 10 other guards handcuffed me behind my back real hard and put leg shackles on me and made me go in a room with all of them. Then they shoved a table in front of the door so nobody could get out. Then, Dan Henry, the Asst. Supt. said that I am going to get a haircut one way or the other and that they didn't care if I was Geronimo. I told them that the courts also said us Indians could keep our hair and Dan Henry said for me and the court to go and fuck ourselves [sic]. I am sorry about that word but that is what he really said.
>
> Well, Dan Henry, Maj. Harris, Capt. Rosenburg and the guards all took my leg shackles and handcuffs real hard and held me down and this inmate barber named Earl Wells came over and cut my hair into a raggedy mess. That is when they all started laughing and Maj. Harris said that now I could get some white religion.

Iron Eyes, 907 F.2d at 817.

As pointed out in the dissent, at least one prison barber referred to the forced haircuts of Native inmates as "scalping." *Id.* at n.14. Ten months later, he was ordered to get another haircut and this time obtained a restraining order from the Federal District

Court. It also came to light that Mr. Iron Eyes' request for a religious exemption was never communicated by prison officials to the proper authorities. *Iron Eyes*, 907 F.2d at 817.

In an effort to skirt the court's restraining order, while awaiting a hearing on the merits the prison placed Iron Eyes in solitary confinement, "not for not cutting his hair, but for disobeying a direct order to cut his hair." *Id.* at 817.

The court's decision was not determined by any of these facts, however. Instead, and in contrast to *Teterud*, the court narrowly focused on whether the prison officials' justifications could conceivably further their penological interests. Notably, applying rational basis, the court did not engage in an individualized, searching inquiry into the facts of Mr. Iron Eyes' case. For example, while prison officials objected to long hair because inmates could purportedly change their appearance, the court found it "incredulous" that prison officials did not simply rephotograph him during one of the periods that his hair was short, but nevertheless, applying rational basis, found their concerns "*rationally related*" to security interests. *Id.* at 814. Thus, the court was constrained to accept the assertions of prison officials simply at face value, which the dissenting judge found alarming. *Id.* at 823.

Therefore, although decided by the same court as *Teterud* and addressing the same types of oppressive conduct, backed by unsubstantiated rationalization,

the *Iron Eyes* case was distinguishable because the court had to apply *O'Lone*'s lower standard. *Iron Eyes*, 907 F.2d at 813. Thus, *Iron Eyes* signaled that highly deferential review would permit extraordinary conduct by prison officials. The case notified prison officials that they could impose severe restrictions, enforce them in a brutal manner and proceed virtually unchecked by simply waving the flag of "safety and security."

Iron Eyes was not an isolated case. Prison officials that took the court's cue became bolder, as can be seen in a case that followed. Stephen Kemp, who was Chickasaw, was incarcerated in the Missouri State Penitentiary, a maximum security prison, for the first four years of his imprisonment, where he was allowed to wear long hair consistent with his traditional religion. *Kemp*, 946 F.2d at 589. After four years, his security level was *reduced* and he was transferred to a minimum security prison, Farmington Correctional Center – the same facility as Henry Iron Eyes – where he was ordered to get a haircut. *See id.* He refused and presented verification of his exemption. *Id.* Nevertheless, the superintendent ordered guards to forcibly shear his hair and disciplinary charges resulted in reduction of his work wages. *Kemp*, 946 F.2d at 589; *see also* Laurence French, NATIVE AMERICAN JUSTICE 123-24 (2003). The resulting opinion was a terse, unequivocal reiteration of the *Iron Eyes* precedent as informed by the *O'Lone* standard.

Senior Judge Gerald W. Heaney, who dissented in *Iron Eyes*, wrote that he was constrained by precedent to concur, but that: "This case smacks of harassment and religious persecution. . . . " *Kemp*, 946 F.2d at 589 (Heaney, S.J., concurring). The judge was confounded by the lack of explanation by prison officials as to why long hair purportedly interfered with penological interests at a lower security facility and not at a maximum security prison. *Kemp*, 946 F.2d at 589. Although there were obvious less restrictive means that could be employed, these were outside the bounds of rational basis inquiry. Tragically, the low bar set by *O'Lone* and amplified in *Iron Eyes* meant the courts gave Mr. Kemp no protection and he was forced to abandon a core tenet of his traditional religion.

O'Lone's impacts continued further in this prison system. In the wake of *Iron Eyes* and *Kemp*, Missouri prisons did away with religious exemptions for long hair altogether. *See Holmes v. Schneider*, 978 F.2d 1263 (8th Cir. 1992). Thus, the increased restrictions brought about by *O'Lone* came full circle into an all-out ban. Any relief would have to come from Congress.

II. CONGRESS ENACTED RLUIPA TO BROADLY PROTECT THE RELIGIOUS PRACTICES OF PRISONERS TO THE "MAXIMUM EXTENT" POSSIBLE.

In *Employment Division v. Smith,* 494 U.S. 872 (1990), this Court held that a state law prohibiting

the use of peyote, as applied to the religious use of peyote by members of the Native American Church, did not violate the Free Exercise Clause. The Court determined that a valid, neutral, and generally applicable law is not invalidated under the Free Exercise Clause merely because it burdens religious practice. *Id.* at 890. As it had in *Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1988) (upholding U.S. Forest Service building roads through and permitting timber harvesting within an area traditionally used for Native American religious ceremonies), the Court declined to apply the strict scrutiny test from *Sherbert v. Verner,* 374 U.S. 398 (1963), whereby governmental actions that substantially burden a religious practice must be justified by a "compelling governmental interest" that cannot be furthered by any less restrictive means.

The results in *Smith* and *Lyng* made it clear that, even for those not imprisoned, certain government burdens on religious exercise would be subject to rational basis review – the lowest level of judicial scrutiny, which Justice Stevens later lamented amounts to no review by the Court whatsoever. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 323 (1993) (Stevens, J., concurring). *Smith* in particular provided the catalyst for Congress to enact RFRA, and in turn RLUIPA, which codify the strict scrutiny test. Specifically, section 3 of RLUIPA prohibits state and local governments from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution . . . unless the

government 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).

A. Despite Congress' clear mandate, the Arkansas Department of Correction and the Alabama Department of Corrections persist in maintaining overly-restrictive grooming policies in violation of RLUIPA.

Currently, the overwhelming majority of prison systems in the United States now have permissive grooming policies, or exemptions which accommodate the needs of various minority religious practitioners – some at their own initiative, others at the behest of the courts. *See* Sidhu, *supra*, at 948, 955. Regardless of the impetus of these policy changes, accommodation by prison officials for facial hair, or the wearing of long hair, for religious reasons has proven to be benign, despite dire warnings from a handful of penal institutions. *Id.* at 961. This small number of intransigent prison systems cling to punitive treatment for violation of their restrictive grooming policies based on "speculation, exaggerated fears, [and] post-hoc rationalization," which RLUIPA was crafted to remedy. *See* Joint Statement of Senator Orrin Hatch and Senator Edward Kennedy on Religious Land Use and Institutionalized Persons Act, 146 Cong. Rec. 16698, 16699 (2000).

As can be seen in cases reaching back to *Iron Eyes* and *Kemp*, and continuing through to the present with *Holt* and *Knight* pending on review before this Court, the common refrain from prison officials in defense of their refusal to provide religious exemptions to restrictive grooming policies has been: Safety; Security; and Hygiene. However, on closer inspection, this common refrain rings hollow in measuring up to RLUIPA's rigorous standard.

1. Prison officials rely on speculative fears to substantiate their compelling interest claims, which are not borne out by the experiences of well-run, more accommodating institutions. In *Holt,* the Arkansas Department of Correction officials claimed compelling interests in safety and security, fearful that Petitioner could secret contraband in his beard but could not give a single example, from Arkansas prisons or anywhere else, where beards had interfered with those interests. *See* Brief for the Petitioner at 28-31, 32. They admittedly had no knowledge of the policies and experiences of other well-run prisons. *Id.* Similarly, they could not give any examples where their other concerns – such as shaving a beard to change appearance or exemptions fomenting the resentment of other inmates – that had actually occurred anywhere. *Id.* at 8-9.

Likewise, in *Knight*, the Alabama Department of Corrections' (ADOC) asserted a compelling penological interest in safety, claiming that prisoners could secret contraband in their long hair. However, out of the thousands of inmates housed in prisons

with more permissive grooming policies, ADOC could only point to purported incidents from an out-of-control, admittedly chaotic Virginia prison system to support its claim. *See Knight v. Thompson*, 723 F.3d 1275, 1279 (11th Cir. 2013). Similarly, ADOC's only support of its interest in hygiene was an unverified story of a prisoner with dreadlocks who had a spider nest in his hair and worries that long hair could conceal scalp sores or tumors – an issue that would presumably be posed in its women's prisons, which allow long hair. *Id.* All of the evidence specific to Alabama on the compelling interest element articulated fears of what might happen based on speculation. Not a single concrete example was offered that actually occurred in the State of Alabama, let alone with reference to the Native prisoners seeking relief. Surely, the claims of these prison officials are the type of "frivolous or arbitrary" barrier, grounded in speculation and exaggerated fears, to which Congress referred when passing RLUIPA and demanding tougher scrutiny by the courts. *See* Joint Statement, *supra*.

2. Prison officials fail to conduct the required individualized inquiry. Proper strict scrutiny analysis is applied with regard to the specific person seeking a religious exemption. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (applying RFRA's strict scrutiny application); *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (explaining RLUIPA's strict scrutiny standard is carried over from RFRA). Non-specific, speculative

assertions by prison officials fail that test. Nevertheless, defenses advanced by prison officials never demonstrated how employing a less restrictive alternative for *the specific inmate-plaintiffs* was infeasible. Without that particularized explanation, a court is left with only "speculation, exaggerated fears, [and] post-hoc rationalizations," which neither prison officials nor reviewing courts may rely upon.

Here, prison officials explained their belief as to why a religious beard exception was unworkable generally in Arkansas, but did not offer any explanation with reference to Mr. Holt specifically. Also, the Magistrate made no conclusions or findings as to why *Mr. Holt* could not be afforded a religious exemption for his beard. *See* Brief for the Petitioner at 54-55. RLUIPA demands case-by-case consideration of religious exemptions. *O Centro*, 546 U.S. at 436. Therefore, a fundamental aspect of the required burden and analysis was not even addressed.

In *Knight*, ADOC claimed that allowing long hair in female prisons but not male prisons was allowable because male inmates are generally more violent. ADOC never attempted to demonstrate how employing a less restrictive alternative for *the specific inmate-plaintiffs* was infeasible. All of the evidence presented discussed generalities in Alabama prisons and any analysis specific to the Native prisoners bringing the claim was conspicuously absent from the Eleventh Circuit's opinion.

3. Prison officials failed to examine and consider less restrictive measures successfully implemented in other prison systems. *See Warsoldier v. Woodford*, 418 F.2d 989, 999 (9th Cir. 2005) (citing *U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 824 (2000) (finding, in context of First Amendment challenge to speech restrictions, that "[a] court should not assume a plausible, less restrictive alternative would be ineffective"); *Spratt v. Rhode Island Dep't of Corrections*, 482 F.3d 33, 41 (1st Cir. 2007); *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007); *contrast Knight*, 723 F.3d at 1285-86 (holding that the heightened level of proof adopted in other circuits is not the law of the Eleventh Circuit).

In both *Holt* and *Knight*, the lower courts simply accepted the unsubstantiated assertions of prison officials that those measures and alternatives were unworkable. The prison officials in *Holt* could not explain what made Arkansas so different from the 44 prison systems that would allow Mr. Holt's beard. Similarly in *Knight*, when it came to evaluating whether prison officials employed the least restrictive means, the court failed to require them to explain why the less restrictive grooming policies safely implemented in at least 38 states, the District of Columbia and the Federal Bureau of Prisons meeting the same penological interests, could not be implemented. *Knight*, 723 F.3d at 1285-86. Thus, these courts departed from settled strict scrutiny jurisprudence. In so doing, the Eleventh Circuit put its imprimatur on the Alabama Department of Corrections'

complete prohibition of a core Native religious practice where it admittedly did not even consider a less restrictive alternative, let alone *demonstrate* its ineffectiveness, just as the Eighth Circuit did in *Holt* with regard to Muslim prisoners. *See Yellowbear v. Lampert*, 741 F.3d 48, 63 (10th Cir. 2014) ("[T]he government's burden here isn't to mull the claimant's proposed alternatives, it is to demonstrate the claimant's alternatives are ineffective to achieve the government's stated goals.").

4. The same prisons that refuse religious exemptions often have other exemptions to their grooming policies that do not interfere with penological interests. In the instant case, Arkansas provides medical exemptions for beards but no religious exemption. Just as confounding, in *Knight* ADOC permits long hair for female inmates, undermining their justification for refusing a long hair religious exemption for Native male inmates. Trial Tr. vol. II, Jan. 22, 2009 (*Knight v. Thompson*, No. 2:93cv1404-WHA) (M.D. Ala. 2008) at 5; *see also Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 367 (3d Cir. 1999) (Alito, J.) ("We are at a loss to understand why religious exemptions threaten important [government] interests but medical exemptions do not."). It is difficult to square these prison officials' apparent ability to further state interests in preventing the secreting of contraband, identification upon escape and inmate hygiene through policies allowing long hair for women and medical exemptions for beards, with its asserted inability to further the same interests with a religious exemption. Indeed,

this contradiction suggests that these restrictive grooming policies do not further those penological interests and that the prison officials are not utilizing the least restrictive means. When the incongruence of these justifications is recognized, there is no doubt that prison officials are merely perpetuating penological myths. *See Kemp*, 946 F.2d at 589 (Heany, S.J., concurring) ("The sooner our court en banc considers this question and resolves to do away with the penological myth that the director of this institution perpetuates, the better.").

When a lower court defers to such flimsy justifications, it effectively converts Congress' strict scrutiny standard under RLUIPA into a rational basis standard. These courts do so under the guise of "due deference," while ignoring the admonition in the same Senate report that "[p]olicies grounded on mere speculation, exaggerated fears, or post-hoc rationalization will not suffice to meet the act's requirements." S. Rep. No. 103-111 (1993) at 10. While Congress anticipated "due deference," it is folly to defer to a judgment that is unsubstantiated and admittedly uninformed. That amounts to no review whatsoever and abdicates the judicial obligation under RLUIPA to apply strict scrutiny. When acting without the particularized evidence tied to the plaintiff that RLUIPA demands, courts *de facto* apply a rational basis standard, which RFRA and RLUIPA were expressly enacted to supplant. *See Cutter*, 544 U.S. at 714-18. This turns back the clock to a time when prison officials could run roughshod over the religious rights of all prisoners.

B. It is critical for Native People that courts interpret and apply RLUIPA as Congress intended.

Stories of the kind of routine, deplorable treatment suffered by Native prisoners at the hands of state prison officials described above in *Iron Eyes* and *Kemp* were documented within the legislative history of RFRA and RLUIPA. As this Court observed in *Cutter v. Wilkinson*, 544 U.S. 709, 716-17 (2005):

> Before enacting § 3 [of RLUIPA], Congress documented, in hearings spanning three years, that "frivolous or arbitrary" barriers impeded institutionalized persons' religious exercise. See 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) (hereinafter Joint Statement) ("Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways."). To secure redress for inmates who encountered undue barriers to their religious observances, Congress carried over from RFRA the "compelling governmental interest"/"least restrictive means" standard. See id., at 16698.

As the case examples demonstrated to Congress, in the absence of strong laws protecting free exercise of religion, government institutions – in particular prisons – will unduly restrict Native religious practices, often brutally. Thus, in passing RFRA and RLUIPA Congress sought "to restore traditional protection afforded to prisoners' claims prior to

O'Lone." S. Rep. No. 103-111 at 10. Congress further recognized that *O'Lone* disturbed a standard that "had proved workable" and was "employed without undue hardship to [ ] prisons. . . . " S. Rep. No. 103-111 at 11. Accordingly, it is critical for Native People that courts interpret and apply RLUIPA as Congress intended: to "broad[ly]"protect Native religious practices to the "maximum extent" possible. *See* 42 U.S.C. §2000cc-3(g); Michael J. Simpson, *Accommodating Indian Religions: The Proposed 1993 Amendment to the American Indian Religious Freedom Act*, 54 MONT. L. REV. 19 (Winter 1993); Inouye, *supra*, at 3; Martin, *supra,* at 245 (1990).

Far from threatening safety and security, religious practice, including traditional Native religious practice, reduces recidivism, positively affects discipline, reduces violence, and aids rehabilitation. *See, e.g.*, Melvina T. Sumter, Religiousness and Post-Release Community Adjustment: Graduate Research Fellowship – Final Report (Aug. 3, 1999) (unpublished Ph.D. dissertation, Florida State University) (on file with National Criminal Justice Reference Service – U.S. Dep't of Justice); Byron R. Johnson et al., *Religious Programs, Institutional Adjustment, and Recidivism Among Former Inmates in Prison Fellowship Programs*, 14 JUST. Q. 145 (1997). This should be weighed against the fact that Respondents could not give a single concrete example of beards being a security or safety issue in Arkansas, nor do the Respondents in *Knight* in relation to long hair.

Prison officials that have actually thoroughly evaluated options and provided accommodations for

Native religious practice do not report interference with penological interests. To the contrary, California corrections officials have acknowledged that appropriate accommodation reduced violence and afforded inmates a sense of pride and brotherhood and that this cooperative attitude carried over into their social reintegration upon release. Grobsmith, *supra,* at 164. Idaho prison officials have reported that Native practices in prison enables inmates to come together in mutual self-help, stating: "It is definitely rehabilitative for those individuals that have no direction in life or no concern or understanding for self or others." *Id.* Oklahoma officials stated that Native People's practices have a positive effect on discipline. *Id.* Yet, these rehabilitative benefits are foreclosed by overly-restrictive grooming policies, further undermining any claim that they actually further the asserted compelling interests.

In his *O'Lone* dissent, Justice Brennan wrote, "To deny the opportunity to affirm membership in a spiritual community . . . may extinguish an inmate's last source of hope for dignity and redemption." *O'Lone*, 482 U.S. at 368. For Native People, hair is an integral facet of religious practice, both in itself and as an aspect of an array of ceremonies. In erecting undue barriers to Native prisoners' religious practice through restrictive grooming policies, many prisons have foreclosed Native inmates' opportunity for worship and its rehabilitative benefits. It is vital that Native communities receive these offenders as rehabilitated, culturally viable members.

CONCLUSION

For the foregoing reasons, the judgment should be reversed and the case remanded for further proceedings consistent with an opinion clearly stating that RLUIPA shall be enforced according to its terms and that Respondents have wholly failed to prove either compelling interest or least restrictive means.

Respectfully submitted,

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