NO. 13-

IN THE

Supreme Court of the United States

BILLY "TWO FEATHERS" JONES, 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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") prohibits state and local governments from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that imposition of the burden on that person": (1) "is in furtherance of a compelling governmental interest," and (2) "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a).

The Question Presented is:

Whether RLUIPA 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.

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the U.S. Court of Appeals for the Eleventh Circuit:

1. Billy "Two Feathers" Jones, Thomas "Otter" Adams, Douglas "Dark Horns" Bailey, Michael Clem, Franklin "Running Bear" Irvin, Ricky Knight, and Timothy "Grey Wolf" Smith, were appellants below and are petitioners in this Court.

2. Leslie Thompson, State of Alabama Department of Corrections, Tom Allen, Governor Robert Bentley (Governor of the State of Alabama), Chaplain James Bowen, Eddie Carter, Chaplain Coley Chestnut, Warden Dees, Roy Dunaway, DeWayne Estes, J.C. Giles, Thomas Gilkerson, Michael Haley (former Commissioner of Alabama Department of Corrections), Warden Lynn Harrelson, Tommy Herring, Roy Hightower, Warden Ralph Hooks, Willie Johnson, Chaplain Bill Lindsey, James McClure, Billy Mitchem, Warden Gwyn Mosley, Deputy Warden Darrell Parker, Kenneth Patrick, Andrew W. Redd (former general counsel, Alabama Department of Corrections), Neal W. Russell, John Michael Shaver, William S. Sticker, Luther Strange (attorney general, State of Alabama), Ron Sutton, Morris Thigpen, Chaplain Steve Walker, J.D. White, Chaplain Willie Whiting, and Officer Wynn were appellees below and are respondents in this Court. Kim Thomas, current commissioner of Alabama Department of Corrections, is a respondent pursuant to Rule 35.3.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Billy "Two Feathers" Jones, Thomas "Otter" Adams, Douglas "Dark Horns" Bailey, Michael Clem, Franklin "Running Bear" Irvin, Ricky Knight, and Timothy "Grey Wolf" Smith respectfully petition for a Writ of Certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit (Pet App. 1a-24a) is reported at 723 F.3d 1275. The order denying the petition for rehearing en banc (Pet. App. 61a) is unpublished. The order of the U.S. District Court for the Middle District of Alabama (Pet. App. 25a-28a) is unpublished, but is available at 2012 WL 777274. The final judgment of the U.S. District Court for the Middle District of Alabama (Pet. App. 29a-30a) is unpublished. The report and recommendation of the Magistrate Judge (Pet. App. 31a-60a) is unpublished, but is available at 2011 WL 7477105.

JURISDICTION

The Eleventh Circuit issued its decision on July 26, 2013 (Pet. App. 1a), and denied a timely rehearing petition on November 8, 2013 (*id.* 61a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. 106-274, provides in part:

(a) General rule

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> > **(1)** is in furtherance of a compelling governmental interest; and
> >
> > **(2)** is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a).

STATEMENT OF THE CASE

A. Background

1. "RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection . . . ." *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). After this Court held that the Free Exercise Clause of the U.S. Constitution does not inhibit enforcement of generally applicable laws that burden religious conduct, *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 882 (1990), Congress responded with the Religious Freedom Restoration Act of 1993 ("RFRA"). 42 U.S.C. § 2000bb *et seq*. By enacting RFRA, Congress sought to protect religious exercise from burdensome neutral laws of general applicability. *Cutter*, 544 U.S. at 714–15.

RFRA expressly sought "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb(b)(1). Accordingly, RFRA required that no government substantially burden an individual's religious exercise unless the application of that burden "is the least restrictive means of furthering" a "compelling governmental interest." *Id.* § 2000bb-1(b). However, in *City of Boerne v. Flores*, this Court invalidated RFRA as applied to the states after finding that Congress had exceeded its remedial powers under the Fourteenth Amendment. 521 U.S. 507, 536 (1997).

Following this Court's decision in *City of Boerne*, Congress enacted RLUIPA in 2000. 42 U.S.C. § 2000cc *et seq*. Relying on its powers under the Constitution's Spending and Commerce Clauses, Congress sought to reduce the barriers to religious practice facing institutionalized persons. *Cutter*, 544 U.S. at 715–17. Congress "carried over from RFRA the 'compelling governmental interest'/'least restrictive means' standard." *Id.* at 717. RLIUPA prohibits state and local governments from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that imposition of the burden on that person" (1) "is in furtherance of a compelling governmental interest" and (2) "is the least restrictive means" of doing so. 42 U.S.C. § 2000cc-1(a). This Court upheld RLUIPA against an Establishment Clause challenge in 2005. *Cutter*, 544 U.S. at 713–14.

2. Petitioners are Native American male inmates in the custody of the Alabama Department

of Corrections ("ADOC"). Pet. App. 1a. None is in a maximum-security facility. *Id.* 2a. While ADOC requires male inmates to have a short hair cut, *id.*, Petitioners "wish to wear their hair unshorn in accordance with the dictates of their Native American religion." *Id.* 1a.

In the Eleventh Circuit, ADOC did not dispute that Petitioners' "desire to wear unshorn hair stemmed from deep religious convictions." *Id.* 15a. ADOC also did "not dispute that its hair-length policy substantially burden[ed] [Petitioners'] religious exercise." *Id.* Indeed, forcing Native Americans to cut their hair "would amount to an 'assault on their sacredness.'" *Id.* Nevertheless, except for women's prisons, ADOC has refused to "grant any exemptions to this policy, religious or otherwise." *Id.* 2a.

ADOC has asserted interests in "prevention of contraband, facilitation of inmate identification . . . , maintenance of good hygiene and health, and facilitation of prison discipline through uniformity." *Id.* 5a. However, Petitioners offered "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." *Id.* 4a. These jurisdictions include the federal Bureau of Prisons (BOP), thirty-eight state corrections systems, and the D.C. prisons. *Id.* 4a n.2.

One of Petitioners' expert witnesses, who had worked in prisons that permitted long hair and audited 170 correctional facilities, "opined that inmates have many other locations where they can more easily store contraband (e.g., socks, stitching areas in clothes, gloves, jackets, etc.), long hair does

not impede inmate identification, and long hair does not pose any health risks if inmates follow basic hygiene procedures." *Id.* 4a. As a result, he argued that Alabama had no "justifiable penological reasons" for refusing to grant religious exemptions to its policy.[1]

Although ADOC witnesses cited speculative risks that prisoners would hide contraband in long hair or pull long hair during fights, the Eleventh Circuit stated that the "witnesses offered little statistical evidence to support their claims." *Id.* 5a. Further, "none of the ADOC's witnesses could point to any instances where an inmate had attacked an exempted long-haired inmate out of jealousy or grabbed long hair during a fight." *Id.* 8a.

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." *Id.* For example, ADOC Institutional Coordinator Gwendolyn Mosley stated that she was "not aware" that other states granted inmates the very religious exemptions that Petitioners were seeking.[2] Similarly, ADOC Warden Grantt 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

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[1] Transcript of Second Day of Evidentiary Hearing at 122, *Limbaugh v. Thompson*, No. 2:93-cv-1404 (M.D. Ala. Jan. 22, 2009).

[2] Transcript of Second Day of Evidentiary Hearing at 37, *Limbaugh v. Thompson*, No. 2:93-cv-1404 (M.D. Ala. Jan. 22, 2009).

who permit inmates to wear their hair long."[3] Even the expert witness Alabama hired for this litigation never reviewed other prisons' hair-length policies—and he did not know that policies granting religious exemptions to grooming requirements existed.[4] Thus ADOC offered no concrete evidence regarding the actual mechanics of granting such an accommodation in Alabama.

The magistrate judge accepted ADOC's claims that its grooming policy was necessary to satisfy its compelling interests in prison safety, the prevention of contraband, hygiene, the identification of inmates, and inmate uniformity and discipline. Pet. App. 9a–10a. The magistrate agreed with Petitioners about "the widespread adoption of permissive grooming policies in other jurisdictions," but found that "the practices of other jurisdictions" were not "dispositive evidence" "of the feasibility of less restrictive measures." *Id.* 10a (emphasis omitted).

The district court adopted the magistrate's report and recommendations. *Id.* 28a. The court recognized that "other prisons permit long hair," but it held that "what happens in other prison systems is beside the point." *Id.* at 27a. The district court dismissed Petitioners' claims under RLUIPA and entered final judgment. *Id.* 28a.

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[3] Transcript of First Day of Evidentiary Hearing at 136, *Limbaugh v. Thompson*, No. 2:93-cv-1404 (M.D. Ala. Jan. 21, 2009).

[4] Transcript of Second Day of Evidentiary Hearing at 66–67, *Limbaugh v. Thompson*, No. 2:93-cv-1404 (M.D. Ala. Jan. 22, 2009).

B. The Decision Below

The Eleventh Circuit affirmed the judgment of the district court. Pet. App. 24a. The court of appeals recognized that no ADOC official had ever considered other state and federal prison systems' less restrictive grooming policies. *Id.* 8a. Acknowledging a conflict with other circuits, the Eleventh Circuit nevertheless held that RLUIPA did not require ADOC officials to actually consider and distinguish less restrictive alternatives. *Id.* 20a–21a. The court of appeals opined:

> It is true, as Plaintiffs point out, that some of our sister courts have focused on the RLUIPA's command that prison administrators "demonstrate" the lawfulness of their policies and have held that . . . prison administrators must show that they "actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *See, e.g., Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); *Spratt v. Rhode Island Dep't of Corrections*, 482 F.3d 33, 41 (1st Cir. 2007) (adopting *Warsoldier*'s heightened proof requirement); *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007) (same). *This, however, is not the law in this circuit, and none of this Court's cases have adopted* Warsoldier's *more strict proof requirement*.

Id. (emphasis added).

In so holding, the Eleventh Circuit rejected the position of the United States as amicus curiae. As the United States explained, "once the prisoner produces evidence that less restrictive alternatives

exist, prison officials must at least show that they have 'actually considered and rejected the efficacy' of those alternatives." Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants at 17, *Knight v. Thompson*, No. 12-11926 (11th Cir.) [hereinafter U.S. Brief] (quoting *Warsoldier*, 418 F.3d at 999). Thus, "[a] prison's claim that its policy is the least restrictive means of advancing compelling governmental interests necessarily is undermined if other prisons with the same compelling interests accommodate the religious practice at issue." *Id.* at 18;[5] *accord* Brief for National Congress of American Indians as Amicus Curiae In Support Of Plaintiffs-Appellants and Reversal at 7–9, *Knight v. Thompson*, No. 12-11926 (11th Cir.).

The Eleventh Circuit acknowledged that many well-run prisons have decided that granting exemptions to their grooming policies will not undermine their interests. Pet. App. 23a. But it found that RLUIPA did not require ADOC to consider these alternatives. Rather, the court held that "[i]t is certainly possible—though perhaps relatively less common—for prison administrators to promulgate an appropriately tailored policy without first considering and rejecting the efficacy of less restrictive measures. The RLUIPA asks only whether efficacious less restrictive measures

[5] As the United States argued, "[t]hough the defendants' witnesses asserted that it would not be feasible for Alabama to do so, none of them claimed any actual knowledge of the mechanics of granting such an accommodation. Instead, they offered only speculation to support their claim that Alabama would not be able to make this well-established accommodation to Native American religious liberty." U.S. Brief at 13–14.

actually exist, not whether the defendant considered alternatives to its policy." *Id.* 20a–21a. The court opined that a "heavy fixation on the policies of other jurisdictions . . . misses the mark." *Id.* 21a. The court held that Alabama's "departure from the practices of other jurisdictions . . . cannot amount to an RLUIPA violation." *Id.*

In a petition for rehearing en banc, Petitioner and amici reiterated that the Eleventh Circuit had expressly created a split with the First, Third, and Ninth Circuits. *See* Petition for Rehearing En Banc for Plaintiffs-Appellants at 7, *Knight v. Thompson*, No. 12-11926 (11th Cir.) [hereinafter Petition for Rehearing]; Brief for The Becket Fund for Religious Liberty, et al., as Amici Curiae In Support Of Petitioners and Rehearing at 4 n.1, *Knight v. Thompson*, No. 12-11926 (11th Cir.) [hereinafter Becket Brief]. As Petitioner and amici noted, the Eleventh Circuit's interpretation also conflicted with decisions in the Second, Fourth, and Eighth Circuits. *See* Petition for Rehearing at 7; Becket Brief at 4 n.1. Nevertheless, the full court denied the petition without recorded dissent. Pet. App. 61a.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's judgment warrants plenary review by this Court. The panel's judgment directly conflicts with the decisions of the First, Second, Third, Fourth, Eighth, Ninth, and Tenth Circuits.

Further, the question at the heart of this conflict—the appropriate interpretation of RLUIPA's strict scrutiny test—is an important and recurring issue of federal law. Thus, this Court has rigorously enforced the requirements of RLUIPA's companion statute, RFRA. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), this Court unanimously held that the Government had failed to justify a burden on religious liberty under the strict scrutiny test, opining that "mere invocation of the general characteristics" of hypothetical concerns "cannot carry the day." *Id.* at 432.

This case presents a question similar to that raised in another case in which this Court recently sought the views of the Solicitor General. *See Iron Thunderhorse v. Pierce*, 131 S. Ct. 380 (2010). *Iron Thunderhorse* involved an unpublished Fifth Circuit opinion that represented a case-specific error, and the Solicitor General recommended either denial of certiorari or summary reversal. *See* Brief for the United States as Amicus Curiae, *Iron Thunderhorse v. Pierce*, No. 09-1353 (U.S.). Since the decision in *Iron Thunderhorse*, the Eleventh Circuit has openly created a split on the proper interpretation of RLUIPA, in a published decision that explicitly rejects the rule followed in other circuits.

Furthermore, the Eleventh Circuit's decision departs from this Court's strict scrutiny jurisprudence, which makes clear that in order for a governmental body to meet its burden of proving that it has chosen the "least restrictive means" of furthering a compelling governmental interest, it must at least consider and provide a sufficient basis for rejecting available alternatives. Accordingly, certiorari is amply warranted here.

I. The Eleventh Circuit's Decision Conflicts With The Judgments Of Other Circuits.

The Eleventh Circuit held that state prison officials do not need to actually consider and distinguish alternative policies in order to meet their burden under RLUIPA. This holding flies in the face of the judgments of every other circuit to consider the issue. As the United States (amicus below), wrote, "[t]he least restrictive means standard does not impose upon prison officials the 'herculean burden' of 'refut[ing] every conceivable option.'" U.S. Brief at 16 (quoting *Hamilton v. Schriro*, 74 F.3d 1545, 1556 (8th Cir. 1996)). Nevertheless, "once the prisoner produces evidence that less restrictive alternatives exist, prison officials must at least show that they have 'actually considered and rejected the efficacy of' those alternatives." *Id.* at 17 (quoting *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005)). Because seven courts of appeals follow this rule, the Eleventh Circuit's contrary judgment creates a direct conflict.

These conflicting interpretations also produce opposite results in factually similar cases. This case is a perfect example. Although the Ninth Circuit found that prison officials' refusal to grant religious

exemptions to a grooming policy was impermissible in light of contrary practice in other prison systems, *see Warsoldier*, 418 F.3d at 1001, the Eleventh Circuit permitted exactly such an approach in Alabama's prisons, *see* Pet. App. 21a. As a result, a prisoner's freedom to practice his religion changes state-by-state.

Despite creating a seven-to-one circuit split that generates irreconcilable results, the Eleventh Circuit has made clear it will not adopt the majority approach. This conflict is thus entrenched and requires this Court's review.

A. The Eleventh Circuit's Interpretation Of RLUIPA's Strict Scrutiny Test Conflicts With Seven Other Circuits.

The Eleventh Circuit expressly recognized that the First, Third, and Ninth Circuits require state prison officials to actually consider and distinguish alternatives. The Eleventh Circuit noted that these courts "have focused on the RLUIPA's command that prison administrators 'demonstrate' the lawfulness of their policies and have held that . . . prison administrators must show that they 'actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.'" Pet. App. 20a (quoting *Warsoldier*, 418 F.3d at 999; citing *Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33, 41 (1st Cir. 2007); *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007)). However, the Eleventh Circuit concluded that this interpretation "*is not the law in this circuit*, and none of this Court's cases have adopted *Warsoldier*'s more strict proof requirement." *Id.* (emphasis added).

The Eleventh Circuit thus acknowledged conflicts with decisions in the First, Third, and Ninth Circuits. In addition, the Eleventh Circuit's interpretation is inconsistent with decisions in the Second, Fourth, Eighth, and Tenth Circuits.

1. Ninth Circuit: In *Warsoldier v. Woodford*, the court considered whether prison officials must at least actually consider and distinguish alternative policies to satisfy RLUIPA's "least restrictive means" test. 418 F.3d at 998. The Ninth Circuit held that a state prison system "cannot meet its burden to prove least restrictive means unless it demonstrates that it has *actually considered and rejected* the efficacy of less restrictive measures before adopting the challenged practice." *Id.* at 999 (emphasis added).

Warsoldier is essentially indistinguishable from the present case. There, a state department of corrections prohibited male inmates from wearing hair longer than three inches. Warsoldier, a Native American inmate, refused to cut his hair on religious grounds. The department argued that its grooming policy was necessary to promote safety and hygiene, broadly asserting that "other modes of regulation would either overly burden the inmate or the penal institution, or conversely fail to meet the compelling penological interests achieved by the grooming standards." *Id.* at 998. But the department did not detail "what other modes of regulation it considered and rejected." *Id.*

The Ninth Circuit determined that conclusory remarks by prison officials did not satisfy RLUIPA. *Id.* The court 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 found "comparisons between institutions analytically useful when considering whether the government is employing the least restrictive means. Indeed, the failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means." *Id.* at 1000. "Where 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.* (alterations removed) (citation omitted) (quoting *May v. Baldwin*, 109 F.3d 557, 564–65 (9th Cir. 1997)) (internal quotation marks omitted).

Likewise, the Ninth Circuit noted the failure to distinguish the more relaxed hair length rule for women (*id.*), holding that the government did not demonstrate the significance of the numerical data offered to show that women offenders were less violent than men. In contrast, the Eleventh Circuit allowed ADOC to rest on broad generalizations grounded in unproven assumptions about alleged and irrelevant gender differences.

In every respect, the Ninth Circuit's holding thus conflicts squarely with the Eleventh Circuit's judgment below.

2. Third Circuit: Two years later, the Third Circuit expressly adopted the Ninth Circuit's rule. In *Washington v. Klem*, an inmate challenged a policy preventing prisoners from possessing more than ten books in their cells because his religion required him

to read four Afro-centric books daily. 497 F.3d at 274–75. The Third Circuit noted that "[i]n other strict scrutiny contexts, the Supreme Court has suggested that the Government must consider and reject other means before it can conclude that the policy chosen is the least restrictive means." *Id.* at 284. The Third Circuit "agree[d] with the Ninth Circuit in *Warsoldier* that this requirement applies with equal force to RLUIPA." *Id.*

The Third Circuit opined that "'least restrictive means' is, by definition, a relative term. *It necessarily implies a comparison with other means*. Because this burden is placed on the Government, it must be the party to make this comparison." *Id.* (emphasis added). The court of appeals held that this standard was not met. The court found "nothing in the record to indicate that prison authorities at . . . other institutions objected to Washington possessing his books." *Washington*, 497 F.3d at 285. Without considering and distinguishing these other prisons, the state "ha[d] not satisfied its burden" under RLUIPA. *Id.*

3. First Circuit: The First Circuit has also held that RLUIPA requires state prison officials to compare alternative approaches. *Spratt*, 482 F.3d at 41 ("A prison 'cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.'" (quoting *Warsoldier*, 418 F.3d at 999)). Moreover, the First Circuit required the government to provide "specific factual information based on personal knowledge" and chided correctional officials for "cit[ing] no studies and discuss[ing] no research." *Id.* at 39, 40-41.

In *Spratt*, a state prison instituted a policy requiring religious services to be directed by official chaplains, preventing inmates from preaching. In an affidavit submitted during litigation, a state department of corrections official explained that the policy prevented inmates from accumulating too much influence in the prison. *Id.* at 36. Thus, the official stated, "there is no less restrictive manner to accommodate [a prisoner's] desire to preach to an inmate congregation, other than an outright ban." *Id.* "Rather than considering alternatives," the state concluded that any inmate preaching would be too dangerous. *Id.* at 41.

The First Circuit held that such conclusory assertions did not satisfy the state's burden under RLUIPA. The court of appeals opined that the Rhode Island Department of Corrections (RIDOC) "has not given consideration to possible alternatives." *Id.* at 42. "Rather than considering alternatives, RIDOC argues that . . . any amount of inmate preaching . . . is dangerous to institutional security under any circumstances." *Id.* at 41. As the court of appeals noted, the federal "Bureau of Prisons policy on religious practices appears to contemplate inmate-led religious services." *Id.* at 42. Noting this tension, the First Circuit held that "in the absence of any explanation by RIDOC of significant differences between [its facility] and a federal prison that would render the federal policy unworkable, the Federal Bureau of Prisons policy suggests that some form of inmate preaching could be permissible." *Id.* Thus, the First Circuit held that the state had failed to meet its burden under RLUIPA.

4. Fourth Circuit: The Fourth Circuit has also rejected the rule adopted by the Eleventh Circuit in

the decision below. Recognizing that prison officials must consider and provide a sufficient basis for rejecting alternative policies in other strict scrutiny contexts, the court concluded that "[r]equiring the same consideration in the RLUIPA context is sensible in light of the statute's plain language." *Couch v. Jabe*, 679 F.3d 197, 203 (4th Cir. 2012) (joined by O'Connor, J., sitting by designation) (citing *Washington*, 497 F.3d at 284). Accordingly, the Fourth Circuit "required that the government, consistent with the RLUIPA statutory scheme, acknowledge and give some consideration to less restrictive alternatives." *Id.*

In *Couch*, the Virginia department of corrections had defended a grooming policy based on the same asserted interests in this case: hygiene, security, and inmate identification. *Id.* at 201. The state refused to grant a religious exception to wear a short beard. *Id.* at 202. Submitting an affidavit to the court, officials "deferred to the Policy's proscriptions and the associated compelling interests without addressing whether those interests would be furthered or frustrated by [a] less restrictive measure." *Id.* While the Fourth Circuit agreed that it usually defers to prison officials' justifications, the court held that because these officials did not consider alternatives, they "failed to provide any explanation to which [a] court could defer." *Id.* at 204. "The Prison Officials, therefore, did not satisfy their burden of showing that the[ir] Policy was the least restrictive means of furthering the identified compelling interests." *Id.*

5. Second Circuit: In 2009, the Second Circuit recognized the increasingly broad consensus among the circuits that prison officials must consider and

provide a sufficient basis for rejecting less restrictive alternative policies under RLUIPA. *Jova v. Smith*, 582 F.3d 410, 416 (2d Cir. 2009) (citing *Warsoldier*, 418 F.3d at 999; *Washington*, 497 F.3d at 284). The Second Circuit agreed "that 'the failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means.'" *Id.* (quoting *Warsoldier*, 418 F.3d at 1000).

Weighing an inmate's request for a diet that would comport with his religious views, the Second Circuit remanded the case because "there [was] no indication that [prison officials] discussed, let alone demonstrated, why they cannot provide" meals that complied with the inmate's beliefs. *Id.* at 417. The court thus "conclude[d] that the Defendants did not demonstrate that the [current] menu was the least restrictive means of furthering their compelling administrative interests." *Id.*

6. Eighth Circuit: In *Murphy v. Missouri Department of Corrections*, the Eighth Circuit found that a ban on group worship might not be the least restrictive means of promoting a prison's interest in security; instead, there was "a question of fact as to whether there are means . . . less restrictive than the total preclusion of group worship." 372 F.3d 979, 989 (8th Cir. 2004). Because "[i]t [was] not clear that [the prison] seriously considered any other alternatives," the court remanded the case. *Id.* The Eighth Circuit has since reaffirmed its rule, upholding policies only where officials developed a memorandum assessing other state prisons' contrary approaches, *see Fegans v. Norris*, 537 F.3d 897, 905 n.3 (8th Cir. 2008), or

offered a compromise with the burdened inmate, *see Fowler v. Crawford*, 534 F.3d 931, 939–40 (8th Cir. 2008) (citing *Spratt*, 482 F.3d at 41 n.11).

7. Tenth Circuit: Most recently, and since the Eleventh Circuit's decision below, the Tenth Circuit adopted the majority approach. In *Yellowbear v. Lampert*, a state prison refused to provide a Native American inmate access to a sweat lodge in which to worship. No. 12-8048, 2014 WL 241981, *1 (10th Cir. Jan. 23, 2014). Although the inmate offered two less restrictive alternatives to total denial of access to the lodge, the prison rejected both. *Id.* at *11. The Tenth Circuit held that the prison, by rejecting both alternatives, failed to satisfy RLUIPA's "least restrictive means" requirement. *Id.* at *11–12.

The Tenth Circuit opined that, "[a]s part of its burden to show that its policy represents the least restrictive means available to further its putatively compelling interest, the government must *of course 'refute . . . alternative schemes' suggested by the plaintiff* to achieve that same interest and show why they are inadequate. *Id.* at *11 (emphasis added) (quoting *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011)). In its brief, the prison "suggest[ed] that it considered the [alternative] and rejected it—and that this, by itself, is enough to discharge any burden under the least restrictive means test." *Id.* at *12. However, the Tenth Circuit concluded, "the government's burden here isn't to *mull* the claimant's proposed alternatives, it is to *demonstrate* the claimant's alternatives are ineffective to achieve the government's stated goals." *Id.*

These seven circuits, by requiring state prison officials at minimum to actually consider and provide a sufficiently specific factual basis for rejecting less restrictive alternatives, have followed RLUIPA's command that prison officials "must '*demonstrate*, and not just assert, that the rule at issue is the least restrictive means of achieving a compelling governmental interest.'" U.S. Brief at 18 (quoting *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003)). The Eleventh Circuit, declining to adopt the majority's approach, established an interpretation inconsistent with RLUIPA and created a seven-to-one circuit split.

B. The Conflicting Interpretations Of RLUIPA Produce Opposite Results.

The conflict in this case produces different concrete results. The Ninth Circuit's decision in *Warsoldier v. Woodford* is a useful illustration. The Ninth and Eleventh Circuits' different interpretations of "least restrictive means" necessarily led to contrary results in identical challenges to essentially identical policies.

Both cases dealt with religious exemptions to grooming policies in a state prison. Both California and Alabama required male prisoners to wear short hair and refused to grant religious exemptions to the policy. *See Warsoldier*, 418 F.3d at 991; Pet. App. 2a. The exemption requested was also the same: both plaintiffs were Native Americans who sought to wear their hair unshorn. *See Warsoldier*, 418 F.3d at 991–92, 999; Pet. App. 1a. When rejecting the requests, prison officials in both cases asserted interests in security, hygiene, and identification of inmates. *See Warsoldier*, 418 F.3d at 997; Pet. App. 5a. Finally,

officials in both states claimed that alternative policies would undermine the prisons' interests, but never actually evaluated the widely accepted accommodations in other prison systems or demonstrated an adequate empirical, inmate-specific basis for imposing the restrictions. *See Warsoldier*, 418 F.3d at 998; Pet. App. 6a–8a.

The Ninth Circuit required California to grant a religious exemption to its grooming policy. Arguing that other "prison systems have the same compelling interest in maintaining prison security, ensuring public safety, and protecting inmate health," the Ninth Circuit described these prisons' willingness to grant exemptions. *Warsoldier*, 418 F.3d at 1000. Surveying national practice, the Ninth Circuit also noted that "[p]risons run by the federal government, Oregon, Colorado, and Nevada all meet the same penological goals without [a grooming] policy." *Id.* at 999. Without distinguishing these alternatives, California prison officials "utterly failed" to meet their burden under RLUIPA. *Id.* at 1002.

Relying on its contrary interpretation of the strict scrutiny test, the Eleventh Circuit reached the opposite conclusion. Because of this intractable conflict, the same inmate enjoys federal civil rights protections in one state's prison that he would lose in another. RLUIPA would protect Petitioners' freedom to practice their religion in California; in Alabama, it does not. Such circuit-by-circuit variations in religious liberty are unjustified and warrant this Court's plenary review.

C. This Irreconcilable Circuit Conflict Requires This Court's Review.

Given the Eleventh Circuit's conscious and explicit rejection of the majority approach, this entrenched conflict cannot be resolved without this Court's review.

The circuit conflict was repeatedly called to the Eleventh Circuit's attention. *See* Petition for Rehearing at 7; Becket Brief at 4 n.1. In an amicus brief below, the United States cited six circuits in favor of its interpretation of RLUIPA – namely, that "Congress required that prison officials seriously consider alternative practices that would not burden religious liberties." U.S. Brief at 13. Other amici echoed the point. *See* Becket Brief at 4.

Despite recognizing these contrary decisions, the Eleventh Circuit expressly rejected them as "not the law in this circuit." Pet. App. 20a. The court adhered to its prior precedent, including *Harris v. Chapman*, 97 F.3d 499 (11th Cir. 1996), which the Eleventh Circuit described as "compel[ling]" its conclusion. Pet. App. 19a. *Harris* upheld a Florida grooming policy against a religious challenge under RLUIPA's predecessor statute. The Florida policy, like Alabama's, categorically forbade male inmates from wearing long hair. In following *Harris*, the Eleventh Circuit thus perpetuated and deepened a circuit split.

Even after Plaintiffs moved for rehearing on this basis, the Eleventh Circuit denied rehearing without recorded dissent. *Id.* 61a. Clearly, then, the conflict will not resolve itself.

Moreover, there is no reason for delay. Eight circuits have set forth interpretations of RLUIPA's "least restrictive means" test. These circuits have already thoroughly analyzed the issues. Further percolation offers no benefit.

II. This Case Presents An Important And Recurring Question Of Federal Law.

This Court's plenary review is warranted in light of the important and recurring question of federal law presented in this case. Because strict scrutiny is central to RLUIPA's statutory scheme, resolving the circuit split created by the Eleventh Circuit decision is an important question of law implicated in every RLUIPA case brought in the federal courts.

A. RLUIPA Presents Important And Recurring Questions.

RLUIPA's "least restrictive means" prong goes to the heart of determining the effectiveness of the heightened protection for religious liberty that Congress enacted. In passing RLUIPA, Congress sought to address the problem of institutions "restrict[ing] religious liberty in . . . unnecessary ways." *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005) (quoting 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy)). Because institutionalized persons are committed to the care, control, and authority of the institutions in which they reside, judicial oversight is particularly necessary to ensure that "'frivolous or arbitrary' barriers [do not] impede[] institutionalized persons' religious exercise." *Id.* Congress documented many examples of such barriers:

> The hearings held by Congress revealed, for a typical example, that "[a] state prison in Ohio refused to provide Moslems with Hallal food, even though it provided Kosher food." Across the country, Jewish inmates complained that prison officials refused to provide sack lunches, which would enable inmates to break their fasts after nightfall. The "Michigan Department of Corrections . . . prohibit[ed] the lighting of Chanukah candles at all state prisons" even though "smoking" and "votive candles" were permitted. A priest responsible for communications between Roman Catholic dioceses and corrections facilities in Oklahoma stated that there "was [a] nearly yearly battle over the Catholic use of Sacramental Wine . . . for the celebration of the Mass," and that prisoners' religious possessions, "such as the Bible, the Koran, the Talmud or items needed by Native Americans[,] . . . were frequently treated with contempt and were confiscated, damaged or discarded" by prison officials.

Id. at 717 n.5 (citations omitted) (alterations in original).

Given the prevalence of burdens on inmates' religious practice, it is unsurprising that RLUIPA challenges frequently come before the federal courts. "In the ten years since its passage, RLUIPA has

been applied in a wide variety of contexts and has been the subject of substantial litigation in the courts."[6] The United States Commission on Civil Rights found that between 2001 and 2006, prisoners brought 250 RLUIPA cases in federal court. United States Commission on Civil Rights, Enforcing Religious Freedom in Prison 80 n.7 (Sept. 2008) [hereinafter "USCCR Report"]. Moreover, "[t]he number of reported RLUIPA cases has increased each year, from four federal cases initiated in 2001 to 136 cases initiated in 2006." *Id*. at 81.

Challenges to grooming regulations, like the one raised in this Petition, are particularly common. The USCCR Report found that "the third most common [basis for complaint] is grooming," occurring in over twenty percent of cases between 2001 and 2006. *Id.* at 88 (recording fifty-nine cases). In 2013 alone, at least five circuit courts of appeals decided cases involving RLUIPA challenges to prison

[6] Statement of the Department of Justice on the Institutionalized Persons Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) 2 (Oct. 15, 2010).

grooming policies[7] and district courts issued orders and opinions in at least fourteen cases.[8]

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[7] *See Knight v. Thompson*, 723 F.3d 1275 (11th Cir. 2013); *Holt v. Hobbs*, 509 F. App'x 561 (8th Cir. 2013), *petition for cert. filed and stay granted*, 82 U.S.L.W. 3297 (U.S. Nov. 14, 2013) (No. 13-6827) (Muslim inmate challenging beard policy); *Garner v. Kennedy*, 713 F.3d 237 (5th Cir. 2013) (Muslim inmate challenging beard policy); *Lewis v. Sternes*, 712 F.3d 1083 (7th Cir. 2013) (inmate, member of African Hebrew Israelites of Jerusalem, challenging policy requiring him to cut his hair); *Maxwell v. Clarke*, No. 13-7056, 2013 WL 5405536 (4th Cir. Sept. 27, 2013) (Rastafarian inmate challenging hair policy).

[8] *Broussard v. Stephens*, No. 2:13-CV-211, 2013 WL 6858510 (S.D. Tex. Dec. 30, 2013) (Muslim inmate challenging beard policy); *Strong v. Livingston*, No. 2:12-CV-106, 2013 WL 6817095 (S.D. Tex. Dec. 20, 2013) (Muslim inmate challenging beard policy); *Hickman-Bey v. Livingston*, No. 2:13-CV-266, 2013 WL 6817309 (S.D. Tex. Dec. 20, 2013) (Muslim inmate challenging beard policy); *Blakemore v. Godinez*, No. 13-CV-01084-JPG, 2013 WL 6096548 (S.D. Ill. Nov. 20, 2013) (Rastafarian inmate challenging policy requiring him to cut dreadlocks); *Bogard v. Perkins*, No. 4:11CV97-M-V, 2013 WL 4829267 (N.D. Miss. Sept. 10, 2013) (Nazarite inmate challenging hair policy); *Jones v. Meinzer*, No. 5:12CV00117 JLH-JTK, 2013 WL 5676801 (E.D. Ark. Oct. 18, 2013) (Nazarite inmate challenging beard policy); *Cox v. Stephens*, No. 2:13-CV-151, 2013 WL 4893522 (S.D. Tex. Sept. 11, 2013) (Native American inmate challenging hair policy); *Amaker v. Goord*, No. 06-CV-490A, 2013 WL 4539347 (W.D.N.Y. Aug. 27, 2013) (inmate, member of Nation of Islam, challenging policy permitting only Rastafarians to wear dreadlocks); *Rognirhar v. Foston*, No. CV-08-892-LRS, 2013 WL 4494475 (E.D. Cal. Aug. 19, 2013) (inmate, adherent of Odinism, challenging hair and beard policies); *Legate v. Stephens*, No. 2:13-CV-00148, 2013 WL 4479033 (S.D. Tex. Aug. 19, 2013) (Native American inmate challenging hair policy); *Coleman v. Jabe*, No. 7:11CV00518, 2013 WL 1209014 (W.D. Va. Mar. 25, 2013) (Muslim inmate challenging beard policy); *Bayadi v. Mathena*, No. 7:12-CV-436, 2013 WL 819735 (W.D. Va. Mar. 5, 2013)

The volume of RLUIPA cases reflects both prisoner-initiated claims under 42 U.S.C. § 2000cc-2(a) and enforcement actions brought by the United States under § 2000cc-2(f). The Government has used its enforcement authority to bring and participate in RLUIPA challenges to prison policies that substantially burden inmates' religious beliefs. In the last three years, the Government has filed complaints in California, Florida, and South Carolina, and statements of interest in cases in Alabama, Indiana, South Dakota, and Texas, including in the district court below.[9] The Government has also appeared as amicus curiae

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(Muslim inmate challenging beard policy); *Smith v. Owens*, No. 5:12-CV-26 (WLS), 2013 WL 633710 (M.D. Ga. Feb. 20, 2013) (Muslim inmate challenging beard policy); *Jouvert v. New York*, No. 9:10-CV-0930 (MAD/CFH), 2013 WL 372331 (N.D.N.Y. Jan. 29, 2013) (Muslim former inmate challenging policy permitting only Rastafarians to wear dreadlocks).

[9] *See* Statement of Interest of the United States, *Limbaugh v. Thompson*, 2011 WL 7477105 (M.D. Ala. 2011) (No. 2:93-cv-1404-WHA (WO)) (district court below); Statement of Interest of the United States, *Ali v. Thaler*, No. 9:09-cv-52 (E.D. Tex. Mar. 29, 2012) (Muslim inmate challenging beard policy); Complaint in Intervention, *Basra v. Cate*, No. CV11-01676 SVW (FMOx) (C.D. Cal. 2011) (Sikh inmate challenging beard policy); *see also* Complaint, *United States v. Sec'y, Fla. Dep't of Corr.*, No. 1:12-cv-22958 (S.D. Fla. Aug. 14, 2012); Complaint in Intervention, *Prison Legal News v. Berkeley Cnty. Sheriff's Office*, No. 2:10-02594-MBS (D. S.C. Apr. 12, 2011); Statement of Interest of the United States, *Native Am. Council of Tribes v. Weber*, 897 F. Supp. 2d 828 (D. S.D. 2012) (No. 4:09-cv-04182-KES); Statement of Interest of the United States, *Willis v. Comm'r, Ind. Dep't of Corrs.*, No. 1:09-cv-815-JMS-DML (S.D. Ind. Jan. 14, 2011); Statement of Interest of the United States, *Moussazadeh v. Tex. Dep't of Criminal Justice*, 2011 WL 4376482 (S.D. Tex. 2011) (No. G-07-574).

numerous times in RLUIPA cases before the courts of appeals, recently filing amicus briefs in support of prisoner-plaintiffs before five circuits, including in the court below.[10]

In the course of its participation, the United States has emphasized the importance of "ensuring that RLUIPA's requirements are properly and uniformly enforced."[11] The Eleventh Circuit's decision undermines both the proper and uniform interpretation of RLUIPA's strict scrutiny test by failing to require prisons to actually consider and provide a sufficiently specific factual basis for rejecting evidence of less restrictive alternatives, as required by other circuits. *See* U.S. Brief at 17.

The obligation of prison systems to actually consider and distinguish less restrictive alternatives

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[10] *See* Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants, *Knight v. Thompson*, 723 F.3d 1275 (11th Cir. 2013) (No. 12-11926) (circuit court below); Brief for the United States as Amicus Curiae Supporting Appellee and Urging Affirmance, *Garner v. Kennedy*, 713 F.3d 237 (5th Cir. 2013) (No. 11-40653) (Muslim inmate challenging beard policy); *see also* Brief for the United States as Amicus Curiae in Support of Plaintiff-Appellees and Urging Affirmance, *Native Am. Council of Tribes v. Weber*, No. 13-1401 (8th Cir. June 26, 2013); Brief for the United States as Amicus Curiae Supporting Appellant on Rehearing En Banc and Urging Reversal, *Khatib v. Cnty. of Orange*, 639 F.3d 898 (9th Cir. 2011) (No. 08-56423); Brief for United States as Amicus Curiae Supporting Appellant and Urging Reversal on RLUIPA Claim, *Nelson v. Miller*, 570 F.3d 868 (7th Cir. 2009) (No. 08-2044).

[11] Brief for the United States as Amicus Curiae in Support of Plaintiff-Appellees and Urging Affirmance at 2, *Native Am. Council of Tribes v. Weber*, No. 13-1401 (8th Cir. June 26, 2013).

is an important one because it will be outcome-determinative in cases like this. Here, Petitioners showed that the Bureau of Prisons and the majority of states permit the requested accommodation and offered testimony from an expert witness familiar with those prison systems who testified that Alabama could do the same. *See* pp. 4–5, *supra*. ADOC officials conceded that they had never actually considered these practices. Pet. App. 8a. Nor did any of the defense witnesses demonstrate a sufficient basis for rejecting those alternatives. *See* pp. 4–6, 8 n.5, *supra*. Instead, ADOC offered only speculation to support its argument that Alabama would not be able to make this well-established accommodation for Native American religious practice. In other words, the State's position in this case rested on precisely the kind of conjecture, undocumented fears, and post-hoc rationalizations that cannot satisfy strict scrutiny.

B. This Case Presents The Opportunity To Review The Question On Which This Court Called For The Views Of The Solicitor General In *Iron Thunderhorse.*

This Petition presents this Court with the proper vehicle to resolve the conflicting interpretations of strict scrutiny under RLUIPA. Previously, this Court invited the views of the Solicitor General regarding a petition for certiorari presenting a similar question. *See Iron Thunderhorse v. Pierce*, 131 S. Ct. 380 (2010). That case also involved a RLUIPA challenge by a Native American inmate to a state hair-length policy, which the Fifth Circuit rejected in an unpublished opinion. *Iron Thunderhorse v. Pierce*, 364 F. App'x 141 (5th

Cir. 2010) (per curiam). The *Iron Thunderhorse* petition asked this Court to evaluate "difference[s] in approach" of the courts of appeals in performing RLUIPA's "least restrictive means" analysis, which the petitioners argued led the circuits to reach different conclusions based on different amounts of evidence in the record. Petition for a Writ of Certiorari at 13–14, *Iron Thunderhorse v. Pierce*, No. 09-1353 (contending that some circuits upheld hair-length restrictions based on "minimal evidence," while other courts of appeals sometimes "required more evidence to support" these policies).

The Solicitor General advised this Court that the Fifth Circuit had properly applied RLUIPA in previous cases, but in its "unpublished opinion in this case the court erroneously affirmed the dismissal of petitioner's RLUIPA challenge to [the Texas] grooming policy without requiring respondent to address record evidence that tended to show that prison officials potentially could further compelling governmental interests through less restrictive means." Brief for the United States as Amicus Curiae at 7–8, *Iron Thunderhorse v. Pierce*, No. 09-1353. The Solicitor General submitted that the Fifth Circuit erred by failing to "require[] respondents to explain why the alternative, less restrictive practices utilized in other prison systems would not work in the [petitioner's] unit." *Id.* at 19. The Solicitor General continued: "That case-specific error does not warrant plenary review by this Court. The Court may, however, wish to consider summarily reversing the judgment of the court of appeals and remanding for application of the correct standard." *Id.* at 8.

Central to the Solicitor General's recommendation to this Court was the conclusion that there was no split among the circuits regarding a prison system's obligation under RLUIPA at least to consider and provide a basis for rejecting alternatives: "[T]he courts of appeals . . . agree that, when there is evidence that potentially less restrictive alternatives exist, prison officials must at least demonstrate that they have 'considered and rejected the efficacy of' those alternatives." *Id.* at 13 (quoting *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005)).

That consensus has now been broken and the instant Petition offers an ideal vehicle for deciding the question presented – a nearly identical issue on which this Court requested the Solicitor General's views in *Iron Thunderhorse*. The Eleventh Circuit squarely held that RLUIPA does not require prison officials to consider and distinguish the less restrictive measures of other systems, and expressly acknowledged that its interpretation of RLUIPA conflicts with decisions in other circuits. This case, in other words, does not suffer from the vehicle problems of *Iron Thunderhorse*.

C. In *Holt v. Hobbs*, No. 13-6827, This Court Has Continued To Recognize The Importance of Issues Arising Under RLUIPA.

The importance of the Question Presented is underscored by a recent case in which this Court has continued to address claims for religious accommodations. In *Holt v. Hobbs*, No. 13-6827, an Arkansas inmate is pursuing a RLUIPA challenge to

the Arkansas Department of Correction's grooming policy prohibiting beards, partly on the ground that the policy is not the least restrictive means of achieving the State's interest. Petition for a Writ of Certiorari, *Holt v. Hobbs*, No. 13-6827 (U.S. Sept. 27, 2013) (cert. pending).

On November 14, 2013, this Court granted Mr. Holt's application for a stay (13A374) pending disposition of the petition for a writ of certiorari. *Holt v. Hobbs*, 134 S. Ct. 635 (2013). In so doing, this Court enjoined the Arkansas Department of Corrections from enforcing its grooming policy to the extent that it prevented Mr. Holt from growing a one-half-inch beard in accordance with his religious beliefs. *Id.* In granting the petitioner's request for an injunction, this Court recognized the irreparable harm that such policies can have by virtue of unnecessarily imposing a substantial burden on the free exercise of prisoners' religious practices.

Like *Holt*, the instant case demonstrates the continued importance of claims involving religious accommodations under federal law. Indeed, the instant case presents an ideal vehicle for this Court to address the circuit conflict regarding the RLUIPA strict scrutiny test. The Eleventh Circuit's decision rests on its distinctive statutory interpretation of RLUIPA. No factual issues or dispute would prevent this Court from reaching the Question Presented and resolving the circuit split over the meaning of the appropriate legal standard.

III. The Eleventh Circuit's Decision Departs From This Court's Strict Scrutiny Jurisprudence.

The Eleventh Circuit's decision departs from this Court's precedents regarding the strict scrutiny test. RLUIPA, like its predecessor statute RFRA, adopts the familiar and highly demanding strict scrutiny standard from this Court's constitutional jurisprudence.[12] Accordingly, challenges brought under RLUIPA, like challenges under RFRA, "should be adjudicated in the same manner as constitutionally mandated applications of the test." *Gonzales*, 546 U.S. at 430.

In *Gonzales*, this Court unanimously invalidated a restriction on religious liberty under the strict scrutiny test, opining that the "mere invocation of the general characteristics" of hypothetical dangers (such as the conjectural security concerns of long hair in prison) "cannot carry the day." 546 U.S. at 432. The Court explained that "RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rule[s] of general applicability.'" *Id.* at 436 (citation omitted). The Court rejected the government's

[12] RLUIPA uses the same "least restrictive means" test as RFRA, *see Cutter v. Wilkinson*, 544 U.S. 709, 717 (2005), which "expressly adopted the compelling interest test 'as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*,'" *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (citations omitted) (quoting 42 U.S.C. § 2000bb(b)(1)). In *Sherbert*, this Court observed that the government would have "to demonstrate that no alternative forms of regulation would [serve the compelling interest] without infringing First Amendment rights." 374 U.S. 398, 407 (1963).

refusal "to assess the particulars of [a religious group's] exemption or weigh the impact of an exemption for that specific [religious] use." *Id.* at 430. It dismissed the government's view that there was "no need to assess the particulars" and opined that the compelling interest standard was a factually "focused" inquiry rather than a "categorical approach." *Id.* The test looks "beyond broadly formulated interests justifying the general applicability of government mandates" and "scrutinize[s] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431. According to *Gonzales*, the government must show with "particularity" "on a case-by-case" basis how any "strong interest" would be jeopardized by a less restrictive alternative. *Id.* (citations and internal quotation marks omitted).

The Eleventh Circuit's decision runs contrary to this Court's strict scrutiny jurisprudence. This Court has previously made clear that the strict scrutiny test requires the government to at least consider and provide a sufficient basis for rejecting available alternatives. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (finding that strict scrutiny "imposes on the [government] the ultimate burden of demonstrating . . . alternatives do not suffice" before utilizing racial classifications). For example, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), this Court upheld an affirmative action policy against an Equal Protection challenge only after determining that the plan at issue "*followed* 'serious, good faith consideration of workable race-neutral alternatives.'" *Fisher*, 133 S. Ct. at 2421 (emphasis added) (quoting *Grutter*, 539 U.S. at 339). By contrast, this Court struck down a racial quota

system for city construction contracts where the city did not engage in "any consideration of the use of race-neutral means to increase minority business participation in city contracting." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989).

The Eleventh Circuit's decision also departs from this Court's free speech jurisprudence, another "constitutionally mandated" application of the strict scrutiny test that controls the RLUIPA analysis. This Court has repeatedly held that government officials can only "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *E.g.*, *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). In *United States v. Playboy Entertainment Group, Inc.*, this Court held that "[i]t was for the Government, presented with a plausible, less restrictive alternative, to prove the alternative to be ineffective." 529 U.S. 803, 823 (2000). For that reason, this Court examined the legislative record to determine whether Congress had considered the "relative efficacy" of a less restrictive method of furthering the government's interest. *Id.* at 822.[13] Finding that Congress had not considered a less restrictive method before adopting the more restrictive method, this Court struck down the statute as violative of the First Amendment. *Id.* at 827.[14]

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[13] Specifically, this Court examined whether Congress had considered "voluntary blocking versus time channeling," two methods of regulating access to pornographic television programming. *Playboy*, 529 U.S. at 822.

[14] In the administrative law context as well, the validity of agency action is evaluated based upon the agency's

The Eleventh Circuit failed to follow this Court's strict scrutiny precedents when it determined that RLUIPA strict scrutiny did not require ADOC to "consider[] alternatives to its policy" and demonstrate a sufficient basis for rejecting them. Pet. App. 20a–21a.

The Eleventh Circuit's decision also runs contrary to *Johnson v. California*, 543 U.S. 499 (2005), where this Court looked to the practices of other prison systems as evidence of workable alternatives to racial segregation in prison. *See also Procunier v. Martinez*, 416 U.S. 396, 414 n.14 (1974), *overruled on other grounds*, *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (noting that "the policies followed at other well-run institutions" are "relevant to a determination of the need for a particular type of restriction" in the prison context). In *Johnson*, this Court determined that an inmate's equal protection challenge to California's inmate segregation policy should be evaluated under strict scrutiny review. 543 U.S. at 515. This Court pointed to the fact that "[v]irtually all other States and the Federal Government manage their prison systems without reliance on racial segregation." *Id.* at 508.

However, under RLUIPA, which incorporates the same strict scrutiny standard, the Eleventh Circuit found instead that a "heavy fixation on the policies of other jurisdictions . . . misses the mark." Pet. App. 21a. The Eleventh Circuit's failure to follow this Court's strict scrutiny jurisprudence led the court below to expressly create a circuit split on

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justifications when adopting the challenged regulation, rather than on the basis of counsel's post hoc rationalizations. *See SEC v. Chenery Corp.*, 318 U.S. 80, 92–94 (1943).

an important and recurring question of federal law. Accordingly, this Court's review is amply warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 6, 2014

APPENDIX

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APPENDIX E

APPENDIX A

United States Court of Appeals,

Eleventh Circuit.

Ricky KNIGHT, et al., Plaintiffs - Appellants,

v.

Leslie THOMPSON, et al., Defendants - Appellants.

No. 12–11926.

July 26, 2013.

Before HULL and ANDERSON, Circuit Judges, and SCHLESINGER, District Judge.

SCHLESINGER, District Judge:

Plaintiffs–Appellants (hereinafter "Plaintiffs") are male inmates in the custody of the Alabama Department of Corrections ("ADOC"). They wish to wear their hair unshorn in accordance with the dictates of their Native American religion, but an ADOC policy forbids them from doing so. Plaintiffs brought this suit against the ADOC and several other defendants (collectively "ADOC"), challenging the ADOC's hair-length policy on various constitutional grounds and under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq*. The United States has intervened on Plaintiffs' behalf. After a full evidentiary hearing and bench trial, the District Court made several findings of fact and entered judgment in favor of the ADOC. Because the ADOC carried its RLUIPA burden to demonstrate that its hair-length policy is the least

restrictive means of furthering its compelling governmental interests, we affirm.

I. BACKGROUND

The ADOC requires all male prison inmates to wear a "regular hair cut," defined as "off neck and ears." Dkt. 471. The ADOC does not grant any exemptions to this policy, religious or otherwise. Dkt. 474 p. 146. Plaintiffs seek a complete religion-based exemption to the male hair-length policy.[1] Plaintiffs seek this exemption because wearing long hair is a central tenet of their religious faith. No plaintiff is a maximum-security inmate.

A. Procedural History

This is the third time that this case has come before this Court. Plaintiffs initially filed suit on November 24, 1993, challenging on various constitutional grounds and under the Religious Freedom Restoration Act ("RFRA") the ADOC's policies restricting hair length and prohibiting sweat lodge ceremonies. After entry of summary judgment for the ADOC, Plaintiffs appealed to this Court. Dkt. 218. During that appeal's pendency, Congress responded to the Supreme Court's partial invalidation of the RFRA by enacting the RLUIPA, and this Court

[1] Three of Plaintiffs seek, in the alternative, a more narrow exemption to wear a kouplock – a two-inch wide strip of hair beginning at the base of the skull and stretching down the back. However, because Plaintiffs first raised their kouplock argument in their objections to the magistrate judge's report and recommendation, and because the District Court did not consider the kouplock argument when it ruled on the report and recommendation, Plaintiffs have waived the issue. *Williams v. McNeil*, 557 F.3d 1287, 1291 (11th Cir. 2009) (district courts have discretion to decline to consider arguments that are not presented to the magistrate judge).

therefore remanded this case to allow Plaintiffs to amend their complaint. Dkt. 235. After Plaintiffs amended the complaint to add claims under the RLUIPA and the Parties engaged in a brief period of additional discovery, the District Court again granted summary judgment to the ADOC. Dkt. 317.

Plaintiffs appealed again, and this Court affirmed the judgment of the District Court as to all but Plaintiffs' hair-length restriction claims. As to the hair-length claims, however, this Court concluded:

> [O]n the present record factual issues exist as to whether, inter alia, the defendants' total ban on the wearing of long hair and denial of an exemption to the plaintiffs based on their Native American religion is "the least restrictive means of furthering [the defendants'] compelling governmental interest[s]" in security, discipline, hygiene and safety within the prisons and in the public's safety in the event of escapes and alteration of appearances. In addition, we note that the evidentiary record relating to the hair-length claims is over ten years old and that, in the intervening time, prison staffing and administration, prison safety and security, and the prison population in Alabama have changed.

Lathan v. Thompson, 251 Fed.Appx. 665, 667 (11th Cir.2007) (internal citation omitted, second and third alterations in original). This Court, therefore, vacated the District Court's judgment as to the hair-length claims and remanded the case for a full evidentiary hearing and bench trial, "following which the district court shall make detailed findings of fact and conclusions of law." *Id.*

B. The Evidentiary Hearing and Bench Trial on Remand

On remand, Magistrate Judge Charles S. Coody held an evidentiary hearing and bench trial. Dkts. 471, 474–76. Plaintiffs proffered undisputed testimony regarding the burden that the ADOC hair-length policy placed on their religious practices. They also presented 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.[2] A witness for Plaintiffs skilled in the use of Photoshop, a computer program used to digitally alter images, testified that corrections officers could easily be trained to alter inmate images to assist in the identification of escaped long-haired inmates. Finally, George Sullivan, Plaintiffs' main witness, testified that his tours and audits of 170 correctional facilities and extensive past employment experience in several prison systems 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. In support of his conclusion, Sullivan opined that inmates have many other locations where they can more easily store contraband (e.g., socks, stitching areas in clothes, gloves, jackets, etc.), long hair does not impede inmate identification, and long hair does not pose any health risks if inmates follow basic hygiene procedures. Dkt. 474 at pp. 121–38, 143–44; Dkt. 475 at pp. 6–29, 118–58; Dkt. 476 at pp. 7–9, 11–29.

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[2] These jurisdictions are: the Federal Bureau of Prisons, the correctional systems of approximately 38 states, and the District of Columbia Department of Corrections. Dkt. 475 at p. 133.

The ADOC's witnesses nonetheless asserted that its policy is necessary to accomplish several compelling goals, including the prevention of contraband, facilitation of inmate identification (both during the usual course of prison business and after escapes), maintenance of good hygiene and health, and facilitation of prison discipline through uniformity. Aside from figures demonstrating that Alabama's prisons have become increasingly over-crowded, under-funded, and under-staffed in recent years, the ADOC's witnesses offered little statistical evidence to support their claims. But they did offer elucidating expert opinions, lay testimony, and anecdotal evidence based on their decades of combined experience as corrections officers.

For example, Warden Grantt Culliver testified that permitting long hair would slow the process of searching inmates for contraband, increase the risk that inmates could grab each other by the hair during fights, and give inmates an additional location to hide small items like handcuff keys on their person. He also testified that granting religious exemptions to Native American inmates would erode discipline and likely cause the ADOC's over-worked staff to stop enforcing the policy against non-exempt inmates. As to hygiene, Culliver recounted an incident in which an inmate developed a fungus on his scalp that remained hidden from view until his hair was cut. Dkt. 474 at pp. 124–32, 144–46, 162–68.

Gwendolyn Mosley, institutional coordinator of the ADOC's southern region and past warden of various ADOC institutions, similarly testified that the hair-length restrictions reduce inmates' ability to hide contraband, assist inmate identification, reduce the time and difficulty of conducting shake-downs and searches, and prevent inmates from pulling each

other's hair during fights. She further testified that exempting only certain inmates from the policy would allow them to identify as a special group and form gangs, eroding order and control. Finally, like Warden Culliver, Mosley testified that the grooming policy promotes health and hygiene. Dkt. 475 at pp. 5–10, 16–38.

Warden Tony Patterson echoed many of Culliver's and Mosley's concerns about Plaintiffs' requested exemption from the short-hair policy. Patterson testified that the hair-length policy facilitates the detection of contraband and assists with prompt inmate identification, both during day-to-day operations and in the event of an escape. He further testified that a generally applicable policy with no exemptions fosters discipline, and if the ADOC were required to grant exemptions, officers would have trouble enforcing the policy due to the difficulty of readily identifying which inmates are entitled to the exemption. Finally, Patterson testified concerning a September 2008 escape of two inmates, whose subsequent capture was accomplished by distributing pictures of the inmates to the public. Dkt. 475 at pp. 92–97, 103–05.

However, it was Ronald Angelone, former director of several state prison systems, who provided the most thorough defense of the ADOC's hair length policy. While serving as the director of Virginia's then-chaotic prison system, Angelone had begun enforcing, in response to security and health concerns, an exceptionless grooming policy for male inmates that required all haircuts to be one inch or shorter.[3]

[3] The policy had allowed female inmates to wear shoulder-length hair, however, on the rationale that they posed a lesser risk of violence and escape than male inmates.

Angelone specified several reasons for why he chose to enforce the grooming policy, chief among which was the 1999 escape of a "very dangerous" Virginia prison inmate who had cut his hair to alter his appearance. The inmate was discovered three or four days after his escape, but the haircut had so significantly changed his appearance that Angelone would not have been able to identify him from the photograph that the prison released to local police departments. Angelone also testified that a review of institutional reports confirmed that inmates had hidden ice picks, handcuff keys, wires, bolts, and other contraband items in their hair. He further recounted one incident in which prison staff cut their hands on a hidden razor blade while searching an inmate's hair. Angelone testified that the short-hair policy reduced the time needed to search inmates, and inmates were aware that officers often will not run their hands through their hair for fear of sharp objects. Angelone further asserted that inmates can grab each other by the hair during fights, and non-exempt inmates might attack exempted inmates out of jealousy for their special long-hair privilege. Turning to the asserted health and hygiene hazards of long hair, he described an incident in which a black widow spider wove a nest in an inmate's dreadlocks, and he noted that long hair had also concealed some inmates' scalp sores, cysts, and tumors. In sum, Angelone opined that his short-hair policy was a factor in his successful restoration of order and control in Virginia's prison system. Dkt. 475 at pp. 46–54, 64–68, 73–74.

Although the ADOC's witnesses combined to offer a strong defense of the short-hair policy, they did make several concessions on cross-examination. They admitted that the ADOC allows female inmates to

wear shoulder-length hair. They also 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. Finally, none of the ADOC's witnesses could point to any instances where an inmate had attacked an exempted long-haired inmate out of jealousy or grabbed long hair during a fight. Dkt. 475 at pp. 46–54, 64–68.

C. The District Court's Decision

After the evidentiary hearing and bench trial, Magistrate Judge Coody issued a report and recommendation ("R&R") that recommended entry of judgment in favor of the ADOC. Dkt. 530. On the basis of exhibits admitted during the trial and in accordance with this Court's directions on remand, the Magistrate Judge made several factual findings that painted the current context of this case. First, he found that in September 2008, the ADOC housed 25,303 inmates—almost 189% of the statewide design capacity of the ADOC's facilities. Second, he found that disciplinary actions increased by 62% in 2007 alone, and nearly 50% of the ADOC's inmates were serving time for felonies against persons. Third, he found that the ADOC's overcrowded prisons are also under-staffed and under-funded, with approximately one in every four correctional personnel positions remaining vacant. Finally, he found that between 1997 and 2007, the number of admissions to the ADOC outpaced the number of releases by almost 5000 inmates each year, except for the years 2000 and 2004.

Judge Coody also made specific factual findings with regard to male inmates' hair length, resolving disputes largely in the ADOC's favor. He found that inmates can use long hair to alter their appearances,

long hair impedes the ability of officers to quickly identify inmates in the prisons, and inmates can use long hair to identify with special groups, including gangs. Implementing a Photoshop program for logging and manipulating digital photographs of inmates would raise practical concerns of cost and training, he found, and in any event would not assist in the identification of inmates inside the prisons. He further found that long hair provides an additional location for inmates to conceal weapons and contraband, and correctional officers risk injury from hidden weapons when searching long hair. He also found that inmates can manipulate self-searches of their hair, and permitting inmates to have long hair would make searches for contraband more difficult and more lengthy. In addition, he found that uniformity within the ADOC's institutions instills discipline and promotes order by allowing officers to exercise control over inmates, and maintaining discipline and order is important because violence is prevalent in the ADOC's prisons. He specifically found, quoting Mosley's conclusory testimony, that the inmates incarcerated in the ADOC today are "younger, bolder and meaner" than those of previous years. He concluded that inmates can grab other inmates' long hair during fights. All these security problems are worse for male inmates than female inmates, he found, because male facilities are more over-crowded than female facilities, and males pose greater security risks than females. Finally, Judge Coody found that requiring inmates to keep their hair short enables corrections officers to more easily detect infections and infestations and prevent their proliferation.

As to his conclusions of law, Judge Coody concluded that the ADOC's hair-length policy substantially burdens Plaintiffs' religious exercise. He went

on to conclude, however, that the ADOC had carried its RLUIPA burden and shown that its hair-length policy is the least restrictive means of furthering its compelling interests in security, safety, control, order, uniformity, discipline, health, hygiene, sanitation, cost-containment, and reducing health care costs. That conclusion was compelled, he reasoned, by this Court's decision in *Harris v. Chapman*, 97 F.3d 499 (11th Cir.1996), which upheld a Florida Department of Corrections short-hair policy under the statutory predecessor to the RLUIPA. Judge Coody additionally noted that several of our sister circuits have, in a variety of contexts, sustained prison grooming regulations in the face of RLUIPA challenges. Magistrate Judge Coody then rejected Plaintiffs' argument that the widespread adoption of permissive grooming policies in other jurisdictions should, by itself, invalidate the ADOC's grooming policy. He reasoned that the practices of other jurisdictions are *some* evidence—but are by no means *dispositive* evidence—of the feasibility of less restrictive measures, and the Supreme Court has cautioned lower courts to defer to the reasoned judgments of prison officials when applying the RLUIPA.

The District Court adopted Magistrate Judge Coody's Report and Recommendation ("R&R") and overruled Plaintiffs' objections, noting that "context matters," "what happens in other prison systems is beside the point," and Judge Coody appropriately took into account staffing and funding shortages as part of the "context" of the case. Dkt. 549 at pp. 2–3. Furthermore, according to the District Court, Plaintiffs' heavy reliance on the practices of other jurisdictions mistakenly "decouple[s] deference [to prison officials] from [the RLUIPA's] least restrictive alternative" prong. *Id.* at 2. The District Court there-

fore adopted the R&R and entered judgment in favor of the ADOC. Dkts. 549, 550. Plaintiffs then initiated this appeal. Dkt. 556.

II. STANDARDS OF REVIEW

We review the District Court's factual determinations for clear error and its legal conclusions *de novo*. In particular, we will conduct a *de novo* review of the District Court's overall legal determination that the ADOC's hair policy comports with the RLUIPA. *Cf. Lawson v. Singletary*, 85 F.3d 502, 511–12 (11th Cir.1996) ("Whether the Rule comports with [the Religious Freedom Restoration Act] is a pure question of law, and is subject to *de novo* review by this Court."); *accord Hamilton v. Schriro*, 74 F.3d 1545, 1552 (8th Cir.1996); *Hoevenaar v. Lazaroff*, 422 F.3d 366, 368 (6th Cir.2005); *McRae v. Johnson*, 261 Fed.Appx. 554, 557 (4th Cir.2008); *United States v. Friday*, 525 F.3d 938, 949 (10th Cir.2008); *Garner v. Kennedy*, 713 F.3d 237, 242 (5th Cir.2013).[4]

A factual finding is clearly erroneous "if the record lacks substantial evidence to support it" or we are otherwise "left with the impression it is not the truth and right of the case"—"a definite and firm conviction

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[4] We acknowledge that *Lawson* identified a policy's validity under the statutory predecessor to the RLUIPA as a "pure question of law." *Lawson*, 85 F.3d at 512. In this appeal, however, Plaintiffs attack not only the District Court's overall legal determination that the ADOC's short-hair policy comports with the RLUIPA, but also the factual findings upon which the District Court rested its ultimate legal conclusion. This appeal, therefore, presents a mixed question of law and fact, and we will review the District Court's factual findings for clear error and its application of the law to those facts *de novo*. *Accord Garner*, 713 F.3d at 242; *Hamilton*, 74 F.3d at 1552; *McRae*, 261 Fed.Appx. at 557; *Fegans v. Norris*, 537 F.3d 897, 905 and n. 2 (8th Cir.2008).

that a mistake has been committed." *Lincoln v. Bd. of Regents of Univ. Sys. of Georgia*, 697 F.2d 928, 939–40 (11th Cir.1983) (internal quotation marks omitted). As to the weighing of evidence, a District Court may weigh competing expert testimony but may not arbitrarily ignore expert testimony; rather, "some reason must be objectively present for ignoring expert opinion testimony." *United States v. Hall*, 583 F.2d 1288, 1294 (5th Cir.1978).[5] In addition, an evidentiary error is harmless if it "had no substantial influence on the outcome and sufficient evidence uninfected by error supports the verdict." *United States v. Dickerson*, 248 F.3d 1036, 1048 (11th Cir.2001) (internal quotation marks omitted).

III. DISCUSSION

A. The RLUIPA Standard

Congress enacted the RLUIPA as a response to the Supreme Court's decisions in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), and *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). In *Smith*, the Court held that the Free Exercise Clause typically does not shield religiously motivated conduct from the burdens of generally applicable laws. 494 U.S. at 878–79, 110 S.Ct. 1595. Congress responded three years later by enacting the Religious Freedom Restoration Act ("RFRA"). In an effort to restore the level of protection that religious observances enjoyed before *Smith*, the RFRA commanded that "government"—including state and local govern-

[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

ments—"shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless such a burden met a "compelling governmental interest" and "least restrictive means" test. 42 U.S.C. § 2000bb–1. In Flores, the Supreme Court declared the RFRA's application to the States unconstitutional because it exceeded Congress's Fourteenth Amendment enforcement power. 521 U.S. at 532–36, 117 S.Ct. 2157.

Mindful of the adage "where there's a will, there's a way," Congress responded to *Flores* with the RLUIPA, predicating its enactment not only on its power to enforce the Fourteenth Amendment, but also on its Spending and Commerce powers. Less sweeping than the RFRA, the RLUIPA targets only two areas: land-use regulation and institutions that receive federal funds. Borrowing the RFRA standard almost entirely, with respect to its protection of institutionalized persons, the RLUIPA commands that:

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution ... even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc–1(a). The Act broadly defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Id. § 2000cc–5(7)(A). Under the RLUIPA, the plaintiff bears the burden to

prove that the challenged law, regulation, or practice substantially burdens his exercise of religion. Once a plaintiff has made this *prima facie* showing, the defendant bears the burden to prove that the challenged regulation is the least restrictive means of furthering a compelling governmental interest. *Id.* § 2000cc–2(b); *Smith v. Allen*, 502 F.3d 1255, 1276 (11th Cir.2007), *abrogated on other grounds by Sossamon v. Texas*, ––U.S. ––––, 131 S.Ct. 1651, 179 L.Ed.2d 700 (2011).

Although the RLUIPA protects, to a substantial degree, the religious observances of institutionalized persons, it does not give courts carte blanche to second- guess the reasoned judgments of prison officials. Indeed, while Congress enacted the RLUIPA to address the many "frivolous or arbitrary" barriers impeding institutionalized persons' religious exercise, it nevertheless anticipated that courts entertaining RLUIPA challenges "would accord 'due deference to the experience and expertise of prison and jail administrators.' " *Cutter v. Wilkinson*, 544 U.S. 709, 716–17, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (quoting 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sens. Hatch and Kennedy on the RLUIPA)). The Supreme Court has cautioned that "[w]e do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety," and "an accommodation must be measured so that it does not override other significant interests." *Id.* at 722, 125 S.Ct. 2113. The Court further instructed:

> We have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns. While the Act adopts a "compelling governmental interest" standard, context

> matters in the application of that standard. Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions. They anticipated that courts would apply the Act's standard with due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.

Id. at 722–23, 125 S.Ct. 2113 (internal quotation marks and citations omitted). This deference is not, however, unlimited, and "policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements." *Rich v. Secretary, Florida Dep't of Corrections*, 716 F.3d 525, 533 (11th Cir.2013) (internal quotation marks omitted).

B. Application of the RLUIPA Standard to this Case

The ADOC does not dispute that its hair-length policy substantially burdens Plaintiffs' religious exercise, nor could it. Plaintiffs' expert on Native American spirituality offered extensive, undisputed testimony that long hair has great religious significance for many Native Americans, and each Plaintiff confirmed that his desire to wear unshorn hair stemmed from deep religious convictions. Plaintiffs' expert further gave an uncontradicted opinion that forcing Native Americans to cut their long hair would amount to an "assault on their sacredness." The sincerity of these firmly-held beliefs—and the gravity of

preventing their exercise—should come as no surprise to anyone familiar with Biblical Scripture.[6]

It is also beyond dispute that the ADOC has compelling interests in security, discipline, hygiene, and safety within its prisons and in the public's safety in the event of escapes and alteration of appearances. *Lathan*, 251 Fed.Appx. at 667. The crux of this appeal, then, is simply whether the ADOC's blanket short-hair policy furthers those goals and is the least restrictive means of doing so.

i. In Furtherance of a Compelling Governmental Interest

As to the first RLUIPA prong, Plaintiffs merely mount an attack on the District Court's factual findings and choice to credit the testimony of the ADOC's witnesses. This attack must surely fail, as the detailed record developed during the trial of this case amply supports the District Court's factual findings about the risks and costs associated with permitting male inmates to wear long hair. Ronald Angelone described specific incidents in which male inmates had used long hair to conceal weapons and contraband, as well as a situation in which a male inmate had cut his long hair to significantly change his appearance after a successful escape. Angelone further testified that prison staff have cut their hands on hidden razors when searching male in-

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[6] *See, e.g.*, Judges 16:4–30 (chronicling Delilah's betrayal of Samson, the forced cutting of Samson's hair in contravention to his Nazirite vow, and Samson's subsequent destruction of the Philistine temple); Numbers 6:1–21 (describing the Nazirite vow, which included a promise to refrain from cutting one's hair unless it became defiled by a sudden death that occurred in the Nazirite's presence, and which entailed the shaving of one's head and sacrifice of the hair at the close of one's period of dedication).

mates' long hair. In addition, Angelone and Grantt Culliver testified that long hair had concealed male inmates' fungus outbreaks, sores, cysts, and tumors, and even a spider's nest. The ADOC's witnesses also offered credible opinions, based on decades of combined correctional experience, that inmates can grab long hair during fights, long hair impedes the ability of prison staff to readily identify inmates inside the prison, and an exceptionless short-hair policy promotes order and discipline while removing a physical characteristic that inmates can use to form gangs. Plainly, the ADOC's witnesses offered more than simply "speculation, exaggerated fears, or post-hoc rationalizations." Rather, they offered a reasoned and fairly detailed explanation of how the ADOC's short-hair policy addresses genuine security, discipline, hygiene, and safety concerns.

Plaintiffs point out that their witnesses offered competing testimony, but the District Court, as the finder of fact, remained free to reject it. We cannot say that the District Court clearly erred in its material factual findings with regard to male inmate hair-length.[7] Nor can we say that it arbitrarily ignored the testimony of Plaintiffs' expert when the

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[7] Plaintiffs direct their most vociferous objection toward the District Court's somewhat conclusory finding that the ADOC's current inmate population is "younger, bolder and meaner" than in previous years. We cannot say that this finding was wholly unsupported by the record, since the District Court also found that disciplinary actions increased markedly in 2007. But to the extent that the record was insufficient to support this particular factual finding, the error was harmless because it had no substantial influence on the outcome and sufficient evidence uninfected by error supports the District Court's determination that the ADOC's policy furthers compelling governmental interests. *Dickerson*, 248 F.3d at 1048.

ADOC's witnesses contradicted his testimony.[8] Given the District Court's factual findings, it is apparent that the ADOC's short-hair policy furthers its compelling interests in security, discipline, hygiene, and safety within its prisons and in the public's safety in the event of escapes and alteration of appearances.

ii. Least Restrictive Means of Furthering the Interest

Plaintiffs cannot prevail on their RLUIPA claim because the ADOC has shown that its exceptionless short-hair policy for male inmates is the least restrictive means of furthering the compelling governmental interests that we have mentioned. The ADOC has shown that Plaintiffs' proposed alternative—allowing an exemption for Native American inmates, requiring exempted inmates to search their own hair, and using a computer program to manipulate inmate photographs—does not eliminate the ADOC's security, discipline, hygiene, and safety concerns. As the District Court found, inmates can manipulate searches of their own hair to conceal weapons and contraband, and using a computer program to alter photographs does nothing to address the impediments that long hair causes for the identification of inmates within the prisons. Plaintiffs' proposed alternative also does nothing to assuage the ADOC's concerns about gang-formation and hair-pulling during fights, or the concealment of infections and infestations. Plaintiffs cannot point to a less restrictive alternative that accomplishes the

[8] As the ADOC points out in its brief, the District Court may have chosen to discredit George Sullivan's testimony because he has testified in many prisoner religious rights cases, but never on behalf of a prison system, and because he admitted a lack of familiarity with the ADOC's prisons.

ADOC's compelling goals, and neither can we. The ADOC has carried its burden on both RLUIPA prongs.

We agree with the District Court that *Harris v. Chapman*, 97 F.3d 499 (11th Cir.1996), compels the foregoing analysis. In *Harris*, this Court confronted a Rastafarian inmate's RFRA challenge to the Florida DOC's grooming policy, which, like the policy at-issue here, categorically forbade male inmates from wearing long hair.[9] This Court upheld the short-hair policy, reasoning in regards to the first RFRA prong that "[i]t is well established that states have a compelling interest in security and order within their prisons," and "[t]his general interest in security clearly includes other specific interests ... such as the identification of escapees and the prevention of the secreting of contraband or weapons in hair or beards." *Id.* at 504. This Court then held that "a reasonable hair length regulation satisfies the least restrictive means test" because neither we nor the plaintiff could conceive of any lesser means that would satisfy these compelling interests. *Id.* So it is in this case. Plaintiffs have not presented any less restrictive alternative that can adequately contain the risks associated with long hair; they have merely argued that the ADOC should volunteer to assume those risks. The RLUIPA places upon the ADOC no such duty.

In response, Plaintiffs make three arguments that are worth addressing. First, they argue that the ADOC has failed to satisfy the "least restrictive means" standard because all its witnesses admitted that the ADOC never considered any less restrictive

[9] As already mentioned, the RLUIPA essentially borrowed the RFRA standard, and the reasoning in *Harris* therefore applies with equal force in the RLUIPA context.

alternatives to its short-hair policy before adopting it. Second, Plaintiffs argue that the widespread adoption of permissive grooming policies in other jurisdictions demonstrates the viability of a religious exemption as a less restrictive alternative. Third, Plaintiffs argue that the ADOC's choice to allow female inmates to wear shoulder-length hair proves that it is able to accommodate their requested religious exemption. All of these arguments are unavailing, and we respond to them in turn.

It is true, as Plaintiffs point out, that some of our sister courts have focused on the RLUIPA's command that prison administrators "demonstrate" the lawfulness of their policies and have held that notwithstanding *Cutter*'s deference mandate, prison administrators must show that they "actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *See, e.g.*, *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir.2005); *Spratt v. Rhode Island Dep't of Corrections*, 482 F.3d 33, 41 (1st Cir.2007) (adopting *Warsoldier*'s heightened proof requirement); *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir.2007) (same). This, however, is not the law in this circuit, and none of this Court's cases have adopted *Warsoldier*'s more strict proof requirement. The language of the RLUIPA directs us to inquire merely whether the policy under review is the least restrictive means of furthering a compelling governmental interest. It is certainly possible—though perhaps relatively less common—for prison administrators to promulgate an appropriately tailored policy without first considering and rejecting the efficacy of less restrictive measures. The RLUIPA asks only whether efficacious less restrictive measures actually exist, not whether the defendant considered alternatives to its policy. As

already explained, the ADOC has shown that no efficacious less restrictive measures exist and has therefore carried its RLUIPA burden.

Plaintiffs' heavy fixation on the policies of other jurisdictions similarly misses the mark. While the practices of other institutions are relevant to the RLUIPA analysis, they are not controlling—the RLUIPA does not pit institutions against one another in a race to the top of the risk-tolerance or cost-absorption ladder. *See Rich v. Secretary, Florida Dep't of Corrections*, 716 F.3d 525, 534 (11th Cir.2013) (practices of other institutions are relevant but not controlling); *see also Daker v. Wetherington*, 469 F.Supp.2d 1231, 1239 (N.D.Ga.2007) (interpreting the RLUIPA to leave "room for a particular prison to decline to join the 'lowest common denominator' when, in the discretion of its officials, the removal of a challenged restriction poses an appreciable risk to security"). The ADOC has shown that Plaintiffs' requested exemption poses actual security, discipline, hygiene, and safety risks. That other jurisdictions choose to allow male inmates to wear long hair shows only that they have elected to absorb those risks. The RLUIPA does not force institutions to follow the practices of their less risk-averse neighbors, so long as they can prove that they have employed the least restrictive means of furthering the compelling interests that they have chosen to address. The ADOC has shown that its departure from the practices of other jurisdictions stems not from a stubborn refusal to accept a workable alternative, but rather from a calculated decision not to absorb the added risks that its fellow institutions have chosen to tolerate. This cannot amount to an RLUIPA violation.

Finally, Plaintiffs' focus on the ADOC's different grooming standards for female inmates ignores the

District Court's factual finding—supported by Ronald Angelone's testimony—that men pose greater safety and security risks than women in prison populations. We are not the first court of appeals to uphold a grooming policy that treats male and female inmates differently when the record shows that there are valid reasons for the different treatment. *See, e.g.*, *Fegans v. Norris*, 537 F.3d 897, 905 (8th Cir.2008). Given the District Court's finding that male inmates pose a greater threat than female inmates, the RLUIPA does not require the ADOC to enforce a sex-blind hair-length policy.

C. Plaintiffs' Additional Legal Rights

In a mere two pages at the end of their initial brief, Plaintiffs assert that the ADOC's hair-length restrictions violate their "additional legal rights." Specifically, Plaintiffs claim that the ADOC's hair-length policy violates their free exercise and freedom of association rights under the First Amendment, their constitutional rights to due process and equal protection of the laws, the Establishment Clause of the First Amendment, and their rights under 42 U.S.C. § 1985. Except for their equal protection claim, Plaintiffs provide no supporting discussion and have therefore abandoned these additional issues in this appeal. *See Rowe v. Schreiber*, 139 F.3d 1381, 1382 n. 1 (11th Cir.1998) (issues mentioned in passing but without supporting argument or discussion are abandoned).

Plaintiffs do present a cursory equal protection argument, but it is wholly meritless. Plaintiffs claim that the ADOC's hair-length policy treats them differently than other inmates on the basis of race, religion, and sex. There is absolutely no evidence in the record to support the contention that the hair-length

policy—which applies to all male inmates without exception—discriminates on the basis of race or religion. Furthermore, while the policy does establish different standards for male and female inmates, the record unmistakably shows that the ADOC has valid reasons for the different hair-length standards and the regulations are not arbitrary or unreasonable. *See Hill v. Estelle*, 537 F.2d 214, 215–16 (5th Cir.1976) (upholding differential prison grooming regulations against an equal protection challenge because "[t]he disparity between the regulations for male and female inmates is not so grievous as to make them arbitrary or unreasonable, cruel or unusual, and the wisdom of the disparate regulations will be left to the judgment of state penologists"); *accord Fegans*, 537 F.3d at 906 (upholding differential prison grooming regulations against an equal protection challenge under a "reasonableness" standard).

IV. CONCLUSION

In the end, Plaintiffs ask us to hold that because many other prison systems have chosen to accept the costs and risks associated with long hair, the ADOC must accept them as well. This we cannot do. Although many well-run institutions have indeed decided that the benefits of giving inmates more freedom in personal grooming outweigh the disadvantages, the RLUIPA does not prevent the ADOC from making its own reasoned assessment. Allowing male inmates to wear long hair carries with it established costs and risks, and the RLUIPA does not require the ADOC to embrace them merely because other institutions have.

The ADOC may, of course, decide in the future that these costs and risks might be worth absorbing, especially in view of the high value that long hair

holds for many religious inmates. And the ADOC might also find persuasive James Madison's admonition that "[i]t is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him," and "[t]his duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society." James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), *in* 5 THE FOUNDERS' CONSTITUTION, at 82 (Philip B. Kurland & Ralph Lerner eds., 1987). But that is a decision that the RLUIPA leaves to the discretion of the ADOC's policy-makers.

For the foregoing reasons, the judgment of the District Court is

AFFIRMED.

APPENDIX B

Case 2:93-cv-01404-WHA-CSC Document 549
Filed 03/08/12

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

RICKY KNIGHT, et al., Plaintiffs, vs. LESLIE THOMPSON, et al., Defendants.	)	Civil Action No. 2:93cv1404–WHA (WO)
NATIVE AMERICAN PRISONERS OF ALABAMA — TURTLE WIND CLAN, et al, Plaintiffs, vs. STATE OF ALABAMA DEPARTMENT OF CORRECTIONS, et al, Defendants.	)	Civil Action No. 2:96cv554–WHA

ORDER

This case is before the court on the Recommendation of the Magistrate Judge (Doc. # 530), entered on July 11, 2011, the Plaintiffs' Objection thereto (Doc. # 539), and the Defendants' Response (Doc. # 546).

The court has conducted an independent evaluation and *de novo* review of the file in this case and, having done so, concludes that the objections are not welltaken and are due to be overruled.

The Plaintiffs complain that the Magistrate Judge incorrectly deferred to prison officials in a manner inconsistent with the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) and *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006), in concluding that the Defendants carried their burden to demonstrate the existence of a compelling interest in requiring that inmates' hair be cut short. "The compelling interest standard under both RLUIPA and the Constitution—is not one of deference but one of proof." (Pl. Objections at 4–5) Of course, the Defendants have a burden of proof on the compelling interest requirement, and the Recommendation fully discussed that. The Plaintiffs' reliance on *Gonzales* is misplaced. The question in that case was whether the Religious Freedom Restoration Act (RFRA) prohibited the government from applying the Controlled Substances Act to ban a religious sect's use of hoasca, a tea containing a hallucinogen, in religious ceremonies. The Court found, as did the courts below, that the government failed to meet its burden of proof to demonstrate a compelling interest. But *Gonzales* did not involve prisons, and the Plaintiffs ignore the fact that both RFRA and RLUIPA

specifically require a court to defer to prison administrators in considering claims of prisoners.

Much of the Plaintiffs' objections are devoted to a discussion of least restrictive alternatives and the fact that other prisons permit long hair. But, as noted in the Recommendation, context matters and what happens in other prison systems is beside the point. What the Plaintiffs want is that the court decouple deference from least restrictive alternative so that these are considered in isolation. That is inconsistent with RLUIPA.

Much of the Plaintiffs' objections are devoted to a demonstration that other prisons have different regulations and that none of the Alabama Department of Corrections's officials' concerns are valid. For the reasons stated in the Recommendation, the fact that other prison officials handle these questions differently is not determinative.

The Plaintiffs argue that the Alabama Department of Corrections' argument premised on lack of staff is "chutzpah." ((Pl. Objections at 49) Put another way, the Plaintiffs argue that the Defendants' lack of ability and money is no reason to violate their rights under RLUIPA. Of course, lack of funding is not an excuse for a denial of rights, but here that is not the question. Rather, the question is whether the Defendants' hair regulations survive scrutiny under the RLUIPA tests. In applying those tests, the court must do so in a manner which takes into account the reality of Alabama prisons which are facts, not excuses. Those facts inform the answer to whether the regulation meets the compelling interest and least restrictive means requirements. The court agrees with the conclusion of the Magistrate Judge, based on the facts, that the Alabama Department of Corrections'

regulations restricting inmate hair length do not violate the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq*.

Accordingly, it is hereby ORDERED as follows:

1. Plaintiffs' Objections are OVERRULED.

2. The Recommendation of the Magistrate Judge is ADOPTED.

3. Final Judgment will be entered in favor of the Defendants and this case DISMISSED with prejudice.

DONE this 8th day of March, 2012.

/s/ W. Harold Albritton

W. HAROLD ALBRITTON

SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX C

Case 2:93-cv-01404-WHA-CSC Document 550
Filed 03/08/12

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

RICKY KNIGHT, et al., Plaintiffs, vs. LESLIE THOMPSON, et al., Defendants.	)	Civil Action No. 2:93cv1404–WHA (WO)
NATIVE AMERICAN PRISONERS OF ALABAMA — TURTLE WIND CLAN, et al, Plaintiffs, vs. STATE OF ALABAMA DEPARTMENT OF CORRECTIONS, et al, Defendants.	)	Civil Action No. 2:96cv554–WHA

Final Judgment

In accordance with the order entered in this case on this day,

Final Judgment is entered in favor of the Defendants and against the Plaintiffs, and this action is DISMISSED with prejudice.

DONE this 8th day of March, 2012.

/s/ W. Harold Albritton

W. HAROLD ALBRITTON

SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX D

Case 2:93-cv-01404-WHA-CSC Document 530
Filed 07/11/11

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JAMES LIMBAUGH, et al., Plaintiffs, vs. LESLIE THOMPSON, et al., Defendants.	)	Civil Action No. 2:93cv1404–WHA (WO)
NATIVE AMERICAN PRISONERS OF ALABAMA — TURTLE WIND CLAN, et al, Plaintiffs, vs. STATE OF ALABAMA DEPARTMENT OF CORRECTIONS, et al, Defendants.	)	Civil Action No. 2:96cv554–WHA

RECOMMENDATION OF THE MAGISTRATE JUDGE

I. INTRODUCTION AND PROCEDURAL HISTORY

The plaintiffs in this case

[1] are prisoners incarcerated in the Alabama Department of Corrections ("ADOC") who are adherents of Native American religion and are challenging, pursuant to 42 U.S.C. § 1983, the ADOC's policies restricting inmate hair length.

This is not the first time these plaintiffs have been before this court. The plaintiffs initially filed suit on November 24, 1993. An evidentiary hearing was held on February 9, 1998, and concluded on February 13, 1998. After the 1998 hearing, the parties announced to the court that they had settled all issues except for the ban on sweat lodges and the ADOC's hair length regulations. *See* Doc. # 193. On June 12, 2000, the court adopted the Report and Recommendation of the Magistrate Judge and entered judgment in favor of the defendants on the sweat lodge and hair length issues. *See* Doc. # 214. The plaintiffs appealed this decision[2] to the Eleventh Circuit Court of Appeals. *See* Doc. # 218.

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[1] The court consolidated this case with one initially filed in the Northern District of Alabama entitled, *Native American Prisoners of Alabama v. Alabama Department of Corrections*, 94-U-186-NE. See Docs. # 92 & 135. The inmate organization which filed this lawsuit objected to the Alabama Department of Corrections ("ADOC's") refusal to provide them with a ceremonial ground, a sweat lodge, sacred plants, and other objects necessary to the practice of their Native American spirituality.

[2] *See* the September 10, 1999 Recommendation of the Magistrate Judge (Doc. # 192) and the district court's June 12, 2000

During the pendency of the appeal, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000, ("RLUIPA"), 42 U.S.C. § 2000cc, et seq. Based on the potential applicability of RLUIPA to this case, the Eleventh Circuit granted the plaintiffs' motion to remand "to permit the district court to determine . . . whether the new federal statute entitles plaintiffs to the relief that they seek." *See* Doc. 235.

The court allowed the plaintiffs to amend their complaint to add claims under RLUIPA. *See* Doc. # 255. After a brief period of discovery, the defendants filed a motion for summary judgment and supporting brief. *See* Docs. # 281 & 282. The parties also stipulated that additional evidentiary hearings were not necessary. *Id.* The court then affirmed its conclusion that the ADOC's restriction on inmate hair length was the least restrictive means of furthering its compelling governmental interests in prison safety and security, and granted the defendants' motion for summary judgment on this issue. *See* Docs. # 309 and 317.

The plaintiffs again appealed this decision to the Eleventh Circuit Court of Appeals. *See* Doc. # 408. The Eleventh Circuit subsequently remanded this case for further development of the record.

> With regard to plaintiffs' hair-length-restriction claims, we conclude that on the present record factual issues exist as to whether, *inter alia*, the defendants' total ban on the wearing of long hair and denial of an exemption to the plaintiffs based on their Native American religion is "the least restrictive means of furthering [the defendants']

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order adopting the Magistrate Judge's Recommendation (Doc. # 214).

> compelling governmental interest[s]" in security, discipline, hygiene and safety within the prisons and the public's safety in the event of escapes and alteration of appearances. *See* 42 U.S.C. § 2000cc-1(a)(2). In addition, we note that the evidentiary record relating to the hair-length claims is over ten years old and that, in the intervening time, prison staffing and administration, prison safety and security, and the prison population in Alabama have changed. We, thus, vacate and remand to the district court for a full evidentiary hearing and bench trial, following which the district court shall make detailed findings of fact and conclusions of law.

Lathan v. Thompson, 251 Fed. Appx. 665, 666 (11th Cir. 2007).[3]

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[3] On April 21, 2011, the United States Supreme Court decided *Sossamon v. Texas* ___ U.S. ___, 131 S.Ct. 1651 (2011). On April 22, 2011, the court directed the parties to brief the effect, if any, *Sossamon*, *supra* has on the issues pending before the court. After careful review and consideration, the court concludes that *Sossamon*, *supra*, has no impact on the issues before the court. *Sossamon* concluded that States that accept federal funds do not waive their sovereign immunity for the purpose of monetary damages claims under RLUIPA, 565 U.S. at ___, 131 S.Ct. at 1655. Consequently, the defendants are immune from monetary damages in their official capacities.

More importantly, however, all of the plaintiffs' claims for monetary damages have previously been dismissed.

> As to plaintiffs' claims for monetary relief, defendants are entitled to qualified immunity in their individual capacities because RLUIPA was not enacted until long after this lawsuit began and the law with regard to Native American inmates' rights to hold sweat lodge ceremonies under RLUIPA or the Constitution was not clearly established at the time the sweat-lodge ban was implemented. Furthermore, the defendants are entitled to sovereign immunity with regard to plaintiffs' official capacity claims.

The sole remaining issue before the court in this most recent chapter of this litigation is whether the ADOC's policies restricting inmate hair length pass muster under RLUIPA.[4] The defendants argue that the policies restricting hair length are in furtherance of and are the least restrictive means of furthering their compelling governmental interests in security, order, safety, and health. The inmates argue that the record clearly supports the conclusion that the ADOC's policies are not the least restrictive means of furthering those compelling governmental interests.

After a lengthy evidentiary hearing and careful review of the briefs and evidence filed in support of and in opposition, the court concludes that the plaintiffs have made a prima facie showing that they are sincere adherents of Native American spirituality whose religious exercise has been substantially burdened by the ADOC's policies restricting inmate hair length. The court further finds that the ADOC's restriction on inmate hair length is the least restrictive means of furthering its compelling governmental interests in prison safety and security.

Lathan, 251 Fed. Appx. at 666. For the same reasons, the defendants are entitled to qualified immunity with regard to the plaintiffs' hair length claim.

[4] None of the plaintiffs' constitutional claims remain before the court. Even if the constitutional claims remained, the plaintiffs would be entitled to no relief. Because the regulations survive RLUIPA, they also survive a constitutional challenge. "If a prison regulation passes muster under RLUIPA, however, it will perforce satisfy the requirements of the First Amendment, since RLUIPA offers greater protection to religious exercise than the First Amendment offers." *Smith v. Allen*, 502 F.3d 1255, 1264 fn 5 (11th Cir. 2007).

III. LEGAL STANDARDS

The substantive portions of RLUIPA provide that "[n]o government shall impose a substantial burden on the religious exercise" of prisoners unless the government can demonstrate that the burden both serves a compelling governmental interest and is the least restrictive means of advancing that interest. 42 U.S.C. § 2000cc-1(a). *See also Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005).

> To establish a prima facie case under Section 3, a plaintiff must show: (1) that he engaged in a religious exercise, and (2) that the religious exercise was substantially burdened by a government practice. *See* [*Smith v. Allen*, 502 F.3d 1255], 1276 [(11th Cir. 2007)]. "The plaintiff bears the burden of persuasion on whether the government practice that is challenged by the claim substantially burdens the exercise of religion." *See id.* (quotation marks, alteration, and ellipsis omitted). If the plaintiff establishes a prima facie case, the government must show that the challenged government practice is "in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." *Id.* (quoting 42 U.S.C. §§ 2000cc-1(a), 2000cc-2(b)). Context matters in the application of the compelling governmental interest standard. *Cutter v. Wilkinson*, 544 U.S. 709, 723, 125 S.Ct. 2113, 2123, 161 L.Ed.2d 1020 (2005). The standard is applied with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Id.*

Muhammad v. Sapp, 388 Fed. Appx. 892, 895 (11th Cir. 2010).

The plaintiffs bear the initial burden of demonstrating that by maintaining and wearing their hair long, they are engaged in a religious exercise, and that the defendants' grooming policies substantially burden that exercise. If the court determines that the challenged prison regulations substantially burden an inmate's religious expression, the burden then shifts to the defendants to prove that the regulations further a compelling governmental interest. *See* 42 U.S.C. § 2000cc-1(a)(1). The defendants must first establish the existence of a compelling governmental interest. The court then evaluates whether a defendant's policies satisfy RLUIPA's requirement that they be the least restrictive means of furthering that compelling governmental interest. *See* 42 U.S.C. § 2000cc-1(a)(2).

Although the defendants bear the burden of proof on the compelling interests and the least restrictive means prongs of the Act, the law is well established that prison officials are entitled to deference on issues relating to good order, security and discipline.[5]

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[5] The standard of review of the defendants' regulations has evolved since the inception of this lawsuit. When the activities which ultimately resulted in the filing of this lawsuit occurred, the rational-basis test outlined in *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987), was the indisputable standard for evaluating prison regulations which affected a prisoner's ability to freely practice his or her religion. The *O'Lone* standard permits the promulgation of policies restricting a prisoner's free exercise of religion if the regulation is "reasonably related to legitimate penological interests." 482 U.S. at 349.

Shortly before this lawsuit was filed, Congress enacted the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et. seq.* Congress' stated purpose in enacting this legislation was to create a more favorable standard of review for

> We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override significant interests. . . . While the Act adopts a "compelling governmental interest" standard, *see supra*, at 2118, "[c]ontext matters" in the application of that standards. See *Grutter v. Bollinger*, 539 U.S. 306, 327, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions. See, e.g., 139 CONG. REC. 26190 (1993) (remarks of Sen. Hatch). They anticipated that courts would apply the Act's standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures, to maintain good order, security and discipline, consistent with consideration of costs and

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plaintiffs challenging policies burdening the free exercise of religion. Under the standard outlined in RFRA, prison officials could promulgate policies which substantially burden the free exercise of religion only if the regulation was "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. Thereafter, the Supreme Court, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), declared RFRA unconstitutional and resurrected the rational basis test articulated in *O'Lone*.

Congress, in response, enacted RLUIPA and adopted the "compelling governmental interest and least restrictive means" standard emphasizing the need to "apply the Act's standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures, to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Cutter*, 544 U.S. at 723.

> limited resources." JOINT STATEMENT 16699 (quoting S. REP. NO. 103-111, at 10, U.S. CODE CONG. & ADMIN. NEWS 1993, pp 1892, 1899, 1900).

Cutter, 544 U.S. at 722-23 (footnotes omitted) (alterations in original).

The court is mindful of its responsibility to avoid substituting its own judgment for that of prison administrators. It is not the court's duty to select on its own the least restrictive alternative but rather to defer, within reason, to the judgment of prison administrators. *DeMoss v. Crain*, 636 F.3d 145 (5th Cir. 2011). *See also Beard v. Banks*, 548 U.S. 521, 528 (2006) ("As Overton [v. Bazzetta, 539 U.S. 126 (2003)], . . . pointed out, courts owe "substantial deference to the professional judgment of prison administrators.")

IV. DISCUSSION

(1) Jurisdictional Requirement

One method of satisfying RLUIPA's jurisdictional requirement involves a determination of whether the allegedly substantially burdensome prison regulations are imposed in a "program or activity" which receives federal financial assistance.[6] *See* 42 U.S.C. § 2000cc-1(b)(1). The parties do not dispute that the ADOC receives a percentage of funding from the federal government for various programs and projects implemented in the prison system. Consequently, the court finds that the plaintiffs' claims fall within LUIPA's jurisdictional ambit.

(2) The Prima Facie Case

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[6] Because jurisdiction is established under 42 U.S.C. § 2000cc-1(b)(1), the court does not address the alternate method of establishing jurisdiction under 42 U.S.C. § 2000cc-1(b)(2).

(a) Religious Exercise. The plaintiffs resist cutting their hair on religious grounds. Consequently, the plaintiffs are required to demonstrate that their preference for unshorn hair is a religious exercise of Native American spirituality which is substantially burdened by the ADOC's policies. *See* 42 U.S.C. § 2000cc-2(b). RLUIPA defines the term "religious exercise" as including "*any exercise of religion*, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (emphasis added). *See also Smith v. Allen*, 502 F.3d 1255, 1276-77 (11th Cir. 2007) ("religious exercise" broadly defined). In this case, the unrebutted testimony demonstrates, and the court finds, that a preference for unshorn hair is a central tenet of Native American spirituality and thus, satisfies the Act's broad definition of a religious exercise. Relying on Deward Walker ("Walker"), the plaintiffs' proffered expert on Native American religious practices, the court finds that unshorn hair is of utmost importance to those adhering to a traditional Native American lifestyle.[7] Plaintiffs Douglas Darkhorns Bailey and Michael Clem testified at the 2009 evidentiary hearing. After careful consideration of their testimony, the court makes the following findings of fact. Cutting of Native Americans' hair has spiritual and religious significance. Prison regulations requiring short hair diminish the ability of the plaintiffs to approach their

[7] Although Walker indicated that not all Native Americans wear their hair long, he also testified that "forcible cutting of a contemporary American Indian's hear would be about as severe a threat to the person as you can possibly imagine." (Evid. Hrg. Tr., Jan. 21, 2009, R. 91). The court finds that long hair has religious significance to American Indians and cutting that hair, as Walker testified, is "an assault on their sacredness." (*Id*. at 92, 100).

Creator with honor.[8] Cutting their hair detracts from their abilities to practice their religion, because when their hair has been cut, they feel separated and disconnected spiritually during their religious ceremonies. (Evid. Hr'g. Tr. at 9-11, 28). For example, one plaintiff cut his hair very short as a sign of mourning when his mother died. (*Id*. at 27).

The defendants do not challenge the centrality of these religious beliefs nor do they question the plaintiffs' sincerity. Moreover, the record clearly supports, and the court finds, that unshorn hair cannot reasonably be interpreted as merely a preference which the plaintiffs have conveniently labeled as religious for purposes of this litigation. Based on RLUIPA's expansive definition of religious exercise and the testimony in this case which establishes that the plaintiffs sincerely believe that unshorn hair is integral to the practice of their religion, the court concludes that the ADOC regulations at issue in this case affect the plaintiffs' exercise of religion.

(b) Substantial Burden. The next question for the court is whether the prison regulations "substantially burden" the inmates' religious exercise. In *Midrash Sephardi, Inc.*, the Eleventh Circuit explained that

> "substantial burden" requires something more than an incidental effect on religious exercise. . . . [A] "substantial burden" must place more than an inconvenience on religious exercise; a "substantial burden" is akin to significant pressure which directly coerces the religious adherent to conform

[8] *See* Evid. Hrg. Tr., Douglas Darkhorns Bailey, Jan. 21, 2009, R. 9-13; Evid. Hrg. Tr., Thomas Adams, Jan. 21, 2009, R. 45-47; Evid. Hrg. Tr., Franklin Running Bear Irvin, Jan. 21, 2009, R. 52-54.

> his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.

Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004). Stated another way, "the governmental action must significantly hamper one's religious practice." *Smith*, 502 F.3d at 1277.

The court finds that the involuntary cutting of the plaintiffs' hair substantially burdens the practice of their religious exercise. (Evid. Hr'g Tr., Thomas Otter Adams, R. 46). Plaintiff Adams described the cutting of his hair as "severely" impacting his ability to practice his religion. (*Id.* at 47).

> . . . [W]hen we set there in ceremony and our effort is to get a prayer through with a prayer pipe, all of our ceremonies are connected. All way of living, our religion, beliefs that it's the circle. If there is part of that missing, when we meet the Creator then we stand before Him with shame on our face. I don't want to meet my Creator with that shame on my face. It's that way in the prisons. I don't want to meet my Creator with that shame on my face. That I haven't lived the truth. That I haven't lived the traditional way of life. I may never get out of prison again. This is my only chance. . . . There are great consequences, eternal consequences, Eternal consequences for not doing that.

(*Id.*)

Plaintiff Michael Clem testified that cutting his hair was a substantial burden on the practice of his religious exercise.

> Q: And how serious a burden is it for you and your religious practices to have to cut your hair?

> A: Well, I'm cutting off a part of myself. I mean, the Creator, GOD, give me the hair for me, to help in my spirituality. It's part of my condition, not just with God, but with everything, all creation. If I start cutting my hands off, my toes, my feet, the same with my hair.
>
> Q: But does your hair have – that has an additional significance, an additional spiritual religious significance to you, is that correct?
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> A: Well, its hard to explain, actually, the symbolics of it, because like I said, it's like my energy source. It's how I connect with everything. It's like if somebody asks me to do a sweat, I tell them I am not capable of doing it. I mean, instead of doing a two hour ceremony I may do it fifteen minutes because I have so much negative, I have so much animosity.

(*Id*. at 29).

Plaintiff Franklin Running Bear Irvin testified that "the growing of our hair in the spiritual sense is a connection between us and Our Creator and the spirit world. To sever that connection would hinder and burden because it would sever that spiritual connection, just like the cutting of Mother Earth's hair." (*Id*. at 53). Thus, the court finds that cutting the hair of adherents of Native American religion substantially burdens the practice of their religious exercise.

The defendants argue that prison regulations restricting inmate hair length are not substantially burdensome because the ADOC permits Native American inmates to participate in a panoply of other religious practices. In short, the ADOC argues that the substantial burden inquiry does not focus on a

specific or isolated religious practice, like hair length, but on whether the plaintiffs' ability to *comprehensively practice* their Native American spirituality is substantially burdened.

As already noted, the court finds that long hair is a central tenet of Native American spirituality of which the plaintiffs are sincere adherents. Additionally, the court finds that the ADOC's restrictive policies prevent the plaintiffs from exercising fundamental religious beliefs. Accordingly, the court concludes that, as a matter of law, the ADOC's curtailment of these religious practices substantially burden the plaintiffs' Native American spirituality.

In reaching this conclusion, the court rejects the ADOC's position that the plaintiffs are not substantially burdened because prison officials allow them to exercise their Native American spirituality through other means. This argument is based on an assumption that all aspects of Native American spirituality are interchangeable and of equal importance. This assumption is clearly unsupported by the record, and contrary to the court's findings of fact. The ADOC's interpretation of the "substantial burden standard," which would permit prison officials with limited knowledge and familiarity with Native American spirituality to unilaterally determine the interchangeability of various religious practices despite expert testimony to the contrary, is inconsistent with RLUIPA's purpose of prohibiting frivolous or arbitrary rules restricting inmate religious practices. *See* S. REP. NO. S7775 (July 27, 2000). The existence of alternate expressions of Native American spirituality does not obviate the centrality of the religious practices at issue in this case. *Cf.*, *Blanken v. Ohio Dep't of Rehab. & Corr.*, 944 F. Supp. 1359, 1365-1366 (S.D. Ohio 1996) (rejecting defendant's claim that plaintiff

was not substantially burdened based on the availability of other religious practices).

Consequently, the court concludes that the plaintiffs have satisfied their prima facie burden of demonstrating that the ADOC's regulations restricting hair length substantially burdens the practice of their Native American spirituality.

3. Application of the Compelling Interests and Least Restrictive Means Prongs

With the plaintiffs having established that the ADOC's policies substantially burden the plaintiffs' exercise of their religion, the burden now shifts to the defendants. They must prove that the grooming restrictions further a compelling governmental interest and that those restrictions are the least restrictive means of furthering those compelling interests. *See* 42 U.S.C. § 2000cc-1(a)(1)(2).

a. Compelling Interests. The ADOC identified several compelling interests that are furthered by enforcing hair length restrictions including security and order, discipline, safety, health, hygiene and sanitation, and prevention of the introduction of contraband.

In accordance with the Eleventh Circuit's remand, the court held an evidentiary hearing on January 21, 22 and 23, 2009.[9] Based on the testimony at the

[9] At the conclusion of the hearing, the parties requested additional time to file post-hearing briefs. Thereafter, *Thunderhorse v. Pierce*, 364 Fed. Appx. 141 (5th Cir. 2010), a RLUIPA case involving forced hair cuts, was appealed to the United States Supreme Court. The case was held over and the Solicitor General's opinion was sought before *certiorari* was denied. ___ U.S. ___, 131 S.Ct. 896 (Jan. 10, 2011).

Also pending before the United States Supreme Court was *Sossamon v. Texas*, ___ U.S. ___, 130 S.Ct. 3319 (May 24, 2010).

hearing and the evidence presented, the court makes the following findings of fact which establish the context for applying the laws. In September 2008, the jurisdiction population[10] of the ADOC was 29,959 inmates.[11] *See* Defs' Ex. 8.[12] The ADOC houses 25,303 inmates.[13] *Id*. ADOC facilities are designed to hold 13,403 inmates. (*Id*.). Consequently, the number of inmates being housed by the ADOC exceeds the statewide design capacity by 188.8%. At the end of 2007, "all correctional institutions housed nearly

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On April 21, 2011, the United States Supreme Court decided *Sossamon v. Texas*, concluding that States that accept federal funds do not waive their sovereign immunity for the purpose of monetary damages claims under RLUIPA, 565 U.S. ___, ___, 131 S.Ct. 1651, 1655 (2011).

[10] Jurisdictional population is defined as "all inmates serving time within ADOC facilities/programs, as well as in the custody of other correctional authorities, such as county jails, other State DOCs, Community Correction Programs, Federal Prisons, and Privately Leased Facilities." *See* Page 1, Alabama Department of Corrections, Monthly Report, Legend.

[11] According to their website, the inmate population of the ADOC on June 15, 2011, was 28,043 male inmates and 2332 female inmates for a total of 30,375 inmates. (http://www.doc.state.al.us/inmsearch.asp).

[12] Defendants' Exhibit 8 is the ADOC's September 2008 Monthly Statistical Report. It was admitted into evidence at the hearing without objection. The ADOC also publishes on its website current monthly reports. The February 2011 monthly report indicates a jurisdictional population of 31,885, with 26,628 inmates in custody and 25,320 inmates housed in ADOC facilities. (http://www.doc.state.al.us/docs/MonthlyRpts/2011-02.pdf) A review of the monthly reports from 2009 until February 2011 demonstrate that the number of inmates housed by the ADOC has increased during that time period. (http://www.doc.state.al.us/reports.asp)

[13] Inmates housed by the ADOC are those inmates in custody and located within correctional facilities owned and operated by the ADOC. *See* Page 1, Alabama Department of Corrections, Monthly Report, Legend.

double the number of inmates that the facilities were designed to hold." (Defs' Ex. 9 at 19, Evid. Hr'g.). The statewide overcrowding index was at 196.5%. (*Id*.) In addition, disciplinary actions increased by 62% in 2007; there were 18,226 disciplinaries issued that year. (*Id*. at 20).

While the prisons remained overcrowded, the ADOC was also understaffed. Although the ADOC added 440 correctional personnel during 2007, it also lost 332 officers. (*Id*. at 33). In 2007, the ADOC was authorized 3672 correctional officers but could only fill 2675 positions. Consequently, the ADOC was operating at a shortfall of 997 correctional personnel which equates to a vacancy in one of every four positions. (*Id*. at 34).

Between 1997 and 2007, the inmate population of the ADOC increased by 23%; it added 6478 inmates.[14] Except for the years 2000 and 2004, the number of admissions to the ADOC outpaced the number of releases by almost 5000 offenders. (*Id*. at 35). Finally, almost 50% of inmates were incarcerated for felonies against persons. (*Id*.)

The law is well established that security, order, and discipline are compelling governmental interests. *See Cutter*, 544 U.S. at 722-23 (security concerns constitute compelling governmental interests); *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989) (security, order and rehabilitation are compelling governmental interests); *Johnson v. California*, 543 U.S. 499, 512 (2005) (prison security and discipline are compelling governmental interests).

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[14] The only year the population of the ADOC did not increase was 2004, and the reason for that decrease was the convening of a second parole board charged with increasing the number of non-violent offenders on parole. (Defs' Ex. 9, at 35, Evid. Hr'g).

The defendants first argue that the compelling governmental interest in security is furthered by being able to quickly and correctly identify inmates. The hair length restrictions promote and are necessary to enable the defendants to maintain this security interest. Based on the evidence presented, the court finds that long hair can be used by inmates to alter their appearance to prevent or hinder identification.[15] Long hair impedes the ability of officers to quickly identify inmates moving through the prison yard, dining halls and dormitory areas. Officers are better able to correctly identify inmates when their hair is shorter. (Evid. Hr'g Tr. at 61). The need to identify inmates quickly and accurately is heightened when the prisons are operating with a shortage of correctional officers. Additionally, the court finds that hair length can be used by inmates to identify with "special groups" including gangs. (*Id*. at 26). The grooming policies enable prison administrators to reduce gang association by requiring all inmates to have short hair. Thus, the court concludes that the defendants have demonstrated a compelling governmental interest in security[16] that is furthered by the accurate and swift identification of inmates.

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[15] The plaintiffs argued extensively that a less restrictive means of furthering the compelling governmental interest of identification would be through the purchase and use of the Photoshop computer program which allows a user to manipulate a digital photograph. According to the plaintiffs, Photoshop would allow the ADOC to manipulate inmate photographs to predict any potential alteration to an inmate's appearance in the case of escape. Beyond the practical matters of cost and training, the use of Photoshop does not alleviate the ADOC's compelling governmental interest in swift, accurate identification of inmates who are incarcerated.

[16] In *Cutter*, the Court found that preventing violence in prisons is a compelling governmental interest. 544 U.S. at 723, fn. 11.

The defendants also argue that preventing weapons and other contraband from entering the prisons promote the compelling governmental interests of security and order. The court finds that long hair can be used as a means of hiding weapons[17] or other contraband. There is an increased likelihood that inmates with long hair could more easily conceal in their hair weapons including pieces of razors or wires, as well as other types of contraband. Requiring correctional officers to search long hair for contraband or weapons constitutes a safety and health hazard to the correctional officers. The court also finds that requiring inmates to search their own hair does not assuage this concern because an inmate secreting contraband in long hair can manipulate the search to avoid detection of the contraband. Long hair exacerbates the difficulty of and length of time necessary to search for contraband, which is of particular

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Gang affiliations often result in violence. Thus, the hair length restrictions, which impede the inmates' abilities to associate with gangs, further the compelling governmental interest of preventing violence.

[17] During the evidentiary hearing, counsel for the plaintiffs brought out evidence that the hair length regulation was different for women prisoners than men. The plaintiffs argue that sex based differential application of a hair length regulation demonstrates that any asserted security reason is false. The plaintiffs ignore testimony presented during the hearing which shows that male prisoners constitute a greater threat than female prisoners. Furthermore, the female inmate population is significantly lower than the male inmate population. For example, the Julia Tutweiler Prison for Women housed 729 female inmates in 2007 while the majority of male inmate facilities each exceeded 1000 inmates. (Defs' Ex. 8, Evid. Hr'g).

Both the Third and Sixth Circuits have concluded that differential hair length regulations in prisons are constitutionally permissible. *Dreibelbis v. Marks*, 742 F.2d 792, 795-96 (3rd Cir. 1984); *Pollock v. Marshall*, 845 F.2d 656, 659-60 (6th Cir. 1988).

concern to the ADOC because of their reduced number of correctional officers. The court therefore concludes that the defendants have demonstrated that the compelling governmental interests in security and order are furthered by the hair length restrictions which prevent "the secreting of contraband or weapons in hair or beards." *Harris v. Chapman*, 97 F.3d 499, 504 (11th Cir. 1996).

Based on the record before the court, including the testimony of Gwendolyn Mosley, the Institutional Coordinator for the ADOC, Ronald Angelone, the defendants' expert witness, and Warden Culliver, the court finds that hair length restrictions further the compelling governmental interest in security by allowing the defendants to maintain control, order, and discipline in the prisons.

> Order is the fabric that any system runs by . . . The strands that bring it together are the policies and procedures that are put into place for safety, security and health reasons to be able to run that environment so that everyone, from every waking moment that an individual is living there or working there, they know exactly what to expect, and then they make their own individual decisions on how they are going to react to those policies and procedures. And by reacting correctly in a mature manner, whether its those living there or those working there, is able to provide an orderly system for people to exist in a safe environment.

(*Id*. at 45).

The plaintiffs suggest in their brief that the defendants did not introduce evidence that security concerns support the hair length regulations. This suggestion is simply incorrect. The court finds that inmates today are "younger, bolder and meaner" and

it is necessary to instill discipline and order to control these inmates because violence is prevalent in prisons. (Evid. Hr'g Tr. at 29). Furthermore, the court finds that long hair is a danger because it can be used in a fight. For example, an inmate could "grab a handful" of hair, pull and cause serious injury. (*Id*. at 69). Mosley testified that "long hair creates problems . . . [in] fights, [inmates] can pull the hair." (*Id*. at 27). Angelone testified that long hair is a safety and security concern during fights. (*Id*. at 52).

The court also finds that ADOC is presently understaffed and overcrowded.[18] Mosley testified that the ratio of correctional officers to inmates is presently 10 to 1. (*Id*. at 28). In light of staff shortfalls, the court finds that maintaining order and discipline in the prisons is critical to ensuring safety for staff and inmates.[19] Uniformity within the institutions also instills discipline and promotes order by exercising some control over the inmates. (*Id*. at 146, 148, 153, 158).

> We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it *does not override* other significant interests.

Cutter, 544 U.S. 722 (emphasis added).

The court concludes therefore that the ADOC has demonstrated a compelling governmental interest in

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[18] Although the parties argued about the methodology and applicability of staffing studies, it was undisputed that Alabama prisons are overcrowded and understaffed.

[19] As previously noted, in 2007, the ADOC personnel had initiated 18,226 disciplinary actions against inmates.

security and order that encompasses maintaining a safe and controlled environment.

The court also finds that the ADOC's grooming policies promote health, hygiene and sanitation which further compelling governmental interests in cost containment and health care costs which are a significant concern in the current economic environment. [20] *See Muhammad*, 388 Fed. Appx. at 896-97. *See also DeMoss*, 636 F.3d at 153. The court finds that the hair length restrictions promote cleanliness and reduce health care costs. Angelone testified that inmates with long hair have found cysts and sores on their heads, and on at least one occasion, an inmate found a spider living in his hair. (*Id*. at 52). The court finds that short hair promotes health and hygiene by making it easier to detect infections and infestations as well as reduce the spread of infections and infestations. (*Id*. at 33). Reduced infections and infestations also reduce the ADOC's health care costs. Thus, the court concludes that the hair length restrictions further the compelling governmental interests in cost containment and health care costs.

Clearly, Alabama has compelling governmental interests in security and safety in their correctional facilities. The grooming policies that restrict hair

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[20] The court can take judicial notice of the current economic climate, including the budgetary woes of the State of Alabama. "A fact may be judicially noticed only if it is not subject to reasonable dispute, either because it is generally known within the district court's territorial jurisdiction or because it can be accurately and readily determined using sources whose accuracy cannot reasonably be questioned." *United States v. Gregory*, 2009 WL 205549, *2 (11th Cir. 2009). *See also* FED. R. EVID. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court. . .")

length further those interests by maintaining order and discipline, preventing violence, hindering the introduction of contraband into the prisons, and enabling the prompt and accurate identification of inmates. The hair length restrictions also promote the health, hygiene and sanitation of its inmates which reduces health care costs and furthers the defendants' compelling governmental interest in cost containment and reducing health care costs. These policies are especially compelling in the context of prisons which are overcrowded and understaffed. Thus, the court concludes that the ADOC has demonstrated compelling governmental interests in the areas of security and order, and cost containment and reduction of health care costs.

It may appear to some that it is ironic for the court to conclude that overcrowding in Alabama's prisons is in part a justification for holding that the plaintiffs' rights under RLUIPA may be curtailed. In other words, it is ironic that a constitutional violation can justify a statutory violation. But the irony would truly exist only if overcrowding alone were a constitutional violation. Plainly it is not. Overcrowding of prisons is not per se unconstitutional. *See Rhodes v. Chapman*, 452 U.S. 337, 347-50 (1981); *Collins v. Ainsworth*, 382 F.3d 529, 540 (5th Cir. 2004).

> Some conditions of confinement may establish an Eighth Amendment violation "in combination" when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise - for example, a low cell temperature at night combined with a failure to issue blankets.

Wilson v. Seiter, 501 U.S. 294, 304 (1991).

Brown v. Plata, — U.S. —, 131 S.Ct. 1910 (2011), is not to the contrary. *Plata* cannot be read to hold that overcrowding alone is a violation of the Eighth Amendment. The three judge panel's order affirmed by the Court required a reduction in California's prison system's population to 137.5% of design capacity. Had the Court found overcrowding itself to be a Constitutional violation, it could not have approved a remedy that permitted continued overcrowding.

Rather, the Court found that medical and mental health care in California's prisons were Constitutionally inadequate and that efforts to remedy that violation were frustrated by overcrowding.

> Overcrowding has overtaken the limited resources of prison staff; imposed demands well beyond the capacity of medical and mental health facilities; and created unsanitary and unsafe conditions that make progress in the provision of care difficult or impossible to achieve. The overcrowding is the "primary cause of the violation of a Federal right," 18 U.S.C. § 3626(a)(3)(E)(I), specifically the severe and unlawful mistreatment of prisoners through grossly inadequate provision of medical and mental health care.

Plata, — U.S. —, 131 S.Ct. at 1923.

Indeed, *Plata's* litany of the ills suffered by California's prison system supports the court's conclusion in the instant case. The consequences of overcrowding in California's prisons include (1) increased, substantial risk for transmission of infectious illness, (2) a suicide rate approaching an average of one per week, (3) failure to provide even minimal treatment to mentally ill inmates, and (4) severely deficient medical treatment for physical illnesses including the infliction of unnecessary pain. *Plata* holds that over-

crowding in California's prisons was the cause of these unconstitutional conditions and prevented implementing a remedy for them. As the court has explained, the overcrowded and understaffed prisons in Alabama increase the difficulties prison guards face daily in controlling inmates and securing order within the prisons. Adopting the plaintiffs' position could exacerbate the consequences of overcrowding by placing increased pressure on already strained security measures. Congress through RLUIPA surely did not intend such a result.

b. Least restrictive means. Finally, the court concludes that the defendants have demonstrated that the grooming policies are the least restrictive means to further the compelling governmental interests in security and order and cost containment and reduction in health care costs. Courts have consistently held that prison grooming regulations restricting inmate hair length are the least restrictive means of advancing compelling governmental interests in maintaining prison security and order. *See Brunskill v. Boy*, 141 Fed. Appx. 771 (11th Cir. 2005) (prison policies requiring plaintiff to cut hair did not violate RLUIPA); *Harris*, 97 F.3d at 504. The hair length restrictions are the least restrictive means of maintaining uniformity, impressing order and discipline on prison inmates, preventing gang affiliation and reducing prison violence, hindering the introduction of contraband into the prisons, and enabling the prompt and accurate identification of inmates. The hair length restrictions are also the least restrictive means of promoting the health, hygiene and sanitation of its inmates and furthers the defendants' compelling governmental interest in cost containment and reducing health care costs.

More importantly, the court is bound by the Eleventh Circuit's holding in *Harris v. Chapman*, *supra*. *Harris* was decided under RFRA, but RLUIPA essentially adopts RFRA's compelling interest/least restrictive means standard, and the plaintiffs have not otherwise distinguished the facts of this case. The court is compelled to follow *Harris* and other cases applying RFRA to regulations as well as RLUIPA cases. In *Harris*, the court upheld the Florida Department of Corrections policy which mandated that all inmates have their hair cut short to medium length. *Id*. In explaining its reasoning, the court indicated "we are unable to suggest any lesser means than a hair length rule for satisfying these interests . . . . we thus join these courts in finding that a reasonable hair length regulation satisfies the least restrictive means test." *Harris*, 97 F.3d at 504.

In addition, Harris's holding is consistent with decisions of other courts which hold that prison grooming regulations restricting inmate hair length are the least restrictive means of advancing the substantial governmental interest in maintaining prison security and order. Almost every court[21] that has considered hair length restrictions have upheld prison hair length restrictions as permissible under RLUIPA. *See DeMoss*, *supra* (Texas state prison grooming policies do not violate RLUIPA); *Thunder-*

[21] In *Warsoldier v. Woodford*, the Ninth Circuit held that the California Department of Corrections' grooming policy "intentionally puts significant pressure on such inmates as [the plaintiff] to abandon their religious beliefs by cutting their hair, [and thus,] . . . imposes a substantial burden on [the plaintiff's religious practice." 418 F.3d 989, 996 (9th Cir. 2005). This case is inapposite to the case at bar. The parties do not argue in the case before the court that the ADOC grooming policies pressure inmates to abandon their religious beliefs.

horse, *supra* (hair length policies were least restrictive means of protecting State's compelling interest in maintaining security, and thus, did not violate RLUIPA); *Williams v. Snyder*, 367 Fed. Appx. 679 (7th Cir. 2010) *cert denied*, — U.S. —, 131 S.Ct. 343 (2010); *Smith v. Ozmint*, 396 Fed. Appx. 944 (4th Cir. 2010) (grooming policy least restrictive means to further compelling governmental interest); *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008) (hair length policies for men do not violate RLUIPA); *Hamilton v. Schriro*, 74 F.3d 1545, 1555, n. 12 (8th Cir. 1996) (collecting cases); *Longoria v. Dretke*, 507 F.3d 898 (5th Cir. 2007) (prison system's hair length policies do not violate RLUIPA). *See generally Smith v. Kyler*, 295 Fed. Appx. 479, 483 (3rd Cir. 2010) ("DOC has demonstrated that the restrictions [regarding paid chaplains to certain groups] are the least restrictive means of advancing a compelling governmental interest."); *Gooden v. Crain*, 353 Fed. Appx. 885 (5th Cir. 2009) (grooming regulations requiring inmates to be clean shaven are least restrictive means of furthering compelling governmental interest in security and do not violate RLUIPA); *Couch v. Jabe*, 5:10cv72 (W.D. Va. Apr. 21, 2011) (same).

The plaintiffs argue that numerous other jurisdictions and the Federal Bureau of Prisons permit long hair.[22] The fact that other jurisdictions permit

[22] On April 8, 2011, the United States filed a Statement of Interest (doc. # 523) urging the court to require the defendants to "formulate a new policy that accounts for Defendants' obligations under RLUIPA." (Doc. # 523 at 2). The court notes that the United States filed its Statement of Interest over two years after the evidentiary hearing, and almost a year after briefing was complete. However, the United States simply regurgitates the plaintiffs' arguments, referencing the parties' briefs. Argument of counsel is of course not a substitute for evidence.

long hair is insufficient by itself to demonstrate that the ADOC's grooming policies are not the least restrictive means of furthering compelling governmental interests in this state.

> Although prison policies from other jurisdictions provide some evidence as to the feasibility of implementing a less restrictive means of achieving prison safety and security, it does not outweigh the deference owed to the expert judgment of prison officials who are infinitely more familiar with their own institutions than outside observers.

Hamilton, 74 F.3d at 1557 n. 15 (8th Cir. 1996); *Fegans*, 537 F.3d at 905.

The court must apply RLUIPA "in an appropriately balanced way, with particular sensitivity to security concerns." *Cutter*, 544 U.S. at 722. "Context matters" when determining whether the defendants have demonstrated that the hair length restrictions are the least restrictive means of further compelling governmental interests being "mindful of the urgency of discipline, order, safety, and security in penal institutions." *Id*. at 723. Here, the context is what occurs in Alabama's prisons, not prisons in other places. The court has carefully considered the evidentiary material, arguments and briefs of the parties, and finds that the ADOC's grooming regulations are the least restrictive means to further the compelling governmental interests in security and order in Alabama's overcrowded, understaffed and underfunded prisons.

In reaching this conclusion, the court is cognizant of its duty to accord "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to

maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Id*. The court may not substitute its judgment for that of the prison officials. *See Hoevenaar v. Lazaroff*, 422 F.3d 366, 370-71 (6th Cir. 2005). Accordingly, the court concludes, as a matter of law, that the ADOC's regulations restricting inmate hair length do not violate RLUIPA.

IV. CONCLUSION

Based on the foregoing analysis, the RECOMMENDATION of the Magistrate Judge is as follows:

1. That the Court find that the Alabama Department of Corrections' policies restricting inmate hair length does not violate the Religious Land Use and Institutionalized Persons Act of 2000.

2. That the Court enter judgment in favor of the defendants and against the plaintiffs; and

3. That the Court dismiss this action with prejudice.

It is further

ORDERED that the parties shall file any objections to the said Recommendation on or before July 25, 2011. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation to which the party objects. Frivolous, conclusive or general objections will not be considered by the District Court. The parties are advised that this Recommendation is not a final order of the court and, therefore, it is not appealable.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a de novo determination by the District Court of issues covered

in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982). *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981, *en banc*), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Done this 11th day of July, 2011.

/s/ Charles S. Coody

CHARLES S. COODY

UNITED STATES MAGISTRATE JUDGE

APPENDIX E

Case: 12-11926 Date Filed: 11/08/2013

IN THE UNITD STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 12-11926-DD

RICKY KNIGHT, et al., Plaintiffs - Appellants,

versus

LESLIE THOMPSON, et al., Defendants - Appellees.

Appeal from the United States District Court for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: HULL and ANDERSON, Circuit Judges, and Schlesinger, *District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull

UNITED STATES CIRCUIT JUDGE

*Honorable Harvey E. Schlesinger, United States District Judge for the Middle District of Florida, sitting by designation.

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