No. 15-999

In the
Supreme Court of the United States

RICKY KNIGHT, ET AL.,
Petitioners,

v.

LESLIE THOMPSON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR FORMER CORRECTIONS OFFICIALS JOHN CLARK, JUSTIN JONES, CHASE RIVELAND, PHIL STANLEY, RICHARD SUBIA, ELDON VAIL, JEANNE WOODFORD, AND JAY AGUAS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former corrections officials who collectively have over 237 years of active experience as corrections professionals. A brief individual biography for each is provided in Appendix "A." They are sensitive to the pressing needs of challenges that arise in the penal setting. In the view of *amici*, this is a case in which the attenuated security concerns articulated by Respondents reflect post-hoc rationalizations, outdated philosophies, and policies that fall short of industry standards. *Amici* have first-hand experience administering secure prisons while accommodating religious exercise, as now codified in section 3 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1, and the analogous provisions of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1. It is *amici*'s view that allowing the requested religious exemption from the hair length restriction at issue here is consistent with

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[1] Pursuant to Rule 37.2(a), the parties received notice of intent to file this brief at least 10 days before its due date and consented to its filing. Copies of their consent have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation of this brief. The issues underlying the instant case raise issues and interests that lead *amici* to take the same position that they took in *Holt v. Hobbs*, No. 6827. Accordingly, parts of this brief have been reprinted *verbatim* from briefs these *amici* and other former correctional officials filed as *amici curiae* in *Holt*. Counsel representing *amici* in *Hobbs* do not represent *amici* in this case and had no role in writing this brief, other than consenting to the inclusion herein of language from their *amicus* brief in *Hobbs*.

sound prison administrative practice and would serve to *enhance*, not diminish prison conditions and prison security. RLUIPA's strict scrutiny inquiry requires prison officials to fully consider successful religious accommodations regarding hair length in other comparable institutions both as a matter of law and sound penal policy. *Holt v. Hobbs,* 135 S. Ct. 853, 866 (2015). Alabama prison officials have failed to do that. Indeed, contrary to *Holt,* Alabama has failed entirely to demonstrate that its hair length their regulation is the least restrictive means to serve any compelling state interest or that it is necessary for prison security. The legal arguments at issue in this case are addressed in the Petition and will not be repeated at length here. *Amici* primarily focus herein on the direct relationship between such religious accommodation and sound penal policy and security.

SUMMARY OF ARGUMENT

There is no question that correctional facilities present significant security concerns. But prison officials must address these concerns while taking into account other important interests, including the religious rights of inmates. When drafting the Religious Land Use and Institutionalized Persons Act (RLUIPA), Congress was well aware of security issues in the penal context. Yet Congress also recognized that prison officials sometimes impose rules that unnecessarily restrict religious liberty. In the view of *amici*, this case, just like *Holt,* is precisely the type of case Congress was concerned about—where vaguely articulated reasons, including security and other concerns, are being used to justify an outdated and unwarranted policy depriving an

inmate of his religious rights. It also is a case, like *Holt*, where prison officials have ignored overwhelming evidence of the benefits of the accommodation sought here and the lack of any real basis for security concerns. In addition, this case is vitally important because it reflects the apparent defiance by the Eleventh Circuit of this Court's decision in *Holt,* which set out a thorough and careful analysis of the issues which applies with the same force and for the same reasons to restrictions on hair length.

The government may not impose a substantial burden on the religious exercise of a prisoner unless doing so is necessary to further a compelling state interest that cannot be furthered by any less restrictive means. 42 U.S.C. § 2000cc-1. The hair length policy enforced by Alabama imposes a substantial burden on the religious rights of Petitioners. There is no dispute that Alabama's hair grooming policy is more restrictive than those in place in the overwhelming majority of prison systems across the country. *Knight v. Thompson,* 797 F.3d 934, 938 (11th Cir. 2015). There is also no question that the Eleventh Circuit's summary dismissal of hair length policies and experience from the vast majority of prison systems in this country undermines the mandate from this Court in *Holt* on this very issue. *Holt,* 135 S. Ct. at 866. The language, history, and purpose of RLUIPA require more before rejecting a requested religious accommodation.

Amici's focus in this brief is to explain that Alabama's claims, relied upon by the lower court to uphold the hair-cut requirement are inconsistent with sound penal policy, contradicted by experience,

contrary to legitimate security concerns, and are not entitled to the deference they were given by the courts below.

First, as *amici* demonstrated in *Holt,* accommodating individual religious practice can have a demonstrably *positive* effect on individual adjustment and rehabilitation and, as a result, on the prison environment as a whole. Short-sighted and unsupported policies that impede individual religious practice in the name of prison security are more likely to have the opposite effect. In *amici's* experience, allowing latitude in prisoner religious exercise meaningfully contributes to the prison environment.

Second¸ as *amici* also demonstrated in *Holt,* accommodating individual religious practices can have a demonstrably *positive* effect on prison security. Additionally, perceptions of fairness and legitimacy play a critical role in contributing to prison security, and are likewise undermined when prison authorities enforce rules that are perceived by prisoners to be arbitrary or unreasoned. Because every prison requires the cooperation of its incarcerated inhabitants to maintain a stable environment, fairness in the exercise of prison authority promotes legitimacy and encourages self-regulation. In the context of RLUIPA, fairness takes on an unmistakably substantive character, where the state's burden of "demonstrating" a compelling interest that cannot be furthered by any less restrictive means requires that it not only consider the less restrictive policies of other prison jurisdictions, but establish with evidence that these other policies could not work in the state's own

prison system as to the particular prisoner practitioner. The arbitrary determinations of the sort at issue here do not enhance security; they undermine it.

ARGUMENT

I. PROVIDING THE KIND OF RELIGIOUS ACCOMMODATION PETITIONERS SEEK HERE IS CONSISTENT WITH GOOD PRISON ADMINISTRATIVE PRACTICE AND ENHANCES APPROPRIATE PENOLOGICAL GOALS.

RLUIPA requires prison officials to "demonstrate[]" that a restriction on religious freedom is "in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000cc-1(a). The statute also requires officials to "meet[] the burdens of going forward with the evidence and of persuasion" on these issues. 42 U.S.C. §§ 2000cc-1, 2000cc-5(2).

Here, the Eleventh Circuit violated this express statutory mandate and refused to apply the analysis required by this Court's decision in *Holt.* The blind deference the lower courts showed to Alabama prison officials' conclusory justifications, nonresponsive rejections of Petitioners' proposed alternatives, refusal to consider policies adopted in the vast majority of jurisdictions, and obsolete policies out of line with industry standards effectively repudiates *Holt.*

Indeed, this Court rejected this very approach in *Holt* and instead prescribed a rule requiring prison

officials to provide specific, credible evidence demonstrating they "actually considered"—rather than automatically denied—an inmate's request for religious accommodation. *Holt*, 135 S. Ct. at 863. That rule must be reiterated here; for the Eleventh Circuit either has misapprehended it or deliberately has defied it. This consideration must focus on specific circumstances of the particular inmate and prison setting, as the Court made clear in *Holt*, 135 S. Ct. at 863.

A. Inmate-Specific Religious Accommodations Like the One Requested Here Enhance the Prison Environment.

As *amici* wrote in support of the Petitioner in *Holt*, in addition to being legally required under RLUIPA, such inmate-specific consideration is consistent with the type of analysis at the forefront of best practices for prison management. Identifying and understanding the individual religious practices and needs of inmates is an essential part of the classification process that is central to proper prison management. Specifically, the National Institute of Corrections (NIC) has observed that prisons and jails ought to implement objective classification systems that evaluate needs based on criteria unique to each inmate. James Austin, *Objective Jail Classification Systems: A Guide for Jail Administrators* 3, U.S. Dep't of Justice, Nat'l Inst. of Corr. (Feb. 1998), *available at* http://nicic.gov/library/014373.

In the experience of *amici*, an effective classification system allows prison officials to evaluate a religious accommodation request based on the particular security concerns (or lack thereof) posed in a specific context. For inmates who receive

accommodations, additional security measures can be implemented to address specific concerns that may arise. Engaging in this type of thoughtful consideration is not only necessary to give meaning to RLUIPA's protections, it leads to sound policy that promotes more effective security while simultaneously better meeting inmates' needs.

B. Alabama Officials Did Not Demonstrate That The Denial of the Requested Exemption Is The Least Restrictive Means Of Furthering A Compelling Interest.

RLUIPA prohibits the government from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution," 42 U.S.C. § 2000cc-1(a), "unless the government demonstrates that imposition of the burden on that person is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." *Id.* The key is "demonstrates." The government is put to its proof under RLUIPA, and must "meet the burdens of going forward with the evidence and of persuasion." 42 U.S.C. 2000cc-5(2). *Holt,* 135 S. Ct. at 863. Alabama certainly never even attempted to meet this burden insofar as it related to the proof adduced below on the accommodations and experience from other jurisdictions around the country.[2]

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[2] The Eleventh Circuit asserted that the evidence of less restrictive policies in the "strong majority" of other jurisdictions merely signified that those "other jurisdictions * * * ha[d] elected to absorb th[e] risks." *See* 797 F.3d at 947. This is not a cognizable basis for dismissing the practice and experience of

A state cannot "demonstrate" that it has furthered a compelling governmental interest via the least restrictive means without "consider[ing]" the less restrictive policies adopted by other jurisdictions. But mere consideration is also insufficient under the statute: the state must not only consider the other policies but empirically *demonstrate* their inefficacy as to the particular practitioner. The lower court's summary disregard of the relevant policies in an overwhelming number of other jurisdictions is irreconcilable with *Holt. Compare, Knight,* 797 F.3d at 942, 947, *with Holt,* 135 S. Ct. at 866.

Holt leaves no doubt that comparisons to policies of other prisons are directly relevant under RLUIPA's legal analysis. Indeed, *Holt* made it crystal clear that it is legally significant that another prison, with similar compelling government interests, is able to accommodate the same activity that is being denied by defendant prison officials. Successful accommodations by other prisons create a strong suggestion—arguably even a presumption—that other workable, less restrictive alternatives are available; prison officials before the court must rebut that presumption by demonstrating that their prison is differently situated from other institutions. *See Holt,* 135 S. Ct. at 866. Indeed, this is at the heart of least restrictive means analysis. *Id.* Such comparisons are vitally important for sound prison administrative policy reasons as well. Specifically, in the collective experience of *Amici,* reasonable

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the overwhelming majority of jurisdictions and this kind of cursory dismissal of such evidence based on an assumption cannot be reconciled with *Holt.*

accommodation for inmates' religious practices like that at issue here directly enhances the prison environment and is a part of sound prison administrative policy.

Abundant social science literature shows that respecting the right of prisoners to practice their religion promotes prisoner adjustment to prison life, promotes rehabilitation, and reduces recidivism. Allowing prisoners to practice their religion in accordance with their faiths can serve an important role in promoting prisoners' adjustment to the new environment in which they find themselves.

Studies show a robust relationship between prison policies that accommodate religious practices and a diminished deviance among prisoners. Todd R. Clear & Melvina T. Sumter, *Prisoners, Prison, and Religion*, J. of Offender Rehab., Vol. 35(3-4), at 125, 152 (2002); Thomas P. O'Connor & Michael Perryclear, *Prison Religion in Action and its Influence on Offender Rehabilitation*, J. of Offender Rehab., Vol. 35(3-4), at 11, 26, 28 (2002); Kent R. Kerley *et al.*, *Religiosity, Religious Participation, and Negative Prison Behaviors*, 44 J. for the Sci. Study of Religion 443, 453 (2005); Todd R. Clear *et al.*, *Does Involvement in Religion Help Prisoners Adjust to Prison?* NCCD Focus, Nov. 1992, at 1, 4; *see also* Byron R. Johnson, *Religious Participation and Criminal Behavior*, *in* Effective Interventions in the Lives of Criminal Offenders 3, 14-15 (J.A. Humphrey & P. Cordella eds., 2014).

Amici's experience confirms the conclusions in the literature: allowing prisoners to exercise their religious beliefs can help moderate the harsh impact of prison life. Incarceration introduces severe

deprivations of freedoms, including significant impediments to the ability of religious prisoners to practice their religion at a time when those prisoners may need the solace and stability provided by their faith traditions more than ever. For some, faith and religious exercise can provide a new sense of purpose or meaning in the absence of these freedoms. SpearIt, *Religion as Rehabilitation? Reflections on Islam in the Correctional Setting*, 34 Whittier L. Rev. 29, 38-39 (2012); *see also* O'Connor & Perryclear, *supra*, at 28. For others, the freedom to exercise religious beliefs can lead to engagement with religious communities within the prison, which can yield intrinsic benefits and steer prisoners away from more harmful social groups like prison gangs. *See* Clear *et al.*, *supra*, at 6; SpearIt, *supra*, at 48.

Permitting prisoners to practice their faith in accordance with their beliefs also promotes rehabilitation and moderates the likelihood of recidivism. Again, the research is abundant.

In 2012, Byron R. Johnson and Sung Joon Jang conducted "the most comprehensive assessment of the religion-crime literature to date by reviewing 270 studies published between 1944 and 2010," confirming this belief. Byron R. Johnson & Sung Joon Jang, *Crime and Religion: Assessing the Role of the Faith Factor*, *in* Contemporary Issues in Criminological Theory and Research, The Role of Social Institutions: Papers from the American Society of Criminology 2010 Conference 117, 120 (Richard Rosenfeld *et al.* eds., 2012); *accord* Byron R. Johnson *et al.*, *A Systematic Review of the Religiosity and Delinquency Literature: A Research Note*, 16 J. of Contemp. Crim. Jus., 32, 46 (2000); Christopher P.

Salas-Wright *et al.*, *Buffering Effects of Religiosity on Crime: Testing the Invariance Hypothesis Across Gender and Developmental Period*, 41 Crim. Jus. & Behavior 673, 688 (2014).

To identify best practices in prison administration, prison officials can and should regularly compare their own policies to those of other institutions on related issues. *See* Dr. Reginald A. Wilkinson, *Correctional Best Practices: What Does It Mean In Times of Perpetual Transition?* 4, Keynote Speech Before the Fifth Annual Conference, International Corrections and Prisons Association, Miami, Florida (Oct. 27, 2003); Lonnie Lemons, *Developing Effective Policies and Procedures* 10, The Criterion (2010), *available at* http://www.mycama.org/uploads/7/7/6/3/7763402/the_criterion__-__august_20101.pdf; *see also*, James Austin & Patricia Hardyman, *Objective Prison Classification: A Guide for Correctional Agencies* 32, U.S. Dep't of Justice, Nat'l Inst. of Corr. (July 2004), *available at* http://nicic.gov/library/019319. The NIC further noted that "[a]n important strategy for learning about models and promising approaches is to contact . . . comparable state agencies that have implemented the model . . . ." *Id.*

Respondents' policy here stands as an aberration when viewed against wide-spread industry practices based on less restrictive grooming policies. Thirty-nine states, the United States, and the District of Columbia permit inmates to grow their hair either for all prisoners or for prisoners with religious motivation. *See* Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 964-72 (2012). Similarly, the

ABA recommends allowing prisoners "a reasonable choice in the selection of their own hair styles and personal grooming, subject to the need to identify prisoners and to maintain security." The ABA went on to note that "experience with religiously motivated grooming choices demonstrates the *low level of security risk* such choices entail, when reasonably regulated." American Bar Association, *Standards for Criminal Justice: Treatment of Prisoners* 216 (3d ed. 2011) (emphasis added); *see also id.* at 209; American Correctional Association, *Standards for Adult Correctional Institutions* 77 (4th ed. 2003). The reasons given in the instant case for ignoring the practices and experiences in other prison systems that allow inmates to grow their hair for religious reasons cannot stand after *Holt*.[3]

Courts, too, have recognized the salutary relationship between accommodating religious practices inside prison and a prisoner's adjustment

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[3] In contrast to more modern theories of prison administration that promote inmate identity and religiosity, some commentators argue that strict grooming policies for inmates are intended to strip them of their religious or cultural identity. Deborah Pergament, *It's Not Just Hair: Historical and Cultural Considerations for an Emerging Technology*, 75 Chi.-Kent L. Rev. 41, 57 (1999) (citing Lori B. Andrews, *White Blood, Black Power: The Life and Times of Johnny Spain* (1996)); *see also* Mara R. Schneider, *Splitting Hairs: Why Courts Uphold Prison Grooming Policies and Why They Should Not*, 9 Mich. J. Race & L. 503, 508 (2004); Raj Kumar Singh, *Male Prisoner Hair Law: Analysis and Discussion*, The Raj Singh Collection (1997), http://www.choisser.com/longhair/rajsing3.html. A*mici* believe these restrictive approaches have yielded no demonstrable benefits for prisons. Social science research disputes the effectiveness of control-model techniques. Susan Clark Craig, *Rehabilitation versus Control: An Organizational Theory of Prison Management*, 84 Prison J. 92S, 1015 (2004).

and rehabilitation. In *Brown v. Livingston*, --- F. Supp. 2d ---, 2014 WL 1761288, at *1 (S.D. Tex. Apr. 30, 2014), for example, the court heard "undisputed testimony" that "overall, the regular practice of religion improves prison safety." *Id.* at *7. The court acknowledged the body of social science research supporting this point, and found that allowing religious prisoners to practice their faith makes for a safer prison unit and a safer community. *Id.* at *8; *see also Grayson v. Schuler*, 666 F.3d 450, 453 (7th Cir. 2012) ("accommodating a genuine religious observance might reduce rather than increase the risk of prisoner misconduct").

The record in this case supports this thesis. The court below heard testimony from George Earl Sullivan—a former Oregon, New Mexico, and Colorado prison official—that providing prisoners the freedom to exercise their religious beliefs promoted prisoners' "support and acceptance of [the] prison environment." *Knight*, Jan. 22, 2009 Hr'g Tr. 149:9-24. By contrast, "prison systems that deny important religious practices such as wearing long hair create resentment and breed anger, hostility and animosity," that can pose "a serious threat of conflict with officers and is a threat to the safety, security, and good order of the prisons." *Knight* Trial Ex. 5, at 11.

Thus, Mr. Sullivan stated, "permitting long hair serve[s] the important purpose of enhancing the safety, security, and good order of the prison, as well as protecting the public safety by reducing resentment and anger among inmates, reducing dissatisfaction and perhaps the desire to escape, and providing optimal rehabilitation opportunities to

maximize the changes of integrating into society upon release." *Id.* at 8.

Also in the court below, Dr. Deward Walker, a Professor of Anthropology at the University of Colorado, testified that the grooming exemptions sought by the Native American plaintiffs in that case enabled a "return to traditionalism" that allowed prisoners to draw on resources needed to overcome the difficulties associated with the transition to prison life. Jan. 21, 2009 Hr'g Tr. 111:19-112:3. Conversely, the denial of these exemptions could cause "depression, anxiety, resentment, anger, hostility, and antagonism in those whose hair is cut," due to the spiritual significance of the practice of wearing long hair for Native Americans. *Knight* Trial Ex. 2, at ¶ 7.

The fact that the accommodation of religion has a positive impact on prisoner adjustment and rehabilitation—and, as a result, on prison security—is well established, was a motivating factor underlying RLUIPA's passage, and has been recognized by the courts. Because religious accommodation generally promotes, rather than detracts from, prison security, religious hair length exemptions should be provided to the "maximum extent" available under the law.

C. The Desire to Treat Inmates Alike Is Not a Compelling Government Interest.

The Eleventh Circuit credited testimony in the district court concerning the institutional importance of treating all inmates the same, thereby justifying an "exceptionless" short hair policy as a legally sound explanation for the policy at issue in

this case. *See e.g. Knight,* 797 F.3d at 939-40, 945. Alabama's argument "echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006).

This Court rejected this exact argument in *Holt,* 135 S. Ct. at 866, noting that RLUIPA's purpose, by definition, is to require prisons to make exceptions in some cases. RLUIPA explicitly prohibits burdens on religious exercise "even if the burden results from a rule of general applicability." 42 U.S.C. § 2000cc-1(a). Allowing Respondents to allege as a compelling interest a bare desire to avoid exceptions would render RLUIPA meaningless.

II. REASONABLE RELIGIOUS ACCOMMODATIONS MAY ENHANCE PRISON SECURITY.

A. Allowing Inmates to Practice Their Religion May Lead to Security Benefits for Prisons, as Well as Broader Benefits For Inmates and Society as a Whole.

Instead of increasing security concerns, *amici* believe that allowing inmates to practice their religion is likely to result in inmate behavior that alleviates security concerns and contributes to other goals of prison administration. A number of studies indicate that "[r]eligion targets antisocial values, emphasizes accountability and responsibility, changes cognitive approaches to conflict, and provides social support and social skills through interaction with religious people and communities."

Byron R. Johnson, *et al.*, *Religious Programs, Institutional Adjustment, and Recidivism among Former Inmates in Prison Fellowship Programs*, 14 Justice Quarterly 145, 148 (1997) (internal citations omitted).[4] One 2002 study, for example, found that increased religious involvement—measured by attendance rates at religious services or programs—reduced infraction rates. Thomas P. O'Connor & Michael Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation*, 35 J. Offender Rehab. 11 (2002); Todd R. Clear & Melvina T. Sumter, *Prisoners, Prison, and Religion: Religion and Adjustment to Prison*, 35 J. Offender Rehab. 127, 154 (2002). Indeed, modern theories of prison administration recognize that security benefits can result when inmates are allowed to take responsibility for aspects of their identity, including religiosity.

Respondents have failed to demonstrate that the requested religious accommodation here would pose a material risk to prison security when the

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[4] *See also* Thomas P. O'Connor, *A Sociological and Hermeneutical Study of the Influence of Religion on the Rehabilitation of Inmates* (2001) (unpublished Ph.D. dissertation, Catholic University of America), *available at* http://transformingcorrections.com/wp-content/uploads/2011/11/Unpublished-Ph.D.-Dissertation.pdf; Todd R. Clear, *et al.*, *Does Involvement in Religion Help Prisoners Adjust to Prison?*, NCCD Focus (Nov. 1992); Todd R. Clear & Marina Myhre, *A Study of Religion in Prison*, 6 Int'l Ass'n Res. & Cmty. Alts. J. on Cmty. Corrs. 20 (1995); Byron R. Johnson, *Religiosity and Institutional Deviance: The Impact of Religious Variables upon Inmate Adjustment*, 12 Crim. Just. Rev. 21 (1987); Byron R. Johnson, *et al.*, *A Systematic Review of the Religiosity and Delinquency Literature: A Research Note*, 16 J. Contemp. Crim. Just. 32 (2000).

overwhelming majority of prison systems around the country have concluded otherwise, and where Respondents did not demonstrate that conditions in Alabama necessitate a different result as to Petitioners. RLUIPA requires more than the *ipse dixit* invocation of prison security before prison officials can impose a substantial burden on the religious rights of prisoners in their care.

B. A Broad Federal And State Consensus Exists That Religious Grooming Exemptions Do Not Implicate Prison Security.

Amici collectively have over 237 years of experience as corrections professionals. That experience, and the experience of their colleagues across the country, has led to a broad consensus among federal and state corrections officials that restrictive grooming policies that fail to permit religious accommodation are not required for reasons of prison security. All told, Petitioners would be allowed to grow their hair as desired in at least 39 states, the District of Columbia and the federal Bureau of Prisons (whether outright or as a religious exemption). *See* Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. Miami L. Rev. 923, 964-72 (2012). Respondents failed to demonstrate below that the policies in place in the vast majority of states presented any meaningful security problems.[5]

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[5] The trial record in the instant case contains an extensive factual development of the less restrictive grooming policies in other jurisdictions, and the various means used by other prison systems to reconcile religious accommodations with asserted security concerns in individual cases in contrast to the blanket

C. Prohibiting Inmates from Growing Unshorn Hair is Not the Least Restrictive Method to Address Identification or Escape Concerns in the Prison Environment

There is no legitimate security concern presented by the accommodation Petitioners seek. Due to space limitations, *amici* focus on one of the Alabama Department of Corrections' stated concerns here. The Eleventh Circuit accepted Respondents' argument that their hair length restriction is justified on the ground that an inmate could change his appearance upon escape from the prison or for other identification purposes. *Knight,* 797 F.3d at 945-946. This argument is problematic for at least three reasons and, of course, expressly was rejected by the Court in *Holt*, 135 S. Ct. at 835.

First, in the experience of *amici* and as the Court in *Holt* expressly found, it is a common practice for prisons to take a new picture of an inmate as the inmate's appearance changes. This would include maintaining before-and-after pictures of an inmate who changes hair style. *Holt,* 135 S. Ct. at 861. Maintaining before and after pictures is also an

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denial imposed by Alabama. *See* Plfs.' Trial Exs. 22-55. The record reflects that some states consider whether the prisoner requesting a religious exemption or otherwise seeking to grow his hair has a history of grooming-related misconduct (e.g., escape attempts, attempts to conceal identity). *See* Ex. 22 at 3, 5. Other states require the prisoner to obtain a new identification photograph when the prisoner's appearance has changed as a result of grooming preferences. *See, e.g.*, Ex. 22 at 7, 24 at 1, 32 at 1, 33 at 7. Others impose restrictive standards on an individualized basis "[a]t any time concealment of contraband is detected in the hair." *Id.* Ex. 34 at 4.

option the ABA has noted. *See* American Bar Association, *Standards for Criminal Justice: Treatment of Prisoners* 209 (3d ed. 2011). Thus, if the inmate escaped and cut his hair, authorities could simply compare his appearance against the photos of the inmate with shorter hair.

This is not an onerous practice. Digital cameras make it easy and inexpensive for prisons to keep multiple pictures in an inmate's file, and some prisons even charge inmates a nominal fee for taking a new picture. *See* Sidhu, 66 U. Miami L. Rev. at 950 n. 161 (Dec. 17, 2009); *see also* Raj Kumar Singh, *Male Prisoner Hair Law: Analysis and Discussion*, The Raj Singh Collection (1997), http://www.choisser.com/longhair/rajsing3.html (in a survey of state prisons, the majority of states that responded said they did not have restrictive hair regulations and yet this "caused them no negativity in the areas of prisoner identification and sanitation/hygiene").

Second, today prisoner escape is a statistically negligible concern. *See* Richard F. Culp, *Frequency and Characteristics of Prison Escapes in the United States: An Analysis of National Data*, 85 Prison J. 270, 287 (Aug. 2005); *see also* James Austin & Patricia Hardyman, *Objective Prison Classification: A Guide for Correctional Agencies* 12, U.S. Dep't of Justice, Nat'l Inst. of Corr. (July 2004), *available at* http://nicic.gov/library/019319; Raj Kumar Singh, *Male Prisoner Hair Law: Analysis and Discussion*, The Raj Singh Collection (1997), http://www.choisser.com/longhair/rajsing3.html).

Third, as in *Holt,* Respondents failed to deal directly with the practice and experience on this

concern from the majority of jurisdictions. *Holt,* 135 S. Ct. at 865, 866; *Knight*, 797 F.3d at 947.

When prison officials prohibit inmates from growing their hair for religious reasons, as an answer to prison escape, they are relying on an indirect solution to a largely non-existent problem. A far better approach would be to focus on implementing or improving an objective inmate classification system focused on providing solutions more relevant to the particular inmate and prison context. "Security risk assessments measure the likelihood of a prisoner engaging in high-risk behavior or attempting to escape while incarcerated." James Austin & Patricia Hardyman, *Objective Prison Classification: A Guide for Correctional Agencies* 4-5, U.S. Dep't of Justice, Nat'l Inst. of Corr. (July 2004), *available at* http://nicic.gov/library/019319. Petitioner presented no evidence that allowing longer hair posed a unique escape risk.

D. Prison Security is Further Enhanced When Religious Exemptions are Evaluated in Ways that are Perceived to be Non-Arbitrary and Fair.

RLUIPA imposes a duty on prison officials to demonstrate that any substantial burden imposed on the free exercise rights of prisoners represents the least restrictive means of achieving a compelling state interest. It is not enough, therefore, for prison officials simply to recite that they have considered less restrictive policies adopted by other prison systems and have chosen to reject them. But when prison officials fail even to consider less restrictive means that have proven successful elsewhere –

indeed, in a large majority of jurisdictions across the country – prison security is further undermined by a rulemaking process that prisoners reasonably understand to be arbitrary and unfair.

Numerous studies have shown that prisoner perceptions of fairness in both approach and outcome have a profound impact on overall social order within prisons. In *amici*'s experience, where prisoners see institutional policies as fair, they are far more likely to obey them and view their issuers as legitimate sources of authority.

Here, Respondents' hair length policy is at odds with the rules in most other U.S. prison jurisdictions, and Respondents have failed to demonstrate the necessity of this different treatment with case-specific evidence. *Holt,* 135 S. Ct. at 866. Instead of promoting security, Respondents' arbitrary policy is likely to exacerbate prisoner perceptions of arbitrary rulemaking and compromise institutional order. RLUIPA demands more, and so do the very security interests Respondents purport to invoke.

Fairness depends in part on the perception that decision-makers have acted with "neutrality," using "assessments of honesty, impartiality, and the use of fact, not personal opinions" in considering one's case. Tom R. Tyler, *Procedural Fairness & Compliance with the Law*, 133 Swiss. J. Econ. & Statistics 219, 228 (1997). *See* David J. Smith, *The Foundations of Legitimacy*, *in* Legitimacy & Criminal Justice: An International Perspective 30 (Tom R. Tyler ed., 2007); Tom R. Tyler, *Why People Obey the Law* 25 (1990); Tom R. Tyler & Jeffrey Fagan, *Symposium: Legitimacy and Criminal Justice, Legitimacy and*

Cooperation: Why Do People Help the Police Fight Crime in Their Communities? 6 Ohio St. J. Crim. L. 231, 263 (2008).

Amici's experience and targeted studies confirm that these principles hold particularly true in prison environments. The research reveals that fairness-based "justice judgments were directly associated with prisoner misconduct," because prisoners who evaluated prison officials' use of authority as just were significantly less likely to engage in misconduct or be charged with violating prison rules. Michael D. Reisig & Gorazd Mesko, *Procedural Justice, Legitimacy, & Prisoner Misconduct*, 15 Psychology, Crime & Law 41, 54-56 (2009); Anthony E. Bottoms, *Interpersonal Violence & Social Order in Prisons*, *in* Prisons: Crime & Justice: A Review of Research 261 (Michael Tonry & Joan Petersilia eds., 1999). One study found that a key context for prisoner assaults on staff is "protest," where a prisoner "considers himself to be the victim of unjust or inconsistent treatment by a staff member." *Id.* at 260-61.

This type of prisoner buy-in is important to prison safety; "it remains the case that order * * * depends on the acquiescence and cooperation of prisoners themselves. Without the active cooperation of most prisoners, most of the time, prisons could not function effectively." Jonathan Jackson *et al.*, *Legitimacy and Procedural Justice in Prisons*, Prison Service J., Sept. 2010, at 4, 4. Cooperation is also compromised when authorities are viewed as excluding some persons or views from consideration. Jan-Willem van Prooijen *et al.*, *Procedural Justice in Punishment Systems: Inconsistent Punishment Procedures Have*

Detrimental Effects on Cooperation, 47 Brit. J. of Soc. Psychology 311, 312-13 (2008).

Amici's experience, again supported by the literature, is that granting religious accommodations affirmatively supports perceptions of fairness among prisoners. As *amici* have observed across prison populations, prisoner perceptions of fairness improve when their religious practices are accommodated through exemption procedures. Indeed, these principles of fairness were central to the goals of RLUIPA.

RLUIPA's legislative history shows that religious exercise has often been burdened in the prison setting in arbitrary, excessive and sometimes discriminatory ways. In fact, one of the elements of unfairness identified in RLUIPA's legislative history was the fundamental inequity manifest in the exact situation presented here, where "what prison officials insist in one facility would bring chaos and a total breakdown of security, works perfectly well in apparently comparable facilities." *Protecting Religious Freedom After Boerne v. Flores (Part III): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 3, 11 (statement of Marc D. Stern, Legal Dir., American Jewish Cong.).

RLUIPA was expressly intended to rein in these excesses to the extent they arise in the religious exemption context, by subjecting denials of requests for religious exemption to strict scrutiny—thereby requiring that such requests be handled in a non-arbitrary manner. Denials imposing "substantial burdens" on religious practices must further a compelling government interest—one

"demonstrate[d]" by the government—for which no less restrictive means of achieving that interest are available. 42 U.S.C. §§ 2000cc-1(a)(1), (2). Thus, any less restrictive means actually adopted by other jurisdictions must not only be "considered" by the state, but "demonstrated" empirically to be unworkable. Alabama admittedly never considered the policy of any other jurisdiction and therefore never demonstrated the multitude of other policies to be unworkable in Alabama.

RLUIPA's requirement of strict scrutiny, which Respondents have failed to meet in this case, thereby protects religious freedom, promotes fairness, and enhances prison security. As the experience of *amici* and the social science literature confirm, religious accommodation in most instances can and should be granted to *further* prison security. Alabama's position and the lower court's decision are both unsupported and ill-advised, and cannot withstand strict scrutiny. Requiring haircuts without exemption is not fair and could not be perceived to be fair, especially in light of the practices and experiences in the vast majority of prison systems across the country.

CONCLUSION

Prisons may present significant security issues; wearing unshorn hair for religious reasons is not one of them. For the foregoing reasons, and those set forth by Petitioners, the Court should grant the Petition and reverse the Eleventh Circuit's decision in this case.

Respectfully Submitted,

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APPENDIX

Appendix "A" to *Amici Curiae* Brief For Former Corrections Officials John Clark, Justin Jones, Chase Riveland, Phil Stanley, Richard Subia, Eldon Vail, Jeanne Woodford, And Jay Aguas In Support Of Petitioners In *Knight v. Thompson, No. 15-999*

Amicus John Clark served as Assistant Director of the Federal Bureau of Prisons from 1991 to 1997. From 1989 to 1991, he served as Warden of USP-Marion, the highest security federal prison in the United States. He has over 30 years of experience in the field of corrections.

Amicus Justin Jones served as Director of the Oklahoma Department of Corrections from 2005 to 2013. He has more than 35 years of experience in the field of corrections.

Amicus Chase Riveland served as Executive Director of the Colorado Department of Corrections from 1983 to 1986 and Secretary of the Washington State Department of Corrections from 1986 to 1997. He has 39 years of professional, management, and administrative experience in the field of corrections.

Amicus Phil Stanley served as Commissioner of the New Hampshire Department of Corrections from 2000 to 2003. He has 35 years of experience in the field of corrections.

Amicus Richard Subia is currently a Public Safety Consultant, sits on the Heald College Criminal Justice Advisory Board, and is an expert in prison gangs and institutional risk assessment. From 2006 to 2007, he served as warden for California's Mule Creek State Prison. From 2007 to

April 2012, Mr. Subia served as the Associate Director, Deputy Director, and then Director of the California Department of Corrections and Rehabilitation. Mr. Subia has over 26 years of experience with CDCR, during which time he also held the positions of Correctional Officer, Correctional Sergeant, Correctional Lieutenant, Correctional Administrator, and statewide Director of the Division of Adult Institutions.

Amicus Eldon Vail served as Secretary of the Washington State Department of Corrections from 2007 to 2011. He has over 30 years of experience in the field of corrections.

Amicus Jeanne Woodford is currently a Senior Distinguished Fellow at the Chief Justice Earl Warren Institute on Law and Social Policy at University of California, Berkeley School of Law. From 1999 to 2004, she served as warden of California's San Quentin State Prison. Ms. Woodford was the Defendant in *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005), in which the Ninth Circuit ruled in favor of a prison inmate requesting a religious accommodation in connection with California's previous grooming policy. In 2004, Ms. Woodford was appointed Director of the California Department of Corrections and Rehabilitation (CDCR), the largest correctional system in the United States, and in July 2005, she was appointed Undersecretary of CDCR. Ms. Woodford then became the Chief of the San Francisco Adult Probation Department. She retired in 2008 after 30 years of work at the state and county level of government in the field of criminal justice.

Amicus Jay Aguas has served as a Superintendent, Deputy Director, and Manager of court compliance efforts with 12 years of experience in these positions in California Youth Correctional Facilities. He has 8 years of experience training probation staff on a variety of issues and teaching Criminal Justice at Sacramento State University. He holds a Masters Degree in Criminal Justice.