No. 23-1197

IN THE

Supreme Court of the United States

DAMON LANDOR,
Petitioner,

v.

LOUISIANA DEPARTMENT OF CORRECTIONS AND PUBLIC SAFETY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS, HUY, AND UNITED SOUTH AND EASTERN TRIBES SOVEREIGNTY PROTECTION FUND IN SUPPORT OF PETITIONER

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The National Congress of American Indians, Huy, and the United South and Eastern Tribes Sovereignty Protection Fund respectfully submit this *amici curiae* brief in support of Petitioner.[1]

INTERESTS OF AMICI

The National Congress of American Indians (NCAI), founded in 1944 and based in Washington, D.C., is the oldest and largest national organization comprised of American Indian and Alaska Native Tribal governments and their citizens. NCAI advises and educates the public, state governments, and the federal government on a broad range of issues involving Tribal sovereignty, self-government, treaty rights, and policies affecting Tribal Nations. NCAI's primary focus is protecting the inherent sovereign legal rights of Tribal Nations through positions directed by consensus-based resolutions. These resolutions are promulgated at NCAI national conventions by the organization's entire membership, which is comprised of approximately 300 Tribal Nations.

NCAI also serves the broad policy interests of Tribal governments by working daily to promote strong tribal and federal government-to-government policies. This includes advancing and protecting religious and cultural rights. In courtrooms around the country and within the halls of Congress, NCAI has vigorously advocated for Native American religious freedom, including by supporting passage of the

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[1] 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.

Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb *et seq*. and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc *et seq*.

Amicus Curiae Huy is a nationally recognized non-profit organization established in 2012 to enhance religious, cultural, and other rehabilitative opportunities for imprisoned Native Americans, Alaska Natives, and Native Hawaiians (collectively hereafter referred to as "Native Americans" or "Native" peoples). 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, a past Secretary of the Washington State Department of Corrections, current and past elected chairpersons of federally recognized Tribal governments, and a past President of NCAI. In addition to funding and supporting Native religious programs in state prisons, Huy advocates for incarcerated Native individuals' religious rights in federal and state trial and appellate courts and at the United Nations.

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) is a non-profit, inter-Tribal organization advocating on behalf of 33 federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico. USET SPF is a sister non-profit organization to the United South and Eastern Tribes, Inc., established in 1969. USET SPF strives to protect, promote, and advance the ability of Tribal Nations to exercise inherent sovereign rights and authorities, and it works to elevate the voices of Tribal Nations to ensure the United States fully delivers on its trust and treaty obligations. USET SPF advocates within

existing institutions to fight today's battles and simultaneously works to improve the foundations of Indian law and policy to create long-lasting impacts for Indian Country.

This case presents issues vital to Native cultural survival. Religious practice is the cornerstone of many Native cultures and has held Native communities together since time immemorial. Walter Echo-Hawk, *Native Worship in American Prisons*, 19.4 CULTURAL SURVIVAL Q. (Winter 1995). As the American Indian Religious Freedom Act (AIRFA) 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; *see also* American Indian Religious Freedom: Hearings on S.J. Res. 102, Before the Senate Select Committee on Indian Affairs, 95th Cong., 2d Sess. 86-87 (1978) (statement of Barney Old Coyote, Crow Tribe, Montana) ("[W]orship is . . . an integral part of the Indian way of life and culture which cannot be separated from the whole."). As Native legal scholar Walter Echo-Hawk has noted, "If we lose our religion, then none of these other rights [to self-determination and tribal sovereignty] make any difference at all. It's our religious rights, our spiritual rights, that give meaning to the rest of our bundle of legal rights that we enjoy as Native people and tribes—this is what we're all about." Walter Echo-Hawk, Lenny Foster, & Adam Parker, *Issues in the Implementation of the American Indian Religious Freedom Act: Panel Discussion*, 19 WICAZO SA REV. 152, 161 (2004).[2]

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[2] While Native religious practice is essential to Native cultural survival, it is also heavily restricted. Native people face regulation of the time, place, and manner of their religious

Native religious liberty in prisons is a particularly salient issue for Amici given the disproportionate rate at which Native Americans are incarcerated, a legacy of the historical dispossession and impoverishment of Native peoples and subjugation of Native Nations. Approximately 22,700 American Indians and Alaska Natives are incarcerated across state and federal prisons in the United States. Desiree L. Fox et al., *Over-Incarceration of Native Americans: Roots, Inequities, and Solutions*, SAFETY AND JUSTICE CHALLENGE 7 (2023). Native people are incarcerated at a rate up to five times higher than other segments of society. U.S. DEPT. OF JUSTICE OFF. OF JUSTICE PROGRAMS, NCJ NO. 302776, PRISONERS IN 2020 – STATISTICAL TABLES at 14 (Dec. 2021). These incarceration rates stand in stark contrast to historical accounts from the 1700s and 1800s describing Native communities virtually devoid of crime where prisons were non-existent. 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). Incarcerated American Indian and Alaska Native people—over 85%—occupy state prisons and local jails. PRISON POLICY INITIATIVE, *Native Incarceration in the*

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exercise unfathomable to many Americans. While many Americans can freely access their churches and places of worship, for Native Peoples certain prayers and ceremonies must be held in sacred places, which are often located on federal lands that they must seek permission to access. Walter Echo-Hawk, *Native Worship in American Prisons*, 19.4 CULTURAL SURVIVAL Q. (Winter 1995). Moreover, use and possession of sacred objects, such as eagle feathers, peyote, and animal parts are often the subject of comprehensive federal and state regulation. 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).

U.S., https://www.prisonpolicy.org/profiles/native.html (last visited Aug. 26, 2025).

Further, Tribal governments generally share with federal, state, and local governments the penological goals of deterring criminal activity and facilitating rehabilitation to prevent recidivism. *See* National Congress of American Indians Res. No. REN13-005 (June 27, 2013). Imprisoned Native Americans 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. (Winter 1995). Allowing religious engagement by and among Native prisoners has been proven to promote rehabilitation and reduce recidivism. *See e.g.*, Melvina T. Sumter, *Religiousness and Post-Release Community Adjustment Graduate Research Fellowship – Final Report* (2000), available at https://www.ncjrs.gov/pdffiles1/nij/grants/184508.pdf. Accordingly, the ability of Native people to practice their religions bears directly on core Tribal governance concerns. National Congress of American Indians Res. No. REN13-005 (June 27, 2013).

Incarcerated Native people persistently experience barriers to their religious practices that mirror Mr. Landor's experience in the present case. For Mr. Landor, the Nazarite vow is an important component of his Rastafarian beliefs; for many Native Americans, wearing unshorn hair is an ancient and essential religious practice. Mr. Landor experienced an unlawful and brutal disregard for his religious practices at the hands of state prison officials, and many incarcerated Native people experience the same. As this Court addresses what remedies are available

for Mr. Landor—a prisoner whose religious freedom was violated in a clear violation of RLUIPA—Amici step forward to provide critical context and information to the Court on the impacts RLUIPA violations have on incarcerated Native people and the importance of meaningful remedies to the preservation of Native religious practice.

SUMMARY OF ARGUMENT

This Court has underscored that when Congress enacted RLUIPA, it intended to create robust protections for religious exercise in state prisons. *Holt v. Hobbs*, 574 U.S. 352, 358 (2015). As decades of case examples demonstrate, comprehensive and enforceable legal protections are necessary to deter state prison officials from violating the religious liberties of imprisoned practitioners of Native religions. Unless RLUIPA is construed as providing effective remedies—including damages remedies against individual prison officials—as Congress intended, RLUIPA's legal protections will be meaningless to many. Incarcerated Native people are likely to continue to face the forced haircutting that has long been an intentional tool of religious persecution and forced assimilation.

Hair, including the practice of maintaining unshorn hair, is central to many Native religions. Indeed, the importance of long hair to many Native religions is what prompted the United States in the eighteenth and nineteenth centuries to use forced haircuts as a tool to stamp out Native religion and compel the assimilation of Native people into non-Native culture. Forced haircuts were employed in a particularly devastating manner against Native prisoners and Native children who had been kidnapped and imprisoned in government boarding schools.

Religious oppression of Native Americans, including the forced shearing of Native people's hair, continued even after the United States turned away from more explicit bans on Native religious exercise. It was not until 1978, after much advocacy by Native American leadership, that Congress enacted the American Indian Religious Freedom Act (AIRFA), declaring for the first time that it was the policy of the United States to recognize and protect the inherent right of religious freedom for Native peoples. But because AIRFA lacked a remedies provision, or provisions addressing state actors, it failed to adequately protect Native religious practices, both inside and outside of prison walls.

For a time, incarcerated Native people successfully challenged forced haircutting through Free Exercise litigation, demonstrating the importance of court intervention for the protection of Native religious freedoms. But *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), which articulated a rational basis test rather than strict scrutiny for prisoner First Amendment claims, put a quick end to successful Free Exercise suits by incarcerated Native people. Litigation under the Free Exercise clause became even more difficult after *Employment Division v. Smith*, 494 U.S. 872 (1990), which lowered the bar to rational basis review for all Free Exercise claims involving laws of general applicability. In response to *Smith*, Congress enacted RFRA to restore broad religious freedom protections. Then, in response to *City of Boerne v. Flores*, 521 U.S. 507 (1997), which held RFRA could not be enforced against states, Congress enacted RLUIPA to specifically protect religious exercise for prisoners in state facilities.

Congress provided that individuals whose rights are violated under RLUIPA may seek "appropriate relief," 42 U.S.C. § 2000cc-2(a), using language identical in relevant part to RFRA, *id.* § 200bb-1(c). This Court has recognized that this same language in RFRA includes damages against government officials acting in their individual capacities. *Tanzin v. Tanvir*, 592 U.S. 43 (2020) (looking also to similar language in 42 U.S.C. § 1983). The broad remedies that Congress intended under RLUIPA are consistent with its desire for the statute to protect religious exercise "to the maximum extent permitted" under law. 42 U.S.C. § 2000cc-2(g); *see also* Brief for the Petitioner on the Merits at pp. 16–20.

In a great many instances, equitable relief has proven insufficient to realize RLUIPA's broad guarantees—misconduct by prison officials has had no consequence and has gone undeterred. Moreover, circumstances such as release and transfer of prisoners can moot otherwise legitimate RLUIPA claims, further frustrating clear Congressional intent. Accordingly, intervention by this Court is needed make clear that "appropriate relief" under RLUIPA includes an individual-capacity damages remedy, as it does under RFRA, in order to fully protect religious liberty as Congress intended.

ARGUMENT

I. Forced Haircuts Have Long Been a Tool of Religious Suppression and Forced Assimilation.

For many Native peoples, unshorn hair is sacred. Understanding this importance, the United States historically subjected Native people to forced haircuts in attempts to strip them of their Native identity and

culture. The continued subjection of incarcerated Native people to forced haircutting in state prisons perpetuates this pattern of religious intolerance and forced assimilation.

A. Keeping Hair Unshorn is an Essential Religious Practice to Many Native Americans.

Native peoples are not monolithic, and Native religious and cultural practices vary. Yet, even diverse Native peoples often share certain core beliefs and traditions. Practices surrounding wearing hair long, and cutting it only under certain conditions, is an ancient and deeply rooted facet of many Native religions. *See Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); *Hamilton v. Schriro*, 74 F.3d 1545, 1547 (8th Cir. 1996); *Kemp v. Moore*, 946 F.2d 588 (8th Cir. 1991); *Iron Eyes v. Henry*, 907 F.2d 810, 813 (8th Cir. 1990); *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"). Uncut hair often symbolizes and embodies the knowledge a person acquires during a lifetime. *Warsoldier*, 418 F.3d at 999; *Teterud*, 522 F.2d at 359-60; O'Brien, supra, at 39. Hair may be braided to express the integration of mind, body, and spirit. O'Brien, supra, at 39. It is common for specific hair preparations to be part of Native religious rituals and ceremonies, such as ceremonial cutting in the sacred observance of a loved one's death. Walker Report, supra at ¶ 4. Keeping hair unshorn, therefore, is not only an important practice in and of itself, but is also required to participate in other religious ceremonies. By contrast, forced haircutting desecrates a Native person's body and spirit and is an egregious

confiscation of personal dignity. *See* O'Brien, supra, at 39.

B. Because of Unshorn Hair's Religious Significance to Native Americans, Forced Haircuts Have Been Used as a Means of Persecution and a Tool of Assimilation.

In its efforts to obtain Native lands and extinguish Tribal Nations, the United States historically "acted on th[e] knowledge" that religious practices form the "basis of Indian identity and value systems." John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13, 22–23 (1991). The United States did so by "suppressing the religious freedom of American Indians [and] assaulting Indian religious beliefs with the goal of gutting Native American cultures and thereby hastening assimilation into mainstream society." *Id.*

The United States' calculated efforts to extinguish Native cultures included outlawing traditional practices and ceremonies and punishing practitioners with violence, imprisonment, or starvation. For instance, in 1890, over 100 Lakota people were massacred at Wounded Knee, South Dakota when the United States military sought to suppress the Ghost Dance. Walter R. Echo-Hawk, *Native American Religious Liberty: Five Hundred Years after Columbus*, AM. INDIAN CULTURE AND RES. J. 17(3), 37 (1993). In 1892, the United States outlawed the Sun Dance and other Native religious ceremonies it characterized as federal "Indian offenses," punishable by withholding rations or by imprisonment. *Id.* (citing Sec'y of the Interior, American Indian Religious Freedom Act Report P.L. 95-341 at 6 (1979)); *see also id.* (discussing 1904 regulations for Court of Indian Offenses banning "[t]he

'sun dance', and all other similar dances and so-called religious ceremonies.").

Shearing hair was a particularly pointed tool of forced assimilation. In 1875, Lt. Richard Henry Pratt imprisoned 72 Cheyenne, Arapaho, Kiowa, Comanche, and Caddo prisoners of war from the southwestern United States at Fort Marion in St. Augustine, Florida. He forcibly cut their hair, removed their traditional clothing, and dressed them in military uniforms, taking "before and after" pictures to document their transformation from "savage" to "civilized." Sarah Kathryn Pitcher Hayes, *The Experiment at Fort Marion: Richard Henry Pratt's Recreation of Penitential Regimes at the Old Fort and Its Influence on American Indian Education*, J. OF FLA. STUDIES 7(1), 4 (2018) (quoting Pratt's autobiography). Pratt further sought to assimilate the prisoners into non-Native culture by requiring them to speak only English and practice Christian religion.

Pratt later expanded upon these tactics in 1879, when he founded the first federally funded, off-reservation boarding school for Native children: the infamous Carlisle Indian Industrial School in Pennsylvania. Around two-thirds of the children at Carlisle were taken from their tribal homes in the Dakota Territory, "to be held as 'hostages' for the good behavior of their tribes." *Id.* (quoting Pratt's autobiography); DEP'T OF THE INTERIOR, OFF. OF INDIAN AFFAIRS, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT at 6 (May 2022) [hereinafter Boarding School Report]. Carlisle (and the many boarding schools that followed) implemented a policy of "kill the Indian, save the man," whereby Native children were subjected to "systemic militarized and identity-alteration methodologies to

attempt to assimilate [them] through education." *Id*. at 7, *see also* Walker Report, *supra*, at ¶ 5; 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.[3] These methodologies included "cutting hair of Indian children" and other measures intended to "discourag[e] or prevent[] the use of American Indian, Alaska Native, and Native Hawaiian languages, religions, and cultural practices." Boarding School Report at 6. School officials punished children with harsh corporal punishment for resisting or refusing to comply. *Id.* at 8.[4]

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[3] Over the next century, the federal Indian boarding school system came to include more than 400 schools across 37 states and territories. Boarding School Report at 6. Hundreds, if not thousands, of Native children died while attending federal boarding schools. *Id.* at 93. For those who survived, the damage to their families, communities, and descendants was and remains profound. *See id.* at 39 (boarding schools "produced intergenerational trauma by disrupting family ties in Indian Tribes [and] Alaska Native Villages"); *see also*, *generally*, *id.* at Pt. 17 ("Legacy Impact of the Indian Boarding School System").

[4] Today, forced haircutting continues to be a tool of forced assimilation and continues to be used against children. *See New Rider v. Bd. of Ed.*, 480 F.2d 693, 695 (10th Cir. 1973) (Pawnee junior high students suspended for wearing long hair consistent with Pawnee traditions and in violation of Oklahoma school district's grooming code); *Hatch v. Goerke*, 502 F.2d 1189, 1191 (l0th Cir. 1974) (Arapaho elementary school student suspended for refusing to cut off his braids as required by dress code); *see also A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist*., 611 F.3d 248 (5th Cir. 2010) (finding Texas school district's refusal to exempt Native American child from grooming policy to be an unlawful burden on religious exercise under state's RFRA equivalent).

Forced haircutting and imprisonment continued to be modes to end Native religious practice into the Twentieth Century. *See* Walker Report, *supra*, at ¶ 5; *see also* Jill E. Martin, *Constitutional Rights and Indian Rites: An Uneasy Balance*, *supra*, at 248; *Let All That is Indian Within You Die!*, *supra*, at 5–7.3. At times, shorn hair was both the objective and the punishment. For example, in 1902, the U.S. Commissioner of Indian Affairs William A. Jones instructed the Superintendent of the Round Valley Indian Reservation in northern California to withhold rations, supplies, and employment from Native men who, after returning from boarding school, still wore their hair long. Letter from William A. Jones (Jan. 11, 1902), available at https://catalog.archives.gov/id/296220. Commissioner Jones wrote that if those inducements did not work, "a short confinement in the guard-house at hard labor, with shorn hair, should furnish a cure." *Id.* "The wearing of long hair by the male population of your agency is not in keeping with the advancement they are making, or will soon be expected to make, in civilization," Jones explained. *Id.*

This ethnocentric approach of "helping" Native peoples manifested in prisons as well, where "rehabilitation" of incarcerated Native people involved stripping them of their cultural identity and religious practices and instead imposing western religion upon them in an effort to assimilate them into mainstream American society. Walter Echo-Hawk, *Native Worship in American Prisons*, *supra*. Forced haircutting of incarcerated Native Americans is, therefore, additionally harmful because the practice is readily associated with this historical campaign aimed at the destruction of

Native communities, and assimilation of Native individuals, through religious persecution.

II. Without Robust and Enforceable Legal Protection, Native Religious Practices in Prison are Consistently Threatened.

History has established that without robust and enforceable legal protection for religious exercise, prisons and jails default to the suppression of Native American religious exercise. The same history establishes that legal protections for religious exercise in prison have waxed and waned, but today RLUIPA is intended to be a sturdy shield against infringement of religious liberty.

A. AIRFA Sought to End the Suppression of Native American Religious Practices, Including in Prisons, but was Ineffective Because it Lacked an Enforcement Provision.

Although the United States slowly changed its philosophy about Native American religious practice, *see* DEP'T OF THE INTERIOR, OFF. INDIAN AFFS., INDIAN AFFAIRS CIRCULAR No. 2970 (1933) (instructing that there should be "no interference with Indian religious life or ceremonial expression"), the government continued violating Native American religious liberty. DEP'T OF THE INTERIOR, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT, P.L. 95-341 at 20 (1979) ("Lifting the threat of intervention did not, however, guarantee religious freedom for American Indians[.]"). It was not until 1978, when Congress enacted AIRFA, that the United States officially abandoned its assimilationist approach and adopted a policy "to protect and preserve for American Indians their inherent right of freedom to believe, express, and

exercise [their] traditional religions … including but not limited to … the freedom to worship through ceremonials and traditional rites." 42 U.S.C. § 1996.

AIRFA resulted from concerted advocacy efforts by Native American leaders that prompted extensive congressional hearings on Native religious liberties. As part of the Tribal self-determination movement of the late 1960s and early 1970s, Native leaders prioritized the revival and protection of traditional religious ceremonies and practices that had been suppressed by centuries of U.S. law and policy. Recognizing traditional religious practices as essential to cultural survival and Tribal self-determination, Native leaders called for congressional action to protect Native religious freedoms throughout the country. Trail of Broken Treaties 20-Point Position Paper at #18 (Oct. 1972) (hereinafter "Trail of Broken Treaties").

Central to the call to protect Native religious freedom was the demand that Native "religion and culture … not be interfered with, disrespected, or denied," including "when manifested in the personal character and treatment of one's own body." *Id.* Particularly cognizant of the experiences of incarcerated members of their communities, Native leaders urged Congress to ensure that "[n]o Indian shall be forced to cut their hair by any institution or public agency or official, including … prison regulation." *Id.*

Although AIRFA was Congress' official repudiation of the United States' policy of religious assimilation and conversion of Native people, it fell short in significant ways. Despite Native leaders' insistence that violations of Native American religious liberty be met with a "strict penalty," *id.* at #18, AIRFA lacked enforcement provisions. The law's impact was limited

because it provided no cause of action for Native people seeking to vindicate the rights it recognized. *See* Vine Deloria, Jr., *The Promotion of Human Rights*, NARF Annual Report 17, 18–19 (1991). As originally enacted, AIRFA also contained no provision purporting to reach state governments, which hold the vast majority of incarcerated Native people.

B. First Amendment Litigation in the 1970s and 1980s Offered Native Prisoners Some Relief from Oppressive Prison Policies.

Although AIRFA failed to protect Native religious practices in prisons, incarcerated Native people in the 1970s and 1980s obtained some relief through litigation enforcing the Free Exercise Clause. During this period, legal challenges to forced shearing of Native people's hair were largely successful, as courts found that state prisons lacked adequate justification for policies and practices that, at best, failed to include reasonable religious exemptions and, at worst, were overtly discriminatory.

For example, incarcerated Native people in Nebraska brought a class action lawsuit challenging state prison grooming policies that—like those maintained by many states at the time—provided no accommodation whatsoever for Native religious practices. *Indian Inmates of the Nebraska Penitentiary v. Vitek*, CV 72-L-156 (D. Neb. filed April 12, 1972). In *Vitek*, a deputy warden was offended by Native people cutting their hair into traditional Mohawk styles and thus threatened them with an untenable choice: cut their hair off, or suffer in solitary confinement. Elizabeth S. Grobsmith, INDIANS IN PRISON: INCARCERATED NATIVE AMERICANS IN NEBRASKA 38 (1994). A Nebraska federal district court found that

the prison lacked adequate justification for violating the prisoners' religious liberty and required that exemptions to the prison's grooming policy be allowed. *Id.* The suit and the resulting consent decree became a touchstone for how state prison officials elsewhere could accommodate the religious practices of incarcerated Native people without compromising penological goals. 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. Numerous such decrees followed in other states, with courts retaining jurisdiction to supervise. *See, e.g.*, Judgment *Crowe v. Erickson*, Civ. No. 72-4101 (D.S.D. of May 4, 1977); *Bear Ribs v. Taylor*, Civil No. 77-3985-RJK(G) (C.D. Cal. April 16, 1979); *Marshno v. McManus*, No. 79-3146 (D. Kan. Nov. 14, 1980); *Frease v. Griffin*, Civ. No. 79-693-C (D.N.M. Dec. 3, 1980); *Ross v. Scurr*, Civ. No. 80-214-A (S.D. Iowa, Mar. 13 1981).

Many other state institutions, however, continued to maintain exemption-less hair grooming policies. Courts regularly found those policies to be unlawful infringement of incarcerated Native people's religious liberty. *See, e.g.*, *Gallanhan v. Hollyfield*, 670 F.2d 1345, 1346 (4th Cir. 1982), *abrogated by O'Lone*, 482 U.S. at 344 (rejecting proffered justifications of identification, contraband control, and sanitation as sufficient to lack exemption for unshorn hair in case brought by Cherokee citizen); *Weaver v. Jago*, 675 F.2d 116, 118 (6th Cir. 1982) (finding prison officials had impermissibly responded to Cherokee citizen's request to wear hair long with "conclusory" justification that regulation was necessary for identification, security, hygiene, and safety); *Teterud v. Gillman*, 385 F. Supp. 153, 154 (S.D. Iowa 1974), *aff'd sub nom. Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975) (determining

failure to provide Cree man exemption to prohibition on long hair based on food sanitation, safety, identification, and hygiene relied on justifications that were "either without substance or unnecessarily broad in their sweep"). The pattern of successful First Amendment lawsuits illustrates how judicial intervention has been necessary to protect religious grooming practices from unnecessary infringement by prison officials.

C. *O'Lone v. Estate of Shabazz* Divested Incarcerated Native People of a Bulwark Against Religious Oppression.

The trend of successful litigation by incarcerated Native plaintiffs abruptly ended following *O'Lone v. Estate of Shabazz*, 482 U.S. at 344, which raised the bar for successful First Amendment claims by people in prison. In *O'Lone*, this Court held that as long as a prison policy or regulation is reasonably related to a legitimate penological objective, the policy is valid, even when it infringes upon a prisoner's constitutional rights. *Id.* Following the *O'Lone* decision, prison officials were able to enforce restrictions on Native religious practices with impunity.

The case of Robert Iron Eyes provides a bleak example of the experiences of Native prisoners in the aftermath of *O'Lone*. Mr. Iron Eyes, a Standing Rock Sioux citizen, had only five haircuts in his twenty-seven years: three in mourning for the death of loved-ones and two at the hands of his jailors. *Iron Eyes*, 907 F.2d at 811. Mr. Iron Eyes was raised in the ways of the Lakota culture and had followed the traditional practices of Sioux religion since his youth. *Id.* He believed that his hair was a gift from the Great Spirit, and that cutting it was an offense to the Creator, unless done in mourning. *Id.*

Mr. Iron Eyes entered Missouri's Farmington Correctional Facility on a parole violation in 1987. At that time, Missouri prison grooming regulations required prisoners to wear their hair "no longer than…the shirt collar." *See id.* at 811 n.3 (citing Div. Rul. 116.050(3), Mo. Admin. Code Tit. 14, Div. 20, Ch. 16). Prison officials at Farmington ordered Mr. Iron Eyes to comply with this regulation, although he had never been ordered to do so during his previous term in a Missouri facility. *Id.* at 812.

When Mr. Iron Eyes refused, he was sent to disciplinary segregation, where he was shackled, handcuffed, and subjected to a forced haircut. *Id.* at 812, 816. Mr. 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. Mr. Iron Eyes was not the only victim of this abuse. At least one prison barber referred to the forced haircuts of Native prisoners as "scalping." *Id.* at n.14.

Ten months later, Mr. Iron Eyes was ordered to get another haircut. It came to light during the subsequent litigation that Mr. Iron Eyes' request for a religious exemption from the prison grooming regulation had never been communicated by prison officials to the proper authorities. *Id.* at 817. This time, Mr. Iron Eyes was able to obtain a restraining order from a federal district court. In an effort to skirt the court's restraining order while Mr. Iron Eyes awaited a hearing on the merits of his complaint, state prison officials placed Mr. Iron Eyes in solitary confinement "not for not cutting his hair, but for disobeying a direct order to cut his hair." *Id.* at 817.

In *Iron Eyes*, prison officials justified their inflexible grooming regulation, in part, by arguing that short hair was necessary for prison officials to be able to identify prisoners. *Id.* at 814. Despite the Court of Appeals for the Eighth Circuit finding it "incredulous" that prison officials could not simply rephotograph Mr. Iron Eyes during one of the periods when his hair was short to satisfy their concern about prisoner identification, undercutting the credibility of their justifications, it nevertheless found the grooming regulations "rationally related" to the prison's purported security interests. *Id.* at 814. Applying *O'Lone*, the court deferred to prison officials even when it found some of their justifications for violating constitutionally-protected rights to strain credulity. The appellate court affirmed the district court's order, upheld Missouri's grooming regulation, and denied Mr.

Iron Eyes any relief despite the prison's severe and repeated interference with his religious practices.

Similar results occurred in other post-*O'Lone* cases, leaving incarcerated Native people's religious exercise virtually unprotected. *See, e.g.*, *Kemp*, 946 F.2d at 588 (failing to find violation when an incarcerated Chickasaw man's long hair was accommodated at maximum security prison but was forcibly sheared when he was transferred to a minimum security prison); *see also id.* at 589 (Heaney, S.J. concurring) (stating that he was constrained by precedent even though "[t]his case smacks of harassment and religious persecution"); *see also* Laurence French, NATIVE AMERICAN JUSTICE 123–24 (2003).

Following another blow to Native religious liberty in *Employment Division v. Smith*, 494 U.S. at 888–90 (rejecting the application of strict scrutiny and instead applying rational basis review to Free Exercise claims involving laws of general applicability), Congress passed RFRA, which restored free exercise protections to pre-*O'Lone* and *Smith* standards. *See Holt* 574 U.S. at 356–57.

RFRA and its sister statute RLUIPA each afford important protection to prisoners, but courts were initially inconsistent in their enforcement of RLUIPA's mandates in particular, necessitating this Court's intervention in *Holt v. Hobbs*, 574 U.S. 352. In *Holt*, this Court made clear that Congress's mandate for robust protection of religious liberty must be taken seriously by state prisons and would be vigorously enforced by the courts. *Id.* at 362–69. While *Holt* ensured that Courts will appropriately scrutinize prisons' justifications for infringing prisoners' religious liberties, the work of ensuring that RLUIPA is robust and enforceable by federal courts remains

only partially done. As explained below, there remain specific circumstances in which state officials continue to skirt the law, which similarly require clear direction from this Court to remedy RLUIPA violations as Congress intended.

III. RLUIPA Mandates Robust Remedies to Effectuate Its Promised Protections, Including for Incarcerated Native Americans.

Congress enacted RFRA and RLUIPA in response to this Court's decisions in *Smith* and *City of Boerne v. Flores*, clearly intending to provide robust protections for the free exercise of religion. *See* 25 U.S.C. § 2000cc-3(g) (providing RLUIPA "shall be construed in favor a broad protection of religious exercise, to the maximum extent permitted by the terms of this statute and the Constitution"). In both of these "sister statute[s]," Congress used language designed to provide remedies for violations of religious freedoms by providing for "appropriate relief." *Holt*, 574 U.S. at 356.

This Court recognized in *Tanzin v. Tanvir*, 592 U.S. at 51, that "appropriate relief" for the purposes of RFRA includes awarding damages in suits against government employees. Specifically, this Court explained that "[a] damages remedy is not just 'appropriate' relief as viewed through the lens of suits against Government employees" but that "[i]t is also the *only* form of relief that can remedy some RFRA violations." *Id.* (emphasis in original).[5] The same holds true for RLUIPA.

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[5] The Court noted also that, "[g]iven the textual cues … it would be odd to construct RFRA in a manner that prevents courts from awarding such relief" and that "[h]ad Congress wished to limit

As the above-described cases of imprisoned Native Americans illustrate, violations of religious liberty in prison can rarely be fully resolved by equitable remedies alone. A prospective equitable remedy cannot make whole an incarcerated Native person who is harmed long before having their day in court. *See Butz v. Economou*, 438 U.S. 478, 504 (1978) ("Injunctive or declaratory relief is useless to a person who has already been injured."). The injuries to these prisoners include forced haircuts, coerced haircuts under threat of disciplinary action, or disciplinary consequences for refusal to comply. *See, e.g.*, *Warsoldier*, 418 F.3d 989 (punished with solitary confinement for refusal to cut hair); *Iron Eyes*, 907 F.2d at 811–12 (forced haircut and disciplinary consequences); *Capoeman v. Reed*, 754 F.2d 1512, 1513 (9th Cir. 1985) (forced haircut).

Additionally, prospective equitable relief fails entirely to redress harms imposed upon individuals who are transferred or released before a claim can be fully adjudicated. *See, e.g.*, *Capoeman*, 754 F.2d at 1513 (finding that, although Washington prison officials' forcible cutting of a Quinault incarcerated person's hair "constituted a serious violation of his constitutional rights," his claims for equitable relief were mooted by his subsequent release).

Limiting relief under RLUIPA to prospective equitable relief also minimizes the deterrent effect of the law. Prisons can, for example "strategically moot claims before courts [can] award relief, thwarting RLUIPA's protections of religious freedom" by releasing or transferring prisoners. Cert Petition at 25–26.

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the remedy … it knew how to do so." *Tanzin*, 592 U.S. at 51. This, too, holds true for RLUIPA.

Further, as Mr. Landor's case, *Iron Eyes*, and *Capoeman* all demonstrate, some of the most egregious injuries to religious liberty are inflicted by the individual state correctional officers who interact with prisoners on a day-to-day basis. Equitable relief, consent decrees, and clearly established law can be effective in addressing systemic issues and pernicious policies, but are not always sufficient to prevent individual unlawful conduct. Mr. Landor had clearly established law on his side—he even held a copy of that case law in his hand before it was taken from him—yet he was forcibly restrained and sheared. Cert Petition at 7.

Prospective equitable relief has proven insufficient to fully effectuate the robust protections for religious liberty that Congress intended with RLUIPA. Without an individual capacity damages remedy available when state prison officials act outside the scope of their duties and in clear violation of RLUIPA, the statute's religious freedom guarantees will, like many of this country's original promises, fall short for incarcerated Native people and their communities.

CONCLUSION

Incarcerated Native people depend upon their freedom to engage in traditional religious practices for rehabilitation and the preservation of their Native identity. Religious practice facilitates Native theologian Vine Deloria, Jr.'s concept of spiritual problem solving. *See, e.g.*, Gabriel S. Galanda, *Tribal, State Prison Leaders Unite to Complete the Circle*, ICTNEWS.ORG (Jul. 1, 2011). Put differently, "for some Native American prison inmates, walking the red road in the white man's iron house is the path to salvation, the way of beauty, and the only road to rehabilitation and survival." Suzanne J. Crawford & Dennis F. Kelley, AMERICAN INDIAN RELIGIOUS TRADITIONS: AN ENCYCLOPEDIA 774 (2005). Yet religious oppression of Native Americans persists in state prisons, where the vast majority of incarcerated Native people are held. Forced haircutting—like that Mr. Landor experienced—continues, in violation of Native prisoners' religious liberties and in spite of the broad protections Congress intended when enacting RLUIPA. The availability of effective remedies under RLUIPA, including damages remedies against prison officials, is necessary to realize the promises of RLUIPA. Amici respectfully request that this Court hold that RLUIPA allows individual capacity damages suits against prison officials.

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