No. 13-955

IN THE

Supreme Court of the United States

RICKY KNIGHT, ET AL.,

Petitioners,

v.

LESLIE THOMPSON, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

JONATHAN MASSEY, P.C.
MASSEY & GAIL LLP
1325 G St., N.W.
Suite 500
Washington, DC 20005
(202) 652-4511
jmassey@masseygail.com

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

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@uw.edu

PETER FRUIN
MAYNARD, COOPER &
GALE, P.C.
1901 Sixth Avenue North
2400 Regions Harbert Plaza
Birmingham, AL 35203
(205) 254-1068
pfruin@maynardcooper.com

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— Additional counsel listed on inside cover —

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

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

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REPLY BRIEF FOR THE PETITIONERS

The Brief in Opposition (BIO) attempts to recast the Eleventh Circuit's decision below, reframe the Question Presented, and revise the record in this case. None of these attempts has merit.

This Court should either grant the Petition outright or hold it in abeyance pending the disposition of No. 13-6827, *Holt v. Hobbs* (cert. granted, Mar. 3, 2014).

I. AT MINIMUM, THIS CASE SHOULD BE HELD FOR NO. 13-6827, *HOLT V. HOBBS*.

A. The Similarity Of The Legal Issues Warrants a "Hold."

The BIO asserts that there is no reason to hold this Petition for *Holt* because Petitioners supposedly seek "a complete and open-ended exception so that they can grow hair of indefinite length," while *Holt* is supposedly limited to "an arguably measured accommodation to a prison grooming policy," in the form of a half-inch beard. BIO 1.

The BIO improperly seeks to rewrite the Question Presented in this case and to narrow *Holt.* The *legal question* in both *Holt* and this case is the same: the correct interpretation of the strict scrutiny standard of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1(a) (RLUIPA). Although *Holt* involves an inmate seeking to grow a half-inch beard and this case involves Native Americans seeking religious exemptions from an arbitrary hair-length policy, RLUIPA's strict scrutiny standard provides the legal framework for resolving both claims.

Respondents' distinction between beard and hair-length grooming policies does not affect the legal question of what RLUIPA's strict scrutiny standard *means* and in particular whether it requires that prison officials actually consider and demonstrate a sufficient basis for rejecting widely accepted accommodations to traditional religious practices as part of their burden of proving that they have chosen the "least restrictive means" of furthering their asserted governmental interests.

On *that* legal question, the arguments in *Holt* and this case substantially overlap. For example, the Petition in *Holt* (Sept. 27, 2013) argued:

• "Prison officials cannot 'justify restrictions on religious exercise by simply citing to the need to maintain order and security in a prison. They must demonstrate that they actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.' The Respondents have the burden of proving that the grooming policy is the least restrictive means to achieve security as applied to Petitioner." Pet. in No. 13-6827, at 7 (citation omitted).

• "Other Department of Corrections are able to meet valid penological goals of security without a grooming policy or a religious exemption to a grooming policy. Petitioner provided information about other state DOC grooming regulations to both the district court and the Eighth Circuit Court of Appeals. Prisons run by the federal government, Oregon, Colorado, Nevada, California, and New York all meet the same penological goals claimed by Arkansas, but without a grooming policy or, in the

alternative, a religious exemption to the policy. . . . Nor does the Federal Bureau of Prisons impose any mandatory restrictions on its inmates' facial hair. In fact, only 9 states have grooming policies and all, interestingly enough, are in the South. If 41 other States and the Bureau of Prisons can still meet valid penological goals without grooming policies, or if those policies exist, religious exemptions – then the Arkansas Department of Corrections can do the same by the wearing of ½ inch beards." *Id.* at 7-9 (citation omitted).

• "The failure of the Respondents to consider and implement the above shows that they never attempted to use the 'least restrictive means' in addressing the wearing of ½ inch beards. The Respondents never established what, if any, modes of regulation it considered and rejected as it relates to a ½ inch beard, or to the alternatives proffered." *Id.* at 10.

• "[T]he failure of the Respondent to explain why another institution with the same compelling interest was able to accommodate the same religious practices may constitute a failure to establish that the Respondents were using the least restrictive means." *Id.* at 11.

This case likewise involves each of these issues.

On January 3, 2014, the petitioner in *Holt* filed a supplemental brief citing the Eleventh Circuit's denial of rehearing in this case as a reason to grant certiorari in *Holt*. The *Holt* supplemental brief provided a lengthy exegesis of the Eleventh Circuit's decision and maintained that the denial of rehearing "further solidif[ied] the circuit split described in the

petition" in *Holt.* Supp. Br. in No. 13-6827 at 1, 2-3. The *Holt* supplemental brief advanced the very same argument as the Petition in the instant case: that "circuits are split over whether a prison system must actually consider less restrictive alternatives before rejecting them, and whether a prison system must demonstrate that it cannot grant religious accommodations that other prison systems have successfully granted or that other prison systems have allowed to all prisoners." *Id.* at 1-2. The supplemental brief explained that "the Eleventh Circuit's denial of *en banc* rehearing in *Knight* solidifies a widespread and acknowledged circuit split over RLUIPA's meaning." *Id.* at 4.

Similarly, the reply brief in *Holt* addressed the Eleventh Circuit's decision in this case and cited it as a key reason for the grant of certiorari in *Holt*:

> Petitioner has documented express circuit splits on whether respondents must actually consider less restrictive measures, and whether they must demonstrate why they cannot adopt less restrictive practices from other prison systems. The Eleventh Circuit has explicitly acknowledged the split on these issues.

Pet. Reply in No. 13-6827, at 6.

On the basis of the petitioner's filings in *Holt*, this Court granted certiorari. Thereafter, this Court reformulated the Question Presented to provide:

> Whether the Arkansas Department of Correction's grooming policy violates the Religious Land Use and Institutionalized

> Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.*, to the extent that it prohibits petitioner from growing a one-half-inch beard in accordance with his religious beliefs.

The reformulation does not eliminate the substantial overlap between *Holt* and this case, both of which involve the proper interpretation of RLUIPA's strict scrutiny standard. Rather, the reformulation was likely due to the somewhat unwieldy framing of six separate Questions Presented in the initial Petition (which was filed IFP).

B. Alternatively, This Court Should Grant Certiorari Outright In The Instant Case.

Ironically, the BIO's attempt to narrow the issues raised by *Holt* provides a reason to grant the instant Petition, not to deny it. If there were any doubt whether *Holt* will give this Court an opportunity to address the full range of issues implicated by RLUIPA's strict scrutiny standard (including its application to prison hair-length policies), the proper course would be to grant the instant Petition.

The BIO does not deny the showing in the Petition that RLUIPA hair-length litigation presents important and recurring questions of federal law, that the United States frequently participates in hair-length litigation, and that this Court has previously called for the views of the Solicitor General *specifically on the RLUIPA hair-length issue*. (Pet. 23-32). Further, the volume of RLUIPA hair-length litigation in the lower courts (*id.* at 24-29) creates a need for authoritative guidance from this Court. Granting certiorari in this case would ensure that this Court has the untrammeled ability

to review all aspects of the legal questions presented by RLUIPA's application to prison grooming policies.

The importance of this case is underscored by the three amici curiae briefs in support of certiorari – all of which were filed after the grant of certiorari in *Holt.* Accordingly, it is appropriate to grant certiorari in this case notwithstanding the existing grant of certiorari in *Holt.*

Granting the instant Petition would not delay *Holt.* Under the *Holt* briefing schedule, the joint appendix and petitioner's brief on the merits will be filed on May 22, 2014, and the respondents' brief will be filed on July 23, 2014. If certiorari were granted in this case, the merits briefing (absent extensions) would be completed not long after the briefing in *Holt.* Both cases could be placed on the argument calendar in the fall – either as cases argued in tandem or as cases consolidated for purposes of oral argument. *E.g.*, *Dorsey v. United States*, 132 S.Ct. 2321 (2012); *Holder v. Martinez Gutierrez*, 132 S.Ct. 2011 (2012); *Douglas v. Independent Living Center of Southern California, Inc.*, 132 S.Ct. 1204 (2012).

II. THE BIO UNDERSCORES THE CIRCUIT SPLIT.

This Court's grant of certiorari in *Holt* reflects a recognition of the circuit split over RLUIPA's strict scrutiny standard. The Eleventh Circuit expressly acknowledged its departure from decisions in the First, Third, and Ninth Circuits. Pet. App. 20a. The BIO underscores the circuit split by observing that the Eleventh Circuit has repeatedly adhered to the rule it followed in this case, BIO 1-2 n.1, and that

courts in other circuits have adopted a similar rule. *Id.* at 9-12. The split is deep and mature.

The BIO illogically contends that only cases involving hair-length policies are relevant in establishing whether there is a circuit split over the meaning of the RLUIPA strict scrutiny standard. BIO 1-2. But the BIO in *Holt* made precisely the same argument with respect to beard policies (*see* BIO in No. 13-6827, at 13-14), and this Court's grant of certiorari in *Holt* indicates that it found the argument unpersuasive.

Even if this Court were to restrict its analysis to hair-length cases, the Eleventh Circuit's decision below conflicts with *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005), which involved a correctional policy prohibiting male inmates from wearing hair longer than three inches. The policy was successfully challenged by a Native American inmate who refused to cut his hair on religious grounds. The Ninth Circuit noted that "other prison systems, including the Federal Bureau of Prisons, do not have such hair length policies or, if they do, provide religious exemptions." *Id.* at 999. The court explained that "[w]here a prisoner challenges the [prison's] justifications, prison officials must set forth detailed evidence, tailored to the situation before the court, that identifies the failings in the alternatives advanced by the prisoner." *Id.* at 1000 (alterations removed) (citation omitted).

The Eleventh Circuit explicitly disagreed with *Warsoldier*. *See* Pet. App. 20a. The BIO's attempts to distinguish *Warsoldier* (BIO 15-17) fall flat:

(i) the fact that *Warsoldier* arose in a preliminary injunction context does not change the legal meaning of the RLUIPA standard;

(ii) while *Warsoldier* involved a minimum security inmate, its holding has been applied to higher security inmates, and none of the Petitioners in this case is a maximum security offender, nor is any currently assigned to a maximum security facility; and

(iii) while the differential treatment between male and female inmates was a factor in the Ninth Circuit's decision, 418 F.3d at 1000-01, the same disparity is present in Alabama, as the Eleventh Circuit noted. Pet. App. 7a-8a. The hair-length requirement does not apply to Alabama's incarcerated women offenders, who are permitted to wear shoulder-length hair regardless of security level, institutional assignment or institutional record. Alabama never considered applying such a policy to men, even though there was no showing in this case that women offenders present materially different security concerns from men. In fact, when addressing genuine security concerns, Alabama uses heightened security protocols for women as well as men (R471-Plaintiffs' Trial Exhibits (PEXs) 67-73), and Alabama's primary women's prison was at times more violent than some or all of its male facilities. *Laube v. Haley*, 234 F.Supp.2d 1227, 1237 (M.D. Ala. 2002). The conclusion of the report to which the BIO refers (BIO 16) was deemed to be inadmissible hearsay at trial. (Tr. Day II at 16).

Similarly, the BIO fails in attempting to distinguish another case involving grooming policies,

Couch v. Jabe, 679 F.3d 197 (4th Cir. 2012) (joined by O'Connor, J., sitting by designation). *Couch* invalidated a prohibition on beards, citing the failure of prison officials to actually consider and address less restrictive alternatives. *Id.* at 203-04.

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR EXAMINING RLUIPA'S STRICT SCRUTINY STANDARD.

The BIO mischaracterizes the record, which does not affect the Question Presented regarding the legal meaning of RLUIPA, but which nonetheless calls for correction.

For example, the BIO labels Petitioners' claim "extreme" and "drastic," because Petitioners seek "a complete exemption to the hair-length policy," as opposed to a supposedly "measured" accommodation. BIO 8. As the Eleventh Circuit observed, "a strong majority of U.S. jurisdictions" – composed of the Federal Bureau of Prisons, 38 states, and the District of Columbia – "permit inmates to wear long hair, either generally or as an accommodation for religious inmates." Pet. App. 4a. The accommodation sought by Petitioners is in fact "measured" and widely accepted. PEX-18 (American Correctional Association (ACA) standard confirming grooming autonomy as the presumptively permitted correctional practice); PEX-23 (listing 40 prison systems that permit hair of unlimited length for either all inmates or as a religious exemption); PEX-22 (examples of religious exemptions to hair length requirements).

Despite the time-tested, overwhelmingly prevalent correctional practice of permitting hair of

unlimited length, ADOC refers to a kouplock as "the most common accommodation." BIO at 2, 18. Here, three Petitioners proposed allowing a "kouplock" (a thin strip of hair beginning at the base of the skull).[1] All Petitioners proposed multiple other alternatives and introduced extensive evidence on the practices in other prison systems. *E.g.,* PEXs-22-55 (policies of other prison systems); PEX-2 at 2, ¶ 8 (Walker's expert report); PEX-5 (Sullivan's expert report); PEX-9 at 4 (Petitoner statement); Dist. Ct. Dkt. 539, at 14-17.

The BIO incorrectly insists that Alabama adduced extensive evidence in support of its policy. BIO 1. In fact, the Eleventh Circuit found that Alabama's witnesses "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," Pet. App. 8a, and ADOC "offered little statistical evidence to support their claims." *Id.* at 5a. By comparison, the Eleventh Circuit observed that "George Sullivan, Plaintiffs' main witness, testified that his tours and audits of 170 correctional facilities and extensive past employment experience in several prison systems

[1] The BIO's assertion that Petitioners waived their kouplock claim (BIO 2) is incorrect. Petitioners repeatedly raised that claim at trial (Tr. Day I at 113; PEX-9, at 4 ¶ 3), before the Magistrate (R508, at 49-50), and District Court. (Dkt. 539, at 14-17). Alabama opposed that claim. (R499, at 38-39; Dkt. 546, at 33-35). The District Court considered all of Petitioners' objections to the Magistrate's report on the merits and overruled them. Pet. App. 26a.

that permit long hair led him to conclude that the ADOC does not need to deny religious exemptions to accomplish its stated goals for its short-hair policy." *Id.* at 4a.

Respondents inaccurately assert that Petitioners "made absolutely no showing of similarity" between Alabama and "the various systems that allow long hair." BIO at 23. Sullivan's unrebutted testimony was that for every Alabama prison, there are two or more similar federal prisons permitting inmates to wear long hair. (Tr. Day III at 25, 26).

The BIO resorts to rank speculation in asserting that hair-length exemptions would lead to disciplinary risks. (BIO 4). The evidence is that such exemptions have proven to constitute sound correctional management across the country for decades because they reduce resentment and hostility. (PEX-18, ACA Standard; PEX-5, at 12, ¶15 (prisons are more secure and "the public enjoys greater protection" if long hair is permitted, because it is "more conducive to successful rehabilitation")).

The BIO invokes the canard of "gang activity," BIO 4, failing to mention the absence of evidence of any gang activity among any Alabama Native Americans. (PEX-5, at 10, ¶8).

The BIO's allegation that searches of long hair would be difficult (BIO 4) is likewise unsupported. The evidence showed: "Given the superiority of other methods of secreting contraband, long hair is neither a reliable nor a plausible vehicle for conveying or secreting contraband." (PEX-5, at 14, ¶4). Sullivan explained that searching long hair took a matter of seconds, was in effect "instantaneous," and that it

took "much longer" to search a Muslim inmate's prayer cap, prayer rug, and Koran than to search a Native American's hair. (Tr. Day III at 7).

The BIO's assertion that Alabama prisons are "uniquely" materially crowded or pose "unique" risks is unsupported. Numerous comparably or more crowded systems, including BOP and California, the Nation's largest systems, permit long hair. (PEX-64 at 25.) The federal BOP has a higher inmate to staff ratio—10.3 to 1—than does Alabama. (Tr. Day II at 143). Alabama's Moseley admitted that she had not "done any comparison to inmates entering other state correctional systems or the federal system." (Tr. Day II at 38).

In the end, the BIO's factual assertions prove our point: because none of the relevant Alabama officials had actually considered the policies or procedures of other prison systems that permit long hair, the BIO's factual arguments before this Court constitute speculation and post hoc rationalization.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, or the Petition should be held in abeyance pending the disposition of No. 13-6827, *Holt v. Hobbs* (cert. granted, Mar. 3, 2014).

Respectfully submitted.

JONATHAN MASSEY, P.C.
MASSEY & GAIL LLP
1325 G St., N.W.
Suite 500
Washington, DC 20005
(202) 652-4511
jmassey@masseygail.com

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

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167
schnapp@uw.edu

PETER FRUIN
MAYNARD, COOPER &
GALE, P.C.
1901 Sixth Avenue North
2400 Regions Harbert Plaza
Birmingham, AL 35203
(205) 254-1068
pfruin@maynardcooper.com

RANDALL C. MARSHALL
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