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Brief of Amicus Curiae National Congress of American Indians Supporting Plaintiffs-Appellants Motion for Rehearing En Banc, Knight v. Thompson

Dawinder S. Sidhu
University of New Mexico - Main Campus

No. 12-11926

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RICKY KNIGHT, *et al.*,

Plaintiffs-Appellants,

v.

LESLIE THOMPSON, *et al*.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF OF *AMICUS CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS SUPPORTING PLAINTIFFS-APPELLANTS MOTION FOR REHEARING *EN BANC*

STEVEN CARL MOORE
JOEL WEST WILLIAMS
NATIVE AMERICAN RIGHTS FUND
Counsel for Amicus
1506 Broadway
Boulder, CO 80302 (303)
447-8760

J. RICHARD COHEN
SOUTHERN POVERTY LAW CENTER
Co-Counsel for Amicus NCAI
400 Washington Avenue
Montgomery, Alabama 36104
(334) 956-8200

ROBERT DAVID SEGALL*
COPELAND FRANCO SCREWS & GILL
444 South Perry Street
Montgomery, AL 36101 (334)
420-2956

DERRICK BEETSO
NATIONAL CONGRESS OF AMERICAN INDIANS
1516 P. Street, NW
Washington, DC 20005
(202) 466-7767

** Counsel of Record*

August 26, 2013

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Circuit Rule 26.1-1, counsel hereby certifies that the following persons and entities may have an interest in the outcome of this particular case:

1. Adams, Thomas (Plaintiff-Appellant)
2. Albritton, Harold (U.S. District Judge, Middle District of Alabama)
3. Allen, Tom (Defendant-Appellee)
4. American Civil Liberties Union of Alabama
5. American Civil Liberties Union, National Headquarters
6. Aminifar, Amin (United States Department of Justice)
7. Bagenstos, Samuel (Principal Deputy Assistant Attorney General, United States Department of Justice, Civil Rights Division)
8. Bailey, Douglas (Dark Horns) (Plaintiff-Appellant)
9. Beck, George (United States Attorney, Middle District of Alabama)
10. Beetso, Derrick (Staff Attorney, National Congress of American Indians)
11. Bentley, Robert (Defendant-Appellee; Governor of the State of Alabama
12. Bowen, James (Defendant-Appellee; Chaplain)
13. Carter, Eddie (Defendant-Appellee)
14. Chestnut, Coley (Defendant-Appellee; Chaplain)

15. Clem, Michael (Plaintiff-Appellant)

16. Coody, Charles, (U.S. Magistrate Judge, Middle District of Alabama;

17. Cohen, J. Richard (Co-Counsel for Amicus National Congress American Indians)

18. Dees, Steve (Defendant-Appellee; Warden)

19. Dodson & Steadman, P.C., (Counsel for Defendants-Appellees)

20. Dubois, James (Assistant United States Attorney, Middle District of Alabama)

21. Dunaway, Roy (Defendant-Appellee)

22. Estes, DeWayne (Defendant-Appellee)

23. Fox, Deena (United States Department of Justice

24. Fruin, Peter (Counsel for Plaintiffs-Appellants)

25. Giles, J.C. (Defendant-Appellee)

26. Gilkerson, Thomas (Defendant-Appellee)

27. Haber, Roy (Counsel for Plaintiffs-Appellants)

28. Haley, Michael (Defendant-Appellee; former Commissioner of Alabama Department of Corrections)

29. Hill, Anne (General Counsel, Alabama Department of Corrections

30. Harrelson, Lynn (Defendant-Appellee; Warden)

31. Herring, Tommy (Defendant-Appellee)

32. Hightower, Roy (Defendant-Appellee)

33. Hooks, Ralph (Defendant-Appellee; Warden)

34. Irvin, Franklin “Running Bear” (Plaintiff-Appellant)

35. Johnson, Willie (Defendant-Appellee)

36. Jones, Billy “Two Feathers” (Plaintiff-Appellant)

37. Knight, Ricky (Plaintiff-Appellant)

38. Lindsey, Bill (Defendant-Appellee; Chaplain)

39. Martin, Preston (Counsel for Plaintiffs-Appellants)

40. Maynard, Cooper, & Gale, P.C. (Counsel for Plaintiffs-Appellants)

41. McClure, James (Defendant-Appellee)

42. Mitchem, Billy (Defendant-Appellee)

43. Moore, Steven Carl (Counsel for National Congress of American Indians)

44. Moseley, Gwyn (Defendant-Appellee; Warden)

45. Mygatt, Timothy D. (United States Department of Justice)

46. National Congress of American Indians (*amicus*)

47. Native American Prisoners of Alabama (& Turtle Wind Clan)

48. Native American Rights Fund

49. Parker, Darrell (Defendant-Appellee; Deputy Warden)

50. Patrick, Kenneth (Defendant-Appellee)

51. Perez, Thomas E. (Assistant Attorney General, United States Department of Justice, Civil Rights Division)

52. Redd, Andrew W. (Defendant-Appellee; Former General Counsel, Alabama Department of Corrections)

53. Russell, Neal W. (Defendant-Appellee)

54. Sticker, William S. (Defendant-Appellee)

55. Sabel, Mark (Counsel for Plaintiffs-Appellants)

56. Sabel Law Firm, L.L.C. (Counsel for Plaintiffs-Appellants)

57. Samberg-Champion, Sasha (United States Department of Justice)

58. Segall, Robert David (Counsel of Record, *amicus*, National Congress of American Indians)

59. Shaver, John Michael (Defendant-Appellee)

60. Sidhu, Dawinder S. (co-counsel for *amicus* National Congress of American Indians)

61. Smith, Timothy Grey Wolf (Plaintiff-Appellant)

62. State of Alabama, Department of Corrections (Defendant-Appellee)

63. Steadman, Joe (Counsel for Defendants-Appellees)

64. Strange, Luther, (Defendant-Appellee; Attorney General, State of Alabama)

65. Sutton, Ron (Defendant-Appellee)

66. Thigpen, Morris (Defendant-Appellee)

67. Thomas, Kim (Commissioner, Alabama Department of Corrections)

68. Thompson, Leslie (Defendant-Appellee)

69. United States Department of Justice, Civil Rights Division

70. United States of America Department of Justice

71. Walker, Steve (Defendant-Appellee; Chaplain)

72. White, J.D. (Defendant-Appellee)

73. Whiting, Willie (Defendant-Appellee; Chaplain)

74. Williams, Joel West (Counsel, National Congress of American Indians)

75. Wynn, Officer (Defendant-Appellee)

Respectfully submitted,

/S/

ROBERT DAVID SEGALL
COPELAND FRANCO SCREWS & GILL
444 South Perry Street
Montgomery, AL 36101
(334) 420-2956

August 26, 2013

STATEMENT REGARDING REHEARING *EN BANC*

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this Circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court:

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); and

Rich v. Sec'y, Florida Dep't of Corr., 716 F.3d 525, 528 (11th Cir. 2013).

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STATEMENT OF ISSUES

1. Whether a prison system may deprive American Indians of their fundamental right to exercise their religion where the prison system has not demonstrated that the policy actually furthers its asserted compelling government interest.

2. Whether a prison system may deprive American Indians of their fundamental right to exercise their religion where the prison system has not even considered less restrictive means of furthering its asserted compelling interest.

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae National Congress of American Indians ("NCAI") is the oldest and largest national organization representing the interests of American Indians. NCAI's membership is comprised of Indian tribal governments and individual tribal members. NCAI advocates for Indian tribes and American Indian/Alaska Native citizens throughout the United States on a multitude of issues, including American Indian religious and cultural rights. NCAI has strongly and actively supported laws that protect American Indian religious freedom and offered extensive Congressional

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or their counsel made a monetary contribution to its preparation or submission. Counsel notes that one of the witnesses that testified at trial, Valerie Downes, is a Southern Poverty Law Center employee, who received no compensation for her testimony.

testimony in support of the passage of and Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§2000cc, *et seq.* (RLUIPA).

NCAI seeks to provide a critical context to the Court on the unique facets of American Indian religion, the history of federal policy in this area and modern Congressional mandates that protect American Indian religious freedom and culture.

Indian tribes' unique practices and cultural rights must be considered when addressing issues that affect American Indians and Alaska Natives under the Religious Freedom Restoration Act (RFRA) and RLUIPA. Tribes and their citizens enjoy a unique political relationship with the United States under numerous treaties, federal statutes, and the U.S. Constitution at Art. I, Sec. 8, Cl. 3. *See Morton v. Mancari*, 417 U.S. 535 (1974). The unique political relationship between Indian tribes and the United States is also evidenced by the entire Title 25 of the United States Code, and numerous Supreme Court holdings, which distinguish Indian tribes as a political classification and impose a fiduciary duty upon the United States.

Currently, Alabama has one federally-recognized Indian Tribe, as well as over a dozen unrecognized Indian tribes, bands and communities that have petitioned for federal recognition through the Office of Federal Acknowledgement. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, Federal Register, Vol. 78 No. 87, May 6, 2013, at 26387 (listing *Poarch Band of Creeks*) (Hereafter "Federally Recognized Tribe List"), *available at*: http://www.bia.gov/cs/groups/xofa/documents/text/idc1-022514.pdf.; Office of

Federal Acknowledgement's "List of Petitioners by State (as of July 31, 2012)" *available electronically at*: http://www.bia.gov/cs/groups/xofa/documents/text/idc-020619.pdf; *see also* (R. 471 – DEX 16 – ADOC's Listing of Native American Practitioners)(indicating that Alabama's entire correctional system houses 195 Native American practitioners, including six women, as of January 2009).

In addition, there are other tribal interests within other states of the Eleventh Circuit. The Seminole Tribe of Florida and the Miccosukee Tribe of Indians of Florida are present within the Eleventh Circuit. *See* Federally Recognized Tribe List, *supra*. Currently there are five more groups seeking federal recognition in Florida. *See* List of Petitioners by State, *supra*. While there are no federally recognized tribes in Georgia, currently there are five groups seeking federal recognition. *Id.*

Further, a substantial population of the American Indian and Alaska Native community is currently incarcerated nationally. As of midyear 2011, approximately 29,700 American Indian and Alaska Natives were incarcerated in the United States, with a significantly larger population under some type of community supervision, such as parole or probation. *See* Todd D. Montin, "Jails in Indian Country, 2011," U.S. Department of Justice (2012), *available at* http://bjs.gov/content/pub/pdf/jic11.pdf. Therefore, it is very important that the highest level of scrutiny be applied when prison policies prevent American Indians from exercising their religion.

NCAI steps forward to ensure that the Court has important information regarding American Indian religious traditions, the evolution of federal policy in this area and the unique relationship of Indian tribes, Indian People and the United States that led Congress to pass specific laws protecting American Indian culture and religious exercise. It is necessary that this context is fully understood so that courts can effectively carry out their duty to protect the fundamental rights of American Indians.

SUMMARY OF THE ARGUMENT

Due to a unique history of government restriction on American Indian religious exercise, Congress enacted remedial legislation to ensure the legacy of historic discrimination would not continue. NCAI seeks treatment of American Indian religious exercise consistent with respect and is cognizant of Congressional concern that protection of American Indian religious exercise can fail merely because its practice looks different from other religions.

In order to remedy historic discrimination and address the failure of modern courts to adequately protect the fundamental religious rights of American Indians and others, Congress mandated that courts apply a heightened level of scrutiny when the government regulates away religious freedom. Here, the district court and Panel failed to follow this Congressional mandate, departed from Supreme Court precedent and was at odds with this and other federal Circuit Courts of Appeals in

how strict scrutiny should be applied.[2] Accordingly, this case merits rehearing *en banc*.

ARGUMENT

I. CONGRESS ENACTED A STRICT SCRUTINY STANDARD TO PROTECT THE EXERCISE OF AMERICAN INDIAN RELIGION IN THE PRISON SETTING AND COURTS ARE DUTY-BOUND TO PROPERLY APPLY THAT STANDARD.

A. Congress enacted the strict scrutiny standard in RLUIPA to protect the free exercise of traditional religion by American Indians.

Because facets of American Indian religion look different from mainstream society, it may be difficult for non-Indian people to recognize and understand the significance of some beliefs and practices. For those unfamiliar with it, the exercise of American Indian religion may not be recognizable as religion at all. In an oversight hearing on amendments to the American Indian Religious Freedom Act, one senator observed:

> [O]ur traditional understanding of how to protect religious freedom, based on a European understanding of religion, is insufficient to protect the rights of the First Americans…. What we are talking about here is not religion in the sense it is traditionally understood in the United States. "Religion," for traditional Native Americans, is not some set of practices easily distinguished from everyday life, accomplished in specific buildings, with particular religious authorities presiding. Instead, religion is deeply intertwined with the

[2] NCAI has reviewed Plaintiff/Appellants' arguments regarding the law applied by other circuits and the Supreme Court. In order to avoid undue repetition, this brief defers to their fuller treatment of the Panel decision's inconsistency with Supreme Court precedent and other Circuit Courts of Appeals.

> very fabric of Native American cultural identities. …I think that it is clear that when we talk about religious freedom for Native Americans, our first problem is to clear up the obvious misunderstandings about what is under consideration. For Native Americans, religion means something different than it does for the dominant religions in this country. But once we understand what that meaning is, it should be a simple matter for us to understand that their freedom to worship ought to be guaranteed. I am sure that I do not need to remind anyone here today that *freedom of religion is one of the fundamental rights provided for every citizen of this country*.

American Indian Religious Freedom Act: Oversight Hearing on the need for amendments to the Religious Freedom Act Before the S. Comm. on Indian Affairs, 102nd Cong. 51-52 (March 8, 1993) (written statement of S. Paul Wellstone, MN) (emphasis added).

At trial, the distinguished anthropologist, Professor Deward Walker, referred to the fact that American Indians do not have scripture, such as the Bible or Koran. (R475 - Tr. II at 110-11- Dr. Walker Testimony). Instead, traditions and beliefs are passed down orally. *Id.* American Indian religion is not necessarily tied to a church or house of worship and does not have clergy in the same sense as many other religions. Instead, its practice is often focused on daily manners of living, as well as a strong recognition of how facets of humanity are connected to places and prayers.

Hair is one such facet of American Indian religious exercise that may not be readily understood. Hair has religious significance for all American Indian tribes and uncut hair is of particular religious significance. (R471 - PEX 2 at ¶4). There is no question that requiring an American Indian to cut his hair substantially burdens his religious exercise. *Id.*

Involuntary hair cutting has also played a particular role in the history of prohibiting American Indians' traditional religious exercise by the United States. Historically, the cutting of hair was a means by which federal officials and missionaries contracted by the federal government coerced American Indians away from their traditional religion and attempted to Christianize them during the Nineteenth and Twentieth Centuries. (R475 - Tr. II at 84-85 - Dr. Walker Testimony; R 471- PEX 2 at ¶ 5); *see also* Jill E. Martin, *Constitutional Rights and Indian Rites: An Uneasy Balance*, 3:2 WESTERN LEGAL HISTORY 245, 248 (Summer/Fall 1990). Thus, in a perverse way, there is a substantial historic recognition by non-Indians of the significance of long hair to American people. The fact that hair cutting was used in such a manner demonstrates that those seeking to eliminate traditional American Indian religion understood the religious significance of long hair to Native people.

Historically, discrimination against American Indians on religious grounds has been "commonplace." Senator Daniel K. Inouye, *Discrimination and Native American Religious Rights*, 23 U.WEST L.A. L.REV. 3, 12-13 (1992). "In 1892 and 1904, federal regulations outlawed the practice of tribal religions entirely, and punished Indian practitioners by either confinement in agency prisons or by withholding rations." *Id.*at 14.

In the latter Twentieth Century, U.S. policy shifted toward recognition and protection of American Indian culture and religion. Congress has enacted a wide

variety of laws to protect American Indian religious liberty, such as the American Indian Religious Freedom Act of 1978, 42 U.S.C. 1996 (1993 amendments at 42 U.S.C. 1996a), the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001 *et seq.*, the Indian Arts and Crafts Act of 1990, 25 U.S.C. 3005, *et seq.*, the National Historic Preservation Act, 16 U.S.C. 470, *et seq*., and the Archeological Resource Protection Act, 16 U.S.C. 470aa, *et seq.* These laws are needed to protect American Indian religious liberty and cultural integrity by virtue of the unique historical circumstances of American Indians as well as the United States' distinct political relationship to Indian Tribes and individual American Indians.

Although federal policy no longer endorses forced assimilation of American Indians and deprivation of their religious freedom, there has been a pronounced lack of judicial protection of minority religious exercise, especially traditional American Indian religious exercise. *See, e.g., Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and *Lyng v. Northwest Indian Cemetery Assn.*, 485 U.S. 439 (1988). Therefore, Congress sought to preserve traditional American Indian and Alaska Native religious ways of life by passing RFRA and RLUIPA and this is why RLUIPA provides broad protection to the "maximum extent possible." *See* 42 USC §2000cc-3(g); Michael J. Simpson, *Accommodating Indian Religions: The Proposed 1993 Amendment to the American Indian Religious Freedom Act*, 54 MONT. L. REV. 19 (Winter 1993); Senator Daniel K. Inouye, *Discrimination and Native American Religion*, 23 U. WEST L.A. L.REV.

3 (1992); Martin, *Constitutional Rights and Indian Rites: An Uneasy Balance,* 3:2 WESTERN LEGAL HISTORY 245 (1990). Accordingly, it is critical for American Indians that courts apply remedial legislation, such as RLUIPA, as Congress intended.

B. Courts have a duty to properly apply the strict scrutiny standard in order to protect the fundamental rights of American Indians.

The Supreme Court has made important observations about Congress' motivation for enacting RLUIPA that bears on the statute's proper application:

> Before enacting § *3,* Congress documented, in hearings spanning three years, that "frivolous or arbitrary" barriers impeded institutionalized persons' religious exercise. See 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) (hereinafter Joint Statement) ("Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways."). To secure redress for inmates who encountered undue barriers to their religious observances, Congress carried over from RFRA the "compelling governmental interest"/"least restrictive means" standard. See *id.*, at 16698.

Cutter v. Wilkinson, 544 U.S. 709, 716-17 (2005); *Rich v. Secretary, Florida Dep't of Corrections,* 716 F.3d 525, 533 (11th Cir. 2013). "Policies grounded on mere speculation, exaggerated fears, or post-hoc rationalization will not suffice to meet the act's requirements." *Rich*, 716 F.3d at 533.

A separate panel in the Eleventh Circuit has concluded that this strict scrutiny standard requires prison officials to establish the burden imposed on religious exercise *actually furthers* a compelling interest. *Rich*, 716 F.3d at 532-33.

Moreover, other courts have required reference to other prison systems as to the feasibility of less restrictive means to achieve the government's compelling interest. *Warsoldier v. Woodford*, 418 F2d 989, 999 (9th Cir. 2005) *(*citations omitted); *Spratt v. Rhode Island Dep't of Corrections*, 482 F.3d 33, 41 (1st Cir. 2007); *Washington v. Klem*, 497 F.3d 272, 284 (3rd Cir. 2007).

In the case *sub judice*, ADOC demonstrated neither element. In examining these two elements, the district court decision observed that "context matters," referring exclusively to Alabama's men's prisons. *Knight v. Thompson*, 2013 WL 3843803 at *5 (11th Cir.). However, in shoehorning the analysis into this "context" both the district court and the Panel erred by unduly narrowing the context used to examine the compelling interest and least restrictive means elements. The Panel opinion limited its probing of whether ADOC utilized the least restrictive means to an Alabama-specific context. *Id.* at *8-*10. Alabama's asserted compelling penological interests were reviewed solely with reference to anecdotes from an out of control, admittedly chaotic Virginia prison system. *See id.* at *8. All of the evidence specific to Alabama on this element articulated fears of what might happen based on speculation. Not a single concrete example was offered that actually occurred in the State of Alabama. Surely, this is the type of "frivolous or arbitrary" barrier, grounded in speculation and exaggerated fears, to which Congress referred when passing RLUIPA and demanding tougher scrutiny by the courts. *See Joint Statement, supra*.

When it came to evaluating whether ADOC employed the least restrictive means, the district court failed to consider the fact that 38 states, the District of Columbia, and the federal Department of Corrections allow less restrictive grooming policies with no adverse consequences. *Id.* at *10. In not requiring ADOC to actually consider the efficacy of less restrictive measures, the Panel departed from Supreme Court precedent, and created a split within the Eleventh Circuit and with other Circuit Courts of Appeals. *See Rich*, 716 F.3d at 533*; Warsoldier v. Woodford*, 418 F2d 989, 999 (9th Cir. 2005) (*citing U.S. v. Playboy Entm't Group, Inc.*,529 U.S. 803, 824 (2000) (finding, in context of First Amendment challenge to speech restrictions, that "[a] court should not assume a plausible, less restrictive alternative would be ineffective"); *Spratt v. Rhode Island Dep't of Corrections*, 482 F.3d 33, 41 (1st Cir. 2007); *Washington v. Klem*, 497 F.3d 272, 284 (3rd Cir. 2007); *Knight*, 2013 WL 3843803 at *10 (holding that the heightened level of proof adopted in other circuits is not the law of the Eleventh Circuit). Thus, ADOC officials have completely prohibited a core practice of American Indian religious exercise and admit they did not even consider a less restrictive alternative.

This use of "context" – unduly narrowing the judicial inquiry to what happens in Alabama's male prisons - led the court to depart from the Congressionally mandated strict scrutiny standard. And the Panel erred in concluding, "RLUIPA asks only whether efficacious less restrictive measures actually exist, not whether the defendant considered alternatives to its policy." *Knight*, 2013 WL 3843803 at *10.

By accepting ADOC's bald assertion that no efficacious less restrictive alternative exists and disregarding contrary evidence as out of "context," the Court *de facto* applied a lower threshold "reasonableness" test,[3] which was legislatively overruled by RLUIPA. This is precisely the type of arbitrary abrogation of religious exercise that the standard set forth in RLUIPA was enacted to prevent.

The Supreme Court requires that the compelling interest test must be satisfied through application of the challenged law to the particular claimant whose religious exercise is being substantially burdened. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006); 42 U.S.C. §2000cc-1(a) (providing that the relevant burden is to the "person"). Thus, the court missed the most important context: whether depriving American Indians of their right to exercise their religion is the least restrict means by which to further the government's penological interest.

The Panel also failed to apply strict scrutiny when it allowed vague, unquantified notions of "cost" to be an excuse for depriving American Indians of religious liberty. It noted that it was within the discretion of ADOC to decide whether to absorb the "costs" associated with allowing American Indians to practice their religion. *Knight*, 2013 WL 3843083 at *4, *8. First, ADOC did not quantify what, if any, financial costs it would incur. Second, even assuming *arguendo* that it

[3] *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (holding a prisoner's free exercise claim will be "judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights").

could make that showing, RLUIPA's framers cited "lack of resources" as one of the excuses by which institutions "restrict religious liberty in egregious and unnecessary ways." *See Joint Statement, supra;* 42 U.S.C. §2000cc-3(c) (providing that "this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise"). Thus, in passing a law that addressed that specific problem, Congress forbade ADOC officials from relying on vague, unsubstantiated assertions of cost as an excuse for depriving its American Indian inmates of their fundamental right to religious exercise.

By accepting ADOC's unsubstantiated claims and ignoring the less restrictive policies in place for decades in nearly 80% of American prison systems, the district court and Panel simply "rubber stamped" the prison policy and abdicated the duty, which Congress mandated, to examine ADOC's justifications with strict scrutiny.

CONCLUSION

NCAI seeks correct application of the heightened legal standard enacted by Congress in response to cases in which courts did not properly protect American Indian religious exercise. The practice of not cutting one's hair is a prime example of a religious practice widely engaged in by American Indians that may be regarded by many in the broader society as fashion rather than religion. Thus, by not recognizing the profound religious significance of the practice of growing one's

hair, institutions – such as the ADOC – institute policies that result in substantially burdening the religious practice of American Indians.

It is vitally important that courts reviewing such actions appreciate unique aspects of American Indian religion and properly apply legal standards to protect the fundamental rights of American Indians as Congress intended. Compelling interests must be quantified and demonstrated. It is not enough to merely offer a theoretical reason why allowing an American Indian to practice his religion may not be feasible. Here, ADOC has not even shown a willingness to investigate - much less implement – a less restrictive means to further its interest. Accepting ADOC's justifications without substantiation was precisely the type of "rubber stamp" that Congress sought to avoid by enacting RLUIPA.

/s/

August 26, 2013

ROBERT DAVID SEGALL
COPELAND FRANCO SCREWS & GILL
444 South Perry Street
Montgomery, AL 36101
(334) 420-2956

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Counsel certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, according to the word-counting function of the Microsoft Word system used by *amicus*, it contains 3,124words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/

ROBERT DAVID SEGALL
COPELAND FRANCO SCREWS & GILL
444 South Perry Street
Montgomery, AL 36101
(334) 420-2956

August 26, 2013

CERTIFICATION OF COMPLIANCE WITH DIGITAL SUBMISSIONS

Pursuant to the Federal Rules of Appellate Procedure and Eleventh Circuit Rules, the undersigned hereby certifies that

(1) All required privacy redactions have been made and, with the exception of those redactions, every document in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and;

(2) The digital submissions have been scanned for viruses with the most recent version of avast! Online scanner (VPS 120827-0 27.08.2012) with the scan occurring on August 26, 2013, and, according to avast!, are virus free.

/s/Robert David Segall
ROBERT DAVID SEGALL

August 26, 2013

CERTIFICATE OF DELIVERY TO COURT AND PARTIES

Pursuant to Fed. R. App. P. 25(d)(2), I hereby certify that on this 26th day of August, 2013, the foregoing pleading and the attached brief was filed electronically through the CM/ECF system with the Court and that the requisite number of true and correct copies of the attached brief are being forwarded by United States Priority Mail to the Court within two days of the date of electronic transmission.

Further, pursuant to Fed. R. App. P. 25(d)(1), I hereby certify that on this 26th day of August, 2013 parties or counsel in this matter were served by electronic means as more fully reflected on the Notice of Electronic Filing and that a true and correct copy of the foregoing pleading and the attached are being forwarded to the following by United States first class mail within two days of the date of electronic transmission:

Joe Steadman
4087 Cottage Hill Rd.
Mobile, AL 36609

Peter Fruin
Attorney for Plaintiff/Appellants
Maynard, Cooper & Gale, P.C.
Suite 2400, 1901
6th Avenue N
Birmingham, AL 35203
(205) 254-1000

Mark Sabel
Sabel Law Firm, LLC
PO BOX 231348
Montgomery, AL 36123

Sasha Samberg-Champion, Esq.
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403

Counsel for the United States of America

George Beck, Esq.
United States Attorney, Middle District of Alabama
James J. Dubois, Assistant United States Attorney
Post Office Box 197
Montgomery, AL 36104

Respectfully submitted,

/s/

ROBERT DAVID SEGALL
COPELAND FRANCO SCREWS & GILL
444 South Perry Street
Montgomery, AL 36101
(334) 420-2956