No. 13-955

IN THE

Supreme Court of the United States

RICKY KNIGHT, ET AL.,

Petitioners,

v.

LESLIE THOMPSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* THE SIKH COALITION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

"My Sikh shall not use the razor. For him the use of razor or shaving the chin shall be as sinful as incest." 2 *The Encyclopaedia of Sikhism* 466 (Harbans Singh ed., 2d ed. 2001). Guru Gobind Singh—the last of the ten founding Sikh gurus—proclaimed this central teaching of the Sikh faith centuries ago, echoing what all gurus before him had preached. Adhering to this foundational practice, all baptized Sikhs must have unshorn hair and faces, or *kesh*, lest they be deemed apostates. *Kesh* must be honored at all times and places, even in prison.

Last week, the Court announced it would review prison-grooming policies that would limit inmates in their ability to wear short beards in accordance with their religious faith. *Holt v. Hobbs*, No. 13-6827, 2014 WL 803796, at *1 (U.S. Mar. 3, 2014). But the Court's order granting review leaves unaddressed a related, yet equally unresolved, question about the impact of such policies on religious hair-length practices generally. Thus the Sikh community's deep interest in this case, which involves forcibly cutting an inmate's hair in violation of his religious beliefs.

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[1] Pursuant to Rule 37.2(a), counsel for the parties received notice of intent to file this brief at least 10 days before its due date. The parties have consented to the filing of this brief; their written consents are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

As a minority faith deeply rooted in the culture of sixteenth-century India, Sikhism has often been misunderstood outside the subcontinent. Sadly, these misunderstandings have only grown since September 11, 2001.[2] Sikhs now face regular harassment and attack—and sometimes even death—based on uninformed prejudices about their religious faith and practices.[3] Pertinently, such prejudices often arise from the misguided association of the turban, which protects the unshorn hair, as a symbol of terrorism.

Anticipating the xenophobia that the September 11th attacks would cause, the Sikh Coalition was founded that day to counter misconceptions, promote cultural understanding, and advocate for the civil liberties of all people, especially Sikhs. The right of Sikhs to practice *kesh*—whether in the military, the workplace, or prison—is central to the cause.

The Sikh Coalition supports the petition because the Eleventh Circuit would allow prisons to persist in their ignorance about the importance and feasibility of accommodating unfamiliar minority-

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[2] Shortly after the 2001 terrorist attacks, the U.S. Senate passed a resolution condemning hate crimes against Sikh Americans. S. Con. Res. 74, 107th Cong. (2001) (enacted).

[3] In August 2012, a gunman with ties to white supremacist groups attacked a Sikh house of worship in Oak Creek, Wisconsin, killing six and injuring several others. Steven Yaccino et al., *Gunman Kills 6 at Sikh Temple Near Milwaukee*, N.Y. Times, Aug. 5, 2012, http://goo.gl/HrQHlM. It was one of the deadliest attacks on an American house of worship since the 1963 bombing at the 16th Street Baptist Church in Birmingham, Alabama. *See* H.R. Res. 334, 113th Cong. (2013).

faith practices such as unshorn hair—in violation of the "least restrictive means" test of the Religious Land Use and Institutionalized Persons Act (RLUIPA) and contrary to what other circuits hold. It further supports the petition because it would enable the Court to finish what it will start in *Holt*.

SUMMARY OF ARGUMENT

Petitioners raise a question that *Holt* will also likely involve and on which the courts of appeals are split: can a prison refuse to accommodate an inmate's religious practice under RLUIPA's "least restrictive means" test without first considering whether other prisons have made such accommodations?

This case involves Native American grooming practices, but the "least restrictive means" split runs wider and deeper. The question impacts any prisoner wishing to seek solace, redemption, or strength in his faith—particularly those with rare or misunderstood practices. And the question affects society at large, for "[t]he degree of civilization in a society can be judged by entering its prisons." Fyodor Dostoyevsky, *The House of the Dead* 76 (C. Garnett trans., 1957).

RLUIPA prohibits state and local prisons from substantially burdening inmate religious practices unless doing so would (1) further a compelling state interest (2) by the least restrictive means. 42 U.S.C. § 2000cc-1(a). The dispute here concerns the "least restrictive means" test, namely whether Prison A can enact a policy that would substantially burden an inmate's religious practice while ignoring that Prison B has successfully accommodated that practice.

The answer to this question affects every prison policy that would substantially burden religion, from meals to the availability of worship services. It also squarely applies to grooming. And although we applaud the Court's seeming openness to touch on the question in *Holt*—as Professor Laycock asked in that case—we urge the Court to go beyond the beard-length rule there and include in its review the legally indistinguishable matter of hair length generally.

Sikhs have maintained unshorn hair and beards, or *kesh*, as a non-negotiable practice for over 500 years. Failure to maintain *kesh* is akin to apostasy, and many Sikhs have died rather than cut their hair. The forcible cutting of hair—whether on the head or face—strips a Sikh of his faith identity and is among the gravest injuries he could suffer. Thus, reviewing RLUIPA in the beard context alone is insufficient.

Contrary to the judgment of seven other circuits, the Eleventh Circuit allows prisons to render Sikhs apostates by shaving their heads—something not without precedent in the circuit—regardless of whether other prisons successfully accommodate *kesh*. In short, prisons are allowed to persist in their ignorance. This not only guts the "least" modifier in the "least restrictive means" test, it also causes particular harm to minority faiths like the Sikhs.

One might think the smaller size of many faith groups threatened by this non-comparative approach diminishes the need for review. Not so. And the Sikh example shows why. Because Sikhs constitute only a fraction of the prison population, many prisons are unfamiliar with Sikh practices and may not design policies with Sikhs in mind. It is precisely in these

situations that requiring prisons to examine policies from prisons that have relevant experience with a particular minority group is indispensable.

Requiring prisons to at least learn about how other prisons approach the often-disparate grooming practices of inmates is in accord with RLUIPA's text, spirit, and majority understanding. We ask the Court to take its order in *Holt* just one step further.[4]

ARGUMENT

I. Sikh Inmates Face Profound Challenges Maintaining Religious Grooming Practices.

A. To A Sikh, Cutting Hair Is Apostasy.

Sikhism is the fifth-largest religion in the world, with approximately 25 million followers. *Learn About Sikhs*, SALDEF, http://goo.gl/UW2xOF (last visited Mar. 11, 2014). Started in India's Punjab region in the fifteenth century by Guru Nanak, it is a monotheistic religion that preaches devotion to God, an honest living, and sharing with others. W. Owen Cole et al., *A Popular Dictionary of Sikhism: Sikh Religion and Philosophy* 10 (1997). Guru Nanak rejected the caste system and declared all human beings, including women, to be equal in rights, responsibilities, and their ability to reach God. He taught that God is universal to all—regardless of religion, nation, race, color, or gender. Nine Sikh

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[4] Strict scrutiny applies equally to federal prison policies under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb. *See Cutter v. Wilkinson*, 544 U.S. 709, 716-17 (2005).

gurus succeeded Guru Nanak and further developed this belief system. The collective wisdom of all ten Sikh gurus lives eternally in the form of a holy book: the Guru Granth Sahib. *Id.* at 1, 5.

Central to the religion is the requirement that adherents maintain or wear five "articles of faith" on a daily basis. These articles—known as the "Five Ks" because each begins with the letter *k*—are (1) *kesh* (unshorn hair and beards), (2) *kanga* (comb), (3) *kara* (metal bracelet), (4) *kaccha* (under-shorts), and (5) *kirpan* (ceremonial knife). Patwant Singh, *The Sikhs* 56 (1999). The particular requirement that Sikhs must maintain *kesh*—uncut hair on all parts of the body—has been taught since the time of Guru Nanak, who called it "God's divine Will." Opinderjit Kaur Takhar, *Sikh Identity: An Exploration of Groups Among Sikhs* 30 (2005). The *Rehat Maryada*, or the Sikh Code of Conduct, explicitly instructs that a Sikh must "[h]ave, on [his or her] person, all the time . . . the *keshas*." Ch. XIII, Art. XXIV(p). And the Sikh holy book confirms that "on each and every hair, the Lord abides." *The Guru Granth Sahib* 344. Sikhs, in short, must keep their hair long.

Sikhs who fail to maintain *kesh* face grave consequences. "Trimming or shaving is forbidden [for] Sikhs and constitutes for them the direst apostasy." 2 *The Encyclopaedia of Sikhism*, *supra*. The unique Sikh philosophy of hair, which has spiritual and physical dimensions, explains this principle. First, Sikhism teaches that God put meticulous thought into crafting mankind. *Id.* Specifically, "He gave men beard, moustaches, and hair on the head." *Id.* By leaving all hair unshorn on their bodies, Sikhs live in harmony with God.

Second, the gurus and their followers have maintained *kesh* since the religion's founding in the fifteenth century. It is central to Sikh identity. *See id.* In the eighteenth century, Sikhs in South Asia were persecuted by the Mughal Empire. *Id.* They were humiliated and pressured to abandon their faith, often by having their turbans torn and hair forcibly cut. *Id.* As resistance to these forced conversions, many Sikhs chose death instead—thus solidifying the religious significance of *kesh*. *Id.*

While each of the Five Ks carries profound importance for a Sikh, *kesh* stands alone as uniquely significant. In fact, the cutting of *kesh* represents one of just four "cardinal prohibitions" in the religion. These prohibitions—analogous in some ways to the Ten Commandments—state in no uncertain terms that practicing Sikhs (1) must not commit adultery, (2) must not use tobacco, (3) must not eat halal meat, and (4) must not have their *kesh* cut. W.H. McLeod, *The A to Z of Sikhism* 119 (2005). Surely no prison would force a Sikh inmate to violate the first three of these norms. To Sikhs, the fourth is no different.

In this historical and spiritual context, the cutting of any hair on the human body constitutes the most humiliating and hurtful physical injury that can be inflicted upon a Sikh.

B. The Small Number Of Sikh Inmates Makes Sikh Religious Practices Prone To Misunderstanding By Prisons.

Because of the importance of unshorn hair in the Sikh faith, prisons should cautiously approach hair-length issues with Sikh inmates. Yet many prisons

lack familiarity with Sikh religious practices. And prisons that remain ignorant of these practices and of the options available to accommodate them threaten Sikhs with immeasurable harm.

Unfamiliarity with Sikh practices begins with their small numbers in the United States generally. The first Sikhs moved to America at the turn of the twentieth century. Juan L. Gonzalez, Jr., *Asian Indian Immigration Patterns: The Origins of the Sikh Community in California*, 20 Int'l Migration Rev. 40, 41 (1986). Today, approximately 500,000 live here. *See How Many U.S. Sikhs?*, Pew Research Ctr. (Aug. 6, 2012), http://goo.gl/p6tilb. This small population has translated into a small prison population: only 74 inmates in the federal prison system (or .03%) self-identify as Sikhs. Letter from Wanda M. Hunt, Chief FOIA/PA Section, Bureau of Prisons, to Hemant Mehta, Patheos (July 5, 2013).

Statistics from state prisons suggest a similarly small population. In a recent study, Sikhs, Baha'is, Rastafarians, practitioners of Santeria, and certain other non-Christian religions together comprise just 1.5% of the prisoner population, suggesting that the Sikh population falls well below 1% in state prisons as well. Pew Research Ctr., *Religion in Prisons: A 50-State Survey of Prison Chaplains* 48 (2012).

These figures indicate most prisons would have little to no experience with Sikh practices or beliefs. Consequently, prisons would likely not craft their policies—such as grooming policies—with Sikh practices in mind. And if, as the Eleventh Circuit would have it, prisons are permitted to persist in

their ignorance of those practices, they run a higher risk of unnecessarily offending Sikh religious beliefs.

C. Sikh Grooming Practices Are Under Attack In The Eleventh Circuit.

Thirty-six-year-old Jagmohan Singh Ahuja never had a haircut in his life until guards strapped him to a chair and shaved his head while jailed in Jacksonville, Florida, in 2008.[5] After his forced haircut and the destruction of his Sikh religious identity, he saw himself as an apostate whom, he told his mother, he did not even recognize. This in turn has caused him deep depression, fear, and grief.

Although Jagmohan—in jail on a misdemeanor offense—made clear that cutting his hair would violate his Sikh faith, the jail refused to relent, citing Florida law and security concerns. The Florida Administrative Code states: "[m]ale inmates shall have their hair cut short to medium uniform length at all times." Fla. Admin. Code r. 33-602.101. And if an inmate refuses to adhere to these standards, even for religious reasons, "[t]he officer in charge or a more senior official shall direct staff to shave the inmate or cut the inmate's hair." *Id.* This is what happened to Jagmohan.

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[5] Jagmohan Singh Ahuja's story is drawn from the following news articles: *Florida Jail to Force Another Haircut of Sikh Inmate*, SikhNet (Sept. 11, 2008), http://goo.gl/SXtsxk; *Sikh Activists Upset Over Inmate's Haircut*, SALDEF (Oct. 6, 2009), http://goo.gl/kpBnsF; *Sikh Prisoner's Hair Is Cut Against His Will! Religious Rights Severely Violated in Florida Jail*, United Sikhs (Aug. 27, 2008), http://goo.gl/09y7Jl.

Jagmohan described the experience of having his hair forcibly cut as particularly traumatic because he had emigrated from Afghanistan in 2001 for the distinct purpose of avoiding religious persecution. Sikhs were not allowed to practice their religion freely under the Taliban. Instead of finding refuge here, however, Jagmohan saw his most fundamental religious beliefs violated.

The jail officials outraged the Sikh American community by cutting Jagmohan's hair. Rajbir Datta, national director of the Sikh American Legal Defense and Education Fund, said of the incident: "It's essentially like saying, I don't care about your religion. I don't care about who you are." And "[f]or a lot of people, it is essentially akin to death."

It did not need to be this way. Jagmohan may have avoided this "death sentence" if the Florida jail took a more informed approach. Indeed, prisons run by 38 states, the District of Columbia, and the federal government all allow for unshorn hair, or at least make accommodations for religion-based hair-length practices. Pet. for Writ of Cert. at 4a, *Knight v. Thompson*, No. 13-955 (U.S. Feb. 6, 2013).

II. Absent Review Here, The Court's Pending Assessment Of RLUIPA's Application To Grooming Policies May Prove Incomplete.

A. *Holt* Will Likely Involve A Question Common To All Grooming Policies, But Only In The Context Of Beards.

The Sikh experience shows why this Court should grant certiorari to the Native American prisoners' petition. As Sikh history and present-day

controversies involving Sikh prisoners confirm, Sikhs consider all hair equally sacred—whether it sits on top of their heads or on the sides of their faces. Thus, while the Sikh community applauds the Court's decision to grant review in *Holt*, it fears the consequences of a piecemeal approach to the "least restrictive means" questions common to both cases.[6]

At present, the Court will review RLUIPA in *Holt* only "to the extent that [the prison policy in question] prohibits petitioner from growing a one-half-inch beard." *Holt*, 2014 WL 803796, at *1. Granting review here would not require the Court to address entirely separate legal questions; indeed, both cases address the steps prisons must take to satisfy RLUIPA's "least restrictive means" test in accommodating inmate religious practices. But by limiting itself to one-half-inch beards, as in *Holt*, the Court risks leaving its commitment to clarifying RLUIPA's requirements unfulfilled. Absent review here, other sacred grooming practices—such as the unshorn hair central to the Sikh and Native

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[6] Mr. Holt asserted in his pro se petition, "Respondents have failed to establish that they have considered less restrictive means to the grooming policy and failed to prove that a ½ inch beard would not be the least restrictive means to achieve the security goals sought by the policy." Pet. for Writ of Cert. at 7, *Holt*, 2014 WL 803796 (U.S. 2014) (No. 13-6827). Petitioners here ask "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." Pet. for Writ of Cert., *Knight*, *supra*, at i.

American religions—will continue to face hostility and uncertainty in our nation's prisons.

Granting review here allows the Court to finish what it will start in *Holt*.

B. Minority Faiths Suffer Under The Circuit Split, Which Allows Uninformed Prisons To Persist In Their Ignorance.

We also urge the Court to grant review because minority-faith groups face disproportionate injury if the circuit split at issue is allowed to fester outside the beard context. Again, the overarching question that has split the courts is this: whether Prison A may refuse to accommodate an inmate's religious practice without considering that Prison B—and, in the hair-length context, C, D, E, etc.—has successfully accommodated the practice.

Seven courts of appeals have rightly answered "no." *See* Pet. for Writ of Cert., *Knight*, *supra*, at 13 (discussing how the First, Second, Third, Fourth, Eighth, Ninth, and Tenth Circuits address the "least restrictive means" test). According to this majority approach, prisons must at least have "actually considered" less restrictive options in place at other prisons before rejecting them as ineffectual. *See, e.g.*, *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005). But the Eleventh Circuit has taken the opposite approach, allowing prisons to ignore policies elsewhere, and, in effect, act with blinders on. *See Knight v. Thompson*, 723 F.3d 1275, 1285-86 (11th Cir. 2013), *pet. for cert. filed*, 2014 WL 546539 (U.S. Feb. 6, 2014) (No. 13-955).

This latter, non-comparative approach threatens minority-faith inmates in particular. Because Sikhs are a distinct minority in this country, for example, most prisons are unfamiliar with their practices. Yet some prisons do have experience accommodating Sikh beliefs, or at least addressing religious hair-length practices generally—such as the 38 states that accommodate unshorn hair for all prisoners. But according to the Eleventh Circuit, this experience—no matter how on point—is of no moment. Instead, prisons have a license to render Sikh inmates apostates by shaving their heads, as was the fate of Mr. Ahuja in the Florida jail, without looking beyond the prison walls. They have legal authorization to persist in their ignorance of more accommodating options and to ignore the sacred issues at stake.

RLUIPA was meant to cure this problem, not bless it. As co-sponsors Orrin Hatch and Edward Kennedy said at the statute's passage, "prison officials sometimes impose frivolous or arbitrary rules" in their prisons out of "ignorance," resulting in "egregious and unnecessary" restrictions on prisoners' religious practices. 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sens. Hatch and Kennedy). Allowing prisons to remain ignorant of other prison policies thus contravenes Congress's intent. It also defies simple logic. As the Third Circuit has urged, the "least restrictive means" test "necessarily implies a comparison with other means." *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007). Prisons that fail to consider those other means cannot conduct the necessary comparison, and thus cannot say they took the *least* restrictive action.

This is not to say the judgment of prison officials should be ignored. To the contrary, and as RLUIPA's sponsors made clear, courts must give due deference to those on the ground. 146 Cong. Rec., *supra.* Indeed, prisons need not implement another prison's policies if doing so poses intolerable risks. *See* Br. for the United States as Amicus Curiae Supporting Pls.-Appellants at 17, *Knight*, 723 F.3d 1275 (11th Cir. 2013) (No. 12-11926) ("Where prison officials do familiarize themselves with and seriously consider proffered alternatives, and nonetheless reject them, they are entitled to the deference that their expertise and experience warrant."). But where Prison A has some experience with a minority-faith prisoner and Prison B does not, Prison B should at least *consider* Prison A's approach.

CONCLUSION

The Court's grant of review in *Holt* should lead it to grant the petition here. Indeed, only in granting this petition will the RLUIPA issue at the heart of both cases receive a complete and thorough review.

Respectfully submitted,

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