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Reply Brief of Petitioners. Knight v. Thompson, 136 S.Ct. 2534 (2016) (No. 15-999), 2016 U.S. S. Ct. Briefs LEXIS 1645, 2016 WL 1555013+A12

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No. 15-999

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

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

BRIEFS

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I. THE COURT OF APPEALS DID NOT COMPLY WITH THIS COURT'S JANUARY 2015 ORDER.

On January 26, 2015, this Court vacated the court of appeals' 2013 opinion and remanded this case for reconsideration in light of *Holt v. Hobbs*, 135 S.Ct. 853 (2015). *Knight v. Thompson*, 135 S.Ct. 1173 (2015). The central issue under *Holt* is whether Alabama could prove that the accommodation that exists in most states and the Federal Bureau of Prisons – permitting inmates to wear long hair – could not work in Alabama because prison conditions there are decidedly different from elsewhere. The Eleventh Circuit on remand inexplicably failed to decide that dispositive question posed by this Court's remand.

Holt held that where a particular accommodation is provided in a large proportion of prison systems, that widespread practice demonstrates that the accommodation is a less restrictive alternative, unless a defendant can show that "its prison system is so different from the many institutions that allow [that accommodation that the accommodation] cannot be employed in its institutions." 135 S.Ct. at 865. This case presents precisely that problem. There was "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." App.13a (foonote omitted). "These jurisdictions are: the Federal Bureau of Prisons, the correctional systems of approximately 38 states, and the District of Columbia Department of Corrections."

App.13a, n.2. There was also undisputed testimony from a former warden, who had worked at two institutions which permitted long hair, that the practice had caused no problems either at those prisons or at the scores of other prisons with which he was familiar.[1] Alabama officials did not dispute the success of that accommodation in those other correctional systems; they simply disavowed any knowledge of the

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[1] P.Ex. 5. The expert had served as the warden of prisons in Oregon and New Mexico, served as the Deputy Director of the Colorado Department of Corrections, and visited or audited 176 other prisons. P.Ex., pp. 3, 9, 13.

> During my fifteen plus years as Warden ... we encountered absolutely no problems from ... allowing Native American inmates to have hairstyles of choice.... We allowed Native American inmates in New Mexico and in Oregon to wear long hair without restriction at all levels of security.... This posed no threat to the health, safety, or good order of the prison or the public.

Id., p. 8.

> [In Colorado] [i]nmates were ... permitted to wear long hair without restriction at all security levels, which brought only positive results, enhancing safety, security, and good order of the prisons.... In my experience ... there is absolutely no security, safety, or sanitation justification to ... preclude ... Native American inmates from wearing their hair long. I am not aware of nor have I ever personally observed any problems arising from a Native American wearing traditional personal hairstyles for religious reasons....

Id., pp. 9-15. "Most States with which I am familiar, and I have toured/audited 176 Correctional Facilities across the Nation, permit Native Americans full access to practice their Religion and wear long hair." *Id.*, p. 13.

practices or experiences in those states or in federal correctional institutions.[2]

This Court's order that the Eleventh Circuit "further consider[] [this case] in light of *Holt v. Hobbs*," 135 S.Ct. at 1173, clearly required the court of appeals to decide whether Alabama had shown that its prisons were so different from prisons in 38 states, the District of Columbia, and the Bureau of Prisons, that the accommodation that worked well in all of those institutions would not work in Alabama. The most important aspect of the brief in opposition (BIO) is what it does *not* say. Respondents never claim that the Eleventh Circuit on remand ever decided the dispositive question mandated by *Holt*.

Respondents argue instead that the Eleventh Circuit acknowledged that policies of other prison systems are "relevant," which they insist was "the

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[2] ADOC officials "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." App.B, 17a. ADOC Institutional Coordinator Gwendolyn Mosley stated that she was "not aware" that other states granted inmates the very religious exemptions that petitioners were seeking. DKT-475-Tr.II-37.

ADOC Warden Grant Culliver agreed that he never "examined or looked into the practices or policies or procedures of either the Federal Bureau of Prisons or any states who permit inmates to wear their hair long." DKT-475-Tr.I-136. Even the expert witness Alabama hired for this litigation had never reviewed other prisons' hair-length policies, and testified that he did not even know that policies granting religious exemptions to grooming requirements existed. DKT-475-Tr.II-122.

main legal principle[ ] established by *Holt*." BIO 10 (quoting App.33a). But under *Holt*, the widespread and successful utilization of a proposed accommodation is *not* merely "relevant," just one factor among many that might be considered. Rather, such a widespread practice precludes a defendant from establishing that its more restrictive practice is necessary unless that *defendant* can "*show*, in the face of [such] evidence, why the vast majority of States and the Federal Government permit inmates to grow [long hair], either for any reason or for religious reasons, but it cannot." 135 S.Ct. at 866 (emphasis added). The Eleventh Circuit on remand failed to determine whether Alabama had made the showing required by *Holt*.

All the Eleventh Circuit did decide was that the district court's pre-*Holt* decision had avoided the error of giving "unquestioned deference" to the defendants' prison officials. App.7a. But *Holt* did more than forbid such deference; it gave presumptively decisive weight to the widespread utilization of an accommodation, absent the requisite showing of a controlling difference in the circumstances of the prisons. The district court also did not evaluate in the manner required by *Holt* the evidence regarding the policies in 38 states, the District of Columbia, and the Bureau of Prisons. Instead, the trial court mistakenly dismissed as "beside the point" the widespread

tolerance of long hair in all those correctional systems. App.40a.[3]

Alabama claims it presented evidence that distinguished all of its prisons from other prison systems with more permissive hair length policies. BIO 15-17. But Alabama does not contend that the appellate court ever decided whether that evidence met the *Holt* standard. In fact none of the evidence relied on by the state even addresses the pivotal issue under *Holt.* Alabama argues that its prisons are overcrowded and that many inmates are incarcerated for "felonies against persons." BIO 16. But Alabama does not claim, and did not offer any evidence, that its prisons are in either respect materially different from prisons in the jurisdictions that permit long hair. Prison overcrowding, for example, is a common problem throughout the nation. *See Brown v. Plata*, 563 U.S. 493 (2011). Although the brief in opposition repeatedly uses the adjective "unique" in describing the Alabama prison system, neither court below used that term, or found that Alabama prisons differed in any

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[3] Respondents assert that the district court found that Alabama had "unique" problems because its inmate population is "younger, bolder, and meaner." BIO 5. The cited holding is that the Alabama prison population "today" is "younger, bolder, and meaner" than the state's inmates in the past. The district court did not hold that the nature of the Alabama prison population is different from other states, and did not use the term "unique." Alabama did not introduce any comparative evidence regarding the youth, boldness or meanness of the inmates in the prison systems that permit long hair.

material way from the prison systems that permit long hair, and the defendants did not demonstrate such differences. Alabama officials conceded that in forbidding long hair during the twenty-three year history of this litigation, they had never even considered the fact that most prisons in the United States permit it.

Alabama suggests it is possible that "several" of the 41[4] jurisdictions that permit long hair might not allow unshorn hair. BIO at 15.[5] But the Eleventh Circuit did not deny that at least most of those jurisdictions would permit unshorn hair. At trial the state did not argue that any of these jurisdictions permitted only "long," but not unshorn hair. The record does not contain a single instance in which one of those prison systems concluded that an inmate's long hair was too long. In most states and the BOP, the right of

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[4] In light of *Holt*, Arkansas amended its regulation to permit religious hair length exemptions.

[5] The New Mexico policy quoted in the BIO refers only to maximum security institutions, where short hair is required. BIO 15-16, n.11; P.Ex. 44, p. 1. The quotation is preceded by this language: "The Corrections Department finds that for reasons of security, safety, health and uniformity, inmates in **Levels V and VI** shall be required to maintain [short hair] grooming standards.... More specifically, ..." P.Ex. 44, p. 1 (emphasis in original). The BIO deletes the key introductory phrase "More specifically," and capitalizes the third word in the sentence ("short"), suggesting to the reader this was the beginning of the sentence. Respondents mischaracterize New Mexico's policy, which imposes no short hair limitation in medium and low security prisons akin to the ones in which Petitioners are incarcerated.

inmates to determine the length of their hair is not limited;[6] in those states the health and safety regulations regarding long hair concern inmates who work in kitchens (where long hair must be covered for sanitation reasons) or near certain machinery (where it must be protected for safety reasons).[7] Alabama

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[6] *E.g.*, 28 C.F.R. § 551.4(a) ("The Warden may not restrict hair length if the inmate keeps it neat and clean"); P.Ex. 29, p. 5 (District of Columbia: "Maximum and minimum lengths of hair are not prescribed"); P.Ex. 30, p. 1 (Hawaii: "Inmates are allowed to grow their hair without restrictions to its length"); P.Ex. 31, p. 5 (Idaho: "Offenders are allowed to wear their hair at any length, but it must be kept clean and neat at all times and styling must be in accordance with [specified rule]"); P.Ex. 33, p. 1 (Indiana: "The Department shall permit offenders to be groomed based upon their personal preferences as long as the offenders continue to be neat and clean"); P.Ex. 38, p. 1 (Michigan: "Except in [certain facilities], prisoners may maintain head and facial hair in accordance with their religious beliefs, provided that reasonable hygiene is maintained and prisoner identification cards are kept current"); P.Ex. 45A, p. 2 (New York: "Hair may be permitted to grow over the ears to any length desired by the inmate."); P.Ex. 52A, p. 5 (Utah: "Hair length shall not be restricted if the inmate keeps it neat and clean").

[7] *E.g.*, 28 C.F.R. § 551.4(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"); P.Ex. 27, p. 3 (Colorado: "When the length ... of hair is found to present a sanitation or safety problem, such as working around food or machinery, corrective measures such as wearing hair restraints or job reassignment will be enforced."); P.Ex. 36, p. 1 (Kentucky: "An inmate who chooses long hair, and works around machinery, shall wear the hair back in a ponytail to decrease the likelihood of a work injury"); P.Ex. 45A, p. 2 (New York: "Long hair is defined as below shoulder length.... Inmates wearing long hair assigned to work near machinery or food shall be required to wear a hair net."); P.Ex. 52, p. 1

(Continued on following page)

offered no evidence that there was a significant practical difference, for example, between shoulder-length hair and shoulder blade-length hair.

The actual basis of the decision below, and the central defense offered by Alabama, was speculation by the state's witnesses that if *any* prison system permitted long hair, that policy would assuredly lead to severe security, safety, and health problems. App.36a; BIO 3-5. *Holt* makes clear that a state cannot defend a RLUIPA claim based on such predictions when, as here, there is undisputed evidence that actual experience in "many prisons" is to the contrary. 135 S.Ct. at 866.

II. THIS COURT SHOULD EITHER GRANT PLENARY REVIEW OR VACATE THE DECISION BELOW AND REMAND WITH INSTRUCTIONS.

In *Iron Thunderhorse v. Pierce*, 562 U.S. 1134 (2011), this Court sought the views of the United States regarding an earlier case in which a Native American inmate unsuccessfully challenged under RLUIPA a state prohibition against long hair. 562 U.S. 821 (2011). The government noted that "where

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(Tennessee: "An inmate shall be required to wear a hair/beard net or head covering if his/her hair is of length which is likely to become entangled if working near machinery, or for sanitary purposes, such as when working in health service or food service areas").

there is evidence in the record that different prison systems ... provide exemptions to a rule that imposes a substantial burden on religious exercise or otherwise utilize less restrictive means of furthering their interest, the court of appeals properly require defendants to explain why they cannot adopt those less restrictive practices." Brief for the United States as Amicus Curiae, No. 09-1353, pp. 14-15. The Solicitor General advised the Court to deny certiorari in *Iron Thunderhorse*, because other, published Fifth Circuit decisions set out the correct interpretation of RLUIPA, and the opaque unpublished opinion in *Iron Thunderhorse* itself did not create a circuit conflict. *Id.*

Here the Eleventh Circuit, in a precedential published opinion, upheld a disputed practice under RLUIPA without requiring Defendant to demonstrate why its prisons are so different from others that it could not adopt policies that have worked in other correctional systems. The decision below thus creates precisely the conflict presaged by the government in *Iron Thunderhorse*. In *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005), the court struck down a short hair requirement that burdened the religious exercise of a Native American inmate, specifically indicating that the state in that case – as here – had failed to show "why the[ ] prison systems [that permit long hair] are able to meet their indistinguishable interest without infringing on their inmates' right to freely exercise their religious beliefs." 418 F.3d at 1000. The *Warsoldier* decision established the same

requirement that was subsequently imposed by *Holt*. The difference between the legal standard applied by the Ninth Circuit in *Warsoldier* and the standard used by the Eleventh Circuit in the instant case led to conflicting decisions regarding whether RLUIPA protects the religious rights of Native Americans to grow unshorn hair, and frames the circuit conflict that now exists between the Ninth and Eleventh Circuits.

The panel on remand expressly reiterated another circuit conflict presented by *Warsoldier*, as well as the First and Third Circuits. App.32a-33a. Underscoring this split is the fact that seven courts of appeal have held that RLUIPA requires prison officials to consider and distinguish the less restrictive measures of other prison systems, Pet. For Writ of Cert. at 13, *Knight v. Thompson*, No. 13-955 (U.S. Feb. 6, 2013), but the Eleventh Circuit remains the outlier, allowing prisons to ignore policies elsewhere rather than actually considering less restrictive means. *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007) (less restrictive means "necessarily implies a comparison with other means"). This deep and mature split on such an important and recurring issue also calls out for this Court's review.

This case provides an excellent vehicle for resolving these conflicts regarding RLUIPA's strict scrutiny standard. It emphatically is not the case, as Alabama suggests, that the predominant Native American spiritual practice is to wear a kouplock. In light of the unrebutted testimony of anthropologist Deward Walker,

(DKT-471-PEX 2), the National Congress of American Indian's amicus brief, and the findings below, that assertion is palpably incorrect. BIO 17; Pet. 6-8. The allegation that two of the plaintiffs engaged in misconduct while in prison has no effect on the RLUIPA claims of the other plaintiffs, or even on their own claims.[8] There was certainly no finding below regarding the alleged behavior of any Petitioner.

In the alternative, the Court should grant certiorari, vacate the decision below, and remand with instructions[9] to decide the issues that are dispositive under *Holt*. We suggest that the Court instruct the lower court on remand to address three specific questions:

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[8] Respondents mis-describe Plaintiffs as "high-security" inmates, BIO 1, though the panel accurately noted: "No plaintiff is a maximum-security inmate." App.B, 11a.

[9] See *Lehman v. Trout*, 465 U.S. 1056 (1984) (granting certiorari, vacating judgment, and remanding case with instructions to make specified findings); *Iacurci v. Lummus Co.*, 387 U.S. 86, 88 (1967) (granting certiorari, vacating judgment, and remanding case with instructions to make specified determination); *Martinez v. United States*, 380 U.S. 260 (1965) (granting certiorari, vacating judgment, and remanding case with instructions to make specified findings); *Railway Labor Executives' Association v. United States*, 379 U.S. 199, 200 (1964) (granting certiorari, vacating judgment, and remanding case with instructions to explain certain actions); *Weston v. Sigler*, 361 U.S. 37 (1959) (granting certiorari, vacating judgment, and remanding case with instructions to resolve merits of application).

(1) Whether the prisons in Alabama are so demonstrably different from the prisons which permit unshorn hair that Alabama could not adopt similar policies to allow a religious exemption for Native American inmates;[10]

(2) Whether the Alabama prohibition against long hair is impermissibly underinclusive;[11]

(3) Whether denying an accommodation for the sake of uniformity is permissible under RLUIPA.[12]

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should grant certiorari, vacate the decision below, and remand with instructions.

Respectfully submitted,

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[10] *See* Pet., pp. 18-21.

[11] *See* Pet., pp. 21-23.

[12] *See* Pet., pp. 23-24.

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