No. 12-41015

In the United States Court of Appeals for the Fifth Circuit

WILLIAM CHANCE, JR., PLAINTIFF-APPELLANT

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL.,
DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, NO. 6:11-CV-435
HON. MICHAEL H. SCHNEIDER, PRESIDING

PLAINTIFF-APPELLANT WILLIAM CHANCE, JR.'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS

No. 12-41015; *William Chance, Jr. v. Texas Department of Criminal Justice, et al.*
USDC No. 6:11-cv-435

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Because of the importance of Plaintiff-Appellant's RLUIPA claim, the fact that the claim has several distinct parts, the length of the record, and the district court's failure to address a number of Plaintiff-Appellant's arguments, oral argument would be helpful to the Court.

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INTRODUCTION

For many years and without incident, the Texas Department of Criminal Justice ("TDCJ") freely allowed William Chance, Jr., an inmate, to take part in several traditional Native American religious ceremonies. Recently, however, the TDCJ changed its policies, inexplicably forbidding many of these religious practices and cutting back on the frequency of others. Accordingly, Chance brought a claim under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1, and now appeals the district court's grant of summary judgment to the TDCJ on that claim.

Where denying religious accommodation substantially burdens an inmate's faith, RLUIPA requires prison authorities to demonstrate that their policies are the "least restrictive means" of furthering a "compelling governmental interest." *Id*. Moreover, this standard is not satisfied by a showing that the government's actions serve a compelling interest in the abstract. Prison authorities must demonstrate a compelling interest in denying accommodation to "the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430-31 (2006).

Here, Chance simply requests to practice his faith in the same manner as before—a manner permitted by many other state and federal prisons. For example, Chance and his Native American brethren were long allowed to participate twice a

month in a Sacred Pipe ceremony—offering their prayers through the smoke of a communal pipe. Indeed, on several occasions Chance was allowed to smoke a separate pipe, which served to protect his fellow Native Americans from contracting any diseases (Chance has tuberculosis and Hepatitis C). Shortly after this suit began, the TDCJ claimed that Chance's separate pipe was not necessary to prevent the spread of disease. Now, however, neither Chance nor any other Native Americans are allowed to smoke *any* pipe, preventing them from practicing the fundamental religious act of *praying* in accordance with the dictates of their faith. For this and various other religious practices, Chance simply seeks to return to the way things were.

Chance's claim rests on a simple argument: If the TDCJ previously permitted these same religious practices without incident, there is at least a factual issue as to whether the TDCJ's current policy is the least restrictive means of furthering a compelling governmental interest. But the district court rejected this argument, failing to recognize that a prior, less-restrictive policy is highly relevant to, if not dispositive of, the question whether current policy satisfies RLUIPA. *See Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33, 40-41 (1st Cir. 2007); *Merced v. Kasson*, 577 F.3d 578, 593-94 (5th Cir. 2009). In so doing, moreover, the district court ignored several simple and practical alternatives that would address the TDCJ's concerns while permitting Chance to practice his faith. Instead, the court adopted the

TDCJ's many "slippery slope" arguments—arguments foreclosed by RLUIPA. *O Centro*, 546 U.S. at 435-36.

In light of Chance's evidence that the TDCJ previously permitted all of the religious practices that he seeks to enjoy—and in light of Chance's unaddressed, less restrictive alternatives—the district court erred in granting summary judgment to the TDCJ. Each of Chance's claims presents significant factual disputes that must be resolved at trial, and the decision below must be reversed.

JURISDICTIONAL STATEMENT

Chance filed this federal civil rights action against the TDCJ and individual defendants (collectively, "defendants"), alleging violations of RLUIPA and the U.S. Constitution. On August 8, 2012, the district court, exercising jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343, granted summary judgment to defendants and entered final judgment. On September 6, 2012, Chance timely filed his notice of appeal. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

Chance maintains that the policies of the TDCJ, which prohibit him from taking part in certain Native American religious ceremonies, substantially burden his religious beliefs in violation of RLUIPA. The ceremonies include: (1) a twice-monthly "Sacred Pipe" ceremony involving a communal pipe; (2) a "Smudging" ritual involving the wafting of smoke from burned herbs over the adherent's body

for purposes of ceremonial cleansing before Native American religious ceremonies; (3) a weekly "Teaching" ceremony in which adherents to the Native American faith are instructed concerning how to prepare for the Sacred Pipe ceremony; (4) the "Wiping Away the Tears" ceremony, which involves congregating for worship with other Native Americans on four annual holy days; and (5) the "Keeping of Souls" ritual, which involves mourning the death of a loved one by keeping a lock of his/her hair. With respect to each of these religious practices, the appeal raises the following issue:

I. Whether the district court erred in granting defendants' motion for summary judgment on the basis that the TDCJ's policies were the "least restrictive means" of furthering a "compelling governmental interest" within the meaning of RLUIPA, where the TDCJ previously permitted Chance and/or others to participate in the ceremonies at issue without evidence of harm to prison security or other vital penal interests.

In addition, with respect to the "Keeping of Souls" ritual, the appeal raises one additional issue:

II. Whether the district court erred in granting defendants' motion for summary judgment on the basis that the TDCJ's actions in barring Chance from possessing a lock of his parents' hair, for purposes of observing the "Keeping of

Souls" ritual, imposed no substantial burden on his faith within the meaning of RLUIPA.

STATEMENT OF THE CASE

Chance is an inmate in the TDCJ's Michael Unit, in Tennessee Colony, Texas. On June 16, 2011, he brought this action against the TDCJ and individual defendants, alleging violations of his rights under RLUIPA, the First Amendment, and the Equal Protection Clause. His amended complaint (filed January 9, 2012) alleges that, by prohibiting him from taking part in several vital Native American ceremonies and rituals—several of which the TDCJ permitted for years without incident—defendants have substantially burdened his sincerely held religious beliefs without compelling justification. R.14-25; R.363-74 (B.).[1]

In June 2012, after the case was referred to a magistrate judge, defendants moved for summary judgment. R.456-99. In July 2012, after briefing, the Magistrate Judge filed a report and recommendation ("R&R") recommending that the district court grant summary judgment to defendants on all claims. R.1210-38 (E.). With respect to all but one of Chance's claims (involving the "Keeping of Souls" ritual), the Magistrate Judge recognized that Chance's beliefs were sincere and that there was a genuine dispute that the challenged policies substantially burdened his

[1] "R.__" indicates the page number(s) in the Record on Appeal. "B." refers to Tab B of the Record Excerpts, followed by the page number(s), where appropriate.

faith. Nonetheless, the Magistrate Judge recommended granting summary judgment to defendants on all of Chance's claims, reasoning that defendants' actions in denying those claims were the least restrictive means of furthering a compelling government interest under RLUIPA, and therefore satisfied the constitutional standard of scrutiny as well.

Chance did not contest the entry of summary judgment on his Free Exercise and Equal Protection claims, but filed objections to the R&R as to his RLUIPA claims. R.1339-67. Defendants did not object to the R&R, including its determinations that they were not entitled to summary judgment on either the sincerity of Chance's religious beliefs or the substantial burden that defendants' actions placed on those beliefs.

On August 8, 2012, the district court adopted the R&R without comment and entered final judgment. R.1555-56 (F.). On September 6, 2012, Chance timely noticed this appeal.

STATEMENT OF FACTS

Chance is a sincere and faithful adherent to Native American religious practice. Chance traces his ethnic heritage to the Cheyenne tribe. R.836, (C.1) ¶ 4. Since his incarceration began, Chance has actively participated in the Native American faith community and adhered to the core facets of the Native American faith. R.836 (C.1), ¶¶ 2-3.

It is undisputed that various ceremonies and rituals are essential aspects of worship in the Native American tradition, and thus to Chance's religious exercise. R.836-37 (C.1), ¶ 6. Specifically, Chance's faith requires that he take part, in specific ways and at specified times, in Native American religious practices including (1) the Sacred Pipe ceremony, (2) the Smudging ritual, (3) the Teaching ceremony, (4) the Wiping Away the Tears ceremony, and (5) the Keeping of Souls ritual. *Id.* Indeed, for several years of his incarceration, Chance was freely permitted to participate in most of these rituals on terms that satisfied the requirements of his faith.

A. The Sacred Pipe Ceremony

In Native American faith traditions, the Sacred Pipe ceremony is a method of prayer. R.853-54 (D.5-6). The ceremony must be conducted at least twice each month —near the time of the full moon and the time of the new moon (R.838, (C.3) ¶¶ 22-24)—and the ceremony is not for mere enjoyment: The smoke generated by the pipe (from tobacco or other herbs) transmits the prayers of adherents to the Spirits. R.837 (C.2), ¶¶ 8-12; R.853-54 (D.5-6); R.858, at 23:18-24:2.

It is vital to the expression of Chance's religious beliefs that he personally be allowed to smoke a prayer pipe during the Sacred Pipe ceremony. R.837 (C.2), ¶¶ 8-13; R.860, at 31:20-32:17. The ceremony requires establishing a personal relationship with the Spirits through direct dialogue, which can only be accomplished by personally inhaling and exhaling the smoke from the pipe. *Id.* For the

Spirits to hear and answer Chance's prayers, he must personally smoke the pipe. *Id.* Moreover, as established by the testimony of Chance's expert, Chance's need to practice the Sacred Pipe ceremony in this manner is consistent with the Native American faith and the way it is practiced by other Native Americans, both inside and outside of prison. *See id.*; R.853-54 (D.5-6).

From 1999 until as late as 2009, Chance and all other Native American adherents were regularly allowed to personally smoke a communal pipe in the Sacred Pipe ceremony. R.838-40 (C.3-4), ¶¶ 20-26. The record contains no evidence suggesting that this practice posed, or resulted in, any safety or security risks. From May 2009 to February 2012, only one pipe ceremony was held, purportedly because of a lack of volunteers or paid chaplains. R.840 (C.5), ¶¶ 38-44. In September 2011, however, the TDCJ changed its policy, allegedly for medical reasons, and since then Chance has not been allowed to personally smoke a pipe. R.737. Instead, Chari Bouse, a paid "contract chaplain" from outside the prison staff, inhales and exhales smoke from the pipe during Native American services. R.837 (C.2), ¶ 14.

This practice does not constitute the Sacred Pipe ceremony within the meaning of the Native American faith. R.837 (C.2), ¶¶ 15-16. In fact, Chaplain Bouse acknowledged that smoking the pipe herself during Native American services does not constitute prayer for or on behalf of Chance, but rather her own prayer regard-

ing Chance. *Id.* Being denied the ability to personally smoke the pipe, and told that only the chaplain may do so, is akin to telling a low-church Protestant Christian that only designated ordained priests may offer prayers regarding him.

Chance has two diseases, Hepatitis C and tuberculosis. R.841 (C.6), ¶ 49. Out of an abundance of caution and a concern that these diseases not be spread to fellow Native American faith adherents, Chance requested to have his own prayer pipe that he could smoke during the Sacred Pipe ceremony. R.841 (C.6), ¶ 50. Such a pipe could be kept, if not in his own cell, in the chaplain's or warden's office, or by a qualified volunteer, and provided to Chance for use during the ceremony. R.841 (C.6), ¶¶ 51-52. In 2008, Chance was allowed to do just that, by using an old community pipe belonging to the Native American community at the Michael Unit as his personal pipe under the supervision of Native American contract chaplain Guillermo Nieto. R.76, ¶ 19; R.839 (C.4), ¶¶ 27-33; R.841 (C.6), ¶¶ 53-54.

In June 2010, however, Native American volunteer Sam Lonewolf removed the community pipe from the Michael Unit and disposed of it, allegedly because it was damaged. R.705; R.840 (C.5), ¶¶ 41-42. There is no evidence that Chance's use of a separate personal pipe ever caused any problems such as jealousy or retaliation by other inmates. Since June 2010, however, Chance has not been allowed to smoke a personal pipe during pipe ceremonies, and his requests for a personal

pipe have been denied. R.841 (C.6), ¶¶ 53-54. Although defendants admit that the Michael Unit is "designated to house Native American faith adherent[s]" (R.980), Chaplain Cynthia Lowry, unit chaplain for the Unit, has not replaced the community pipe. R.705.

B. The Smudging Ritual

The Smudging ritual involves using smoke from certain burned herbs to ritually cleanse one's body, and the ceremonial site, before performing certain Native American religious ceremonies. R.841-42 (C.6-7), ¶¶ 56-66; R.854 (D.6). For example, the Smudging ritual must be performed before any Sacred Pipe or Teaching ceremony. R.842 (C.7), ¶¶ 60-64. According to Native American beliefs, smudging is a necessary element of appealing to the Spirits. *Id*.

When the relevant ceremony is performed indoors, the Smudging ritual is used to cleanse the ceremonial site. R.842 (C.7), ¶¶ 65-66. But when the relevant ritual is performed outdoors, it is not necessary to cleanse the ceremonial site, as the wind itself distributes the smudge smoke, thus purifying the area. *Id.* As Chance's expert testified, the need to practice the Smudging ritual in this manner is consistent with the Native American faith and the way in which it is practiced by other Native Americans. R.842 (C.7), ¶ 67; R.853-54 (D.5-6).

Chance is currently allowed to smudge outdoors, once per month, under the supervision of Chaplain Bouse, during her monthly visits to perform Native Amer-

ican services. R.842-43 (C.7-8), ¶¶ 68-71. From 1998 to 2009, moreover, Chance was allowed to smudge indoors—in the Michael Unit's gymnasium—before participating in the Sacred Pipe and Teaching ceremonies. R.843-44 (C.8), ¶¶ 75-80. In the event of inclement weather, indoor smudging is the only alternative that prevents the Native American ceremonies from being cancelled. The record contains no evidence that the TDCJ's practice of allowing indoor smudging posed or resulted in any security or safety risks.

Beginning in 2009, however, with one exception (in February 2012), defendants ceased allowing Chance to smudge indoors. R.843-44 (C.8-9), ¶¶ 80-85. Chance was then informed that indoor smudging was no longer allowed in the Michael Unit. R.844 (C.9), ¶ 86.

C. The Teaching Ceremony

The Teaching ceremony is a comprehensive ceremony that lasts about two hours and teaches Native American practitioners how to prepare for the Sacred Pipe ceremony and more generally how to practice the Native American faith. R.74, ¶ 6; R.846 (C.11), ¶ 102. Both the individual participants and the ceremonial site must be cleansed before this ceremony, which includes sacred activities. R.846 (C.11), ¶ 103. The center of the teaching circle also must be blessed. R.74, ¶ 7. During the ceremony, a community teaching is given, congregants offer personal ritual prayers and meditation, and the congregants gather in smaller circles

for discussions. R.74, ¶¶ 7-9. At the end, a final journey prayer is offered. *Id.* To practice the Native American faith, weekly Teaching ceremonies are required. R.845 (C.10), ¶ 101.

Currently, Chance is allowed to participate in a Teaching ceremony only once a month, under the supervision of Chaplain Bouse. R.846 (C.11), ¶ 104. Although TDCJ offers "talking circle" activities twice per month—essentially, allowing each participant to share with the others for a few minutes what the "Great Spirit" has placed on his heart—and DVD viewings once per month, Native American teaching holds that these are not substitutes for the Teaching ceremony. R.846 (C.11), ¶¶ 106-09.

D. The Wiping Away the Tears Ceremony

The Wiping Away the Tears ceremony involves congregating for worship with other Native American adherents on Native American holy days. R.846-47 (C.11-12), ¶¶ 111-15. Chance believes he is required to observe four such holy days: the anniversaries of the Sand Creek Massacre (November 29), Trail of Tears (June 5), Massacre of Wounded Knee (December 29), and Battle of Little Big Horn (June 25). R.847 (C.12), ¶ 113. As expert testimony confirmed, Chance's beliefs are consistent with the Native American faith and the manner in which it is practiced by other Native Americans, including the Cheyenne. R.857, at 18:7-18; R.861, at 48:6-19; R.863-64, at 85:5-86:14; *see generally* R.863-64 (D.5-6).

From 2005 to 2008, Chance was allowed to congregate and worship at the Michael Unit on each of these holy days. R.79, ¶¶ 36-37; R.847 (C.12), ¶ 114. In September 2008, however, defendants changed their policy, and Chance is no longer allowed to participate in the Wiping Away the Tears ceremony. *Id.* Defendants stated that they made this change because another inmate had complained that the chosen holy days discriminated against other Native American tribes. R.693. Under the advice of contract chaplains Bob Pierce and Chari Bouse, defendants eliminated the designated holy days and adopted a policy, loaded with theological significance, that "every day is a holy day." *Id*.

E. The Keeping of Souls Ritual

The Keeping of Souls ritual involves possessing a small lock of a deceased relative's hair in order to mourn the relative's death. R.844 (C.9), ¶ 90. Chance's Native American faith requires him to possess such a lock of his deceased parents' hair for a period of one year. R.844 (C.9), ¶ 91. Chance presented evidence that this period of mourning does not begin at the moment of a person's death, but rather when the lock of hair is prepared and delivered to the recipient. R.844-45 (C.9-10), ¶¶ 91-93. As confirmed by expert testimony, Chance's need to practice the Keeping of Souls ritual is consistent with the Native American faith and the way it is practiced by other Native Americans. R.854 (D.6); R.862, at 60:5-21; R.864, at 87:7-88:6.

Because Chance is not allowed to possess a lock of his parents' hair, he is not able to properly mourn their loss and will not be able to reconnect with them in the afterlife. R.845 (C.10), ¶¶ 95-96. Chance feels haunted by his parents because of this lack of mourning. *Id*.

Chance is aware that in the past, at least one other Michael Unit inmate, John Rose, was permitted to keep a lock of his deceased daughter's hair. R.845 (C.10), ¶ 97. To the best of Chance's knowledge, Rose received this lock of hair around 2002 and was able to keep it until approximately 2009. R.845 (C.10), ¶¶ 98-99.

F. The Magistrate Judge's Report and Recommendation

The Magistrate Judge's R&R recommended granting summary judgment to defendants on all of Chance's claims. R.1210-38 (E.). The Magistrate Judge recognized that all of Chance's beliefs were sincere. In addition, with respect to all but one of Chance's claims (involving the Keeping of Souls ritual), the Magistrate Judge found sufficient evidence that the challenged policies substantially burdened his sincerely held religious beliefs. R.1219-23 (E.10-14).

With respect to the Keeping of Souls ritual, Chance submitted evidence that the one-year period for mourning had not yet begun because he had not received his parents' locks of hair, while the defendants pointed to evidence that the period of mourning began at his parents' deaths (2008 and 2009, respectively), such that

the time for observing the ritual had already passed. R.1223 (E.14). The Magistrate Judge improperly resolved this factual dispute in defendants' favor, holding that it was too late for Chance to seek relief. *Id*.

The Magistrate Judge went on to recommend granting summary judgment to defendants on all of Chance's claims, reasoning that defendants' actions in denying those claims were the "least restrictive means" of furthering a "compelling government interest" under RLUIPA, and therefore satisfied the Constitution as well. R.1223-38 (E.14-29).

With respect to personal pipe-smoking, the Magistrate Judge acknowledged that the TDCJ had previously permitted Native Americans to share a communal pipe at the Sacred Pipe ceremonies. R.1225 (E.16). As the Magistrate Judge noted, this raised obvious questions: "[W]hat compelling interest is now at stake and whether the new policy is the least restrictive means of furthering the compelling governmental interest[.]" *Id.* Nonetheless, the Magistrate Judge accepted defendants' purported medical rationale that banning communal pipe-smoking furthered its compelling interest in preventing the spread of disease, without explaining how the TDCJ's situation was any different than it was just a few years ago when it permitted communal pipe-smoking. R.1226 (E.17). Nor did the district court, upon adopting the R&R, address Chance's evidence that the prisons of the

federal government and several States permit communal pipe-smoking. R.1358-60.

Chance also suggested that, as a less restrictive alternative, he could be permitted to smoke a personal pipe separate from the pipe used by other Native American inmates. R.1226 (E.17). Here too, Chance was previously allowed to do just that without incident. In 2008, Chance was permitted to use an old pipe belonging to the Michael Unit's Native American community, while the rest of the community used volunteer Chaplain Nieto's pipe. R.839 (C.4), ¶¶ 27-32. Defendants presented no evidence that this ever caused any problems.

Nonetheless, the Magistrate Judge rejected this alternative without so much as acknowledging the TDCJ's past practice of allowing it. The Judge speculated that, if Chance received a personal pipe, there would be a risk of "[j]ealousy and retaliation." R.1226 (E.17). The Judge uncritically accepted defendants' testimony that "over 300 offenders who participate in [Native American] ceremonies" would have to receive their own pipes, that "it would take ten officers to supervise the ceremonies," and that storing and administering the pipes would be impractical. R.1227 (E.18). The Judge ignored the absence of such results under past practice. He also ignored defendants' own expert's acknowledgment that the number of people smoking is irrelevant to the need for additional security personnel—because the need for such personnel is based on the number of attendees, *not* on how many,

if any, are smoking—and the fact that nowhere close to that many inmates had ever attended the pipe ceremony. R.920, at 72:2-73:5; R.923, at 87:10-17.

Chance also proposed that it was feasible to accommodate his faith without health risks by using sanitizing wipes to clean the pipe's mouthpiece after each use. R.805. The Magistrate Judge, however, did not even discuss this alternative —let alone explain why it did not create a factual dispute precluding summary judgment.

With respect to the frequency of the pipe ceremonies, the Magistrate Judge simply accepted defendants' argument that, because they could not find any Native American volunteers, they could not hold the ceremonies more often. R.1228-29 (E.19-20). Noting that this Court has previously upheld the TDCJ's volunteer policy under RLUIPA, the Judge held that it passed scrutiny here. R.1229 (E.20). But the Judge ignored Chance's evidence that the Sacred Pipe ceremony had previously been conducted under the supervision of a non-Native American volunteer or the prison's non-Native American chaplain. R.839 (C.4), ¶¶ 34-35.

With respect to the Smudging ritual, the Magistrate Judge reasoned that, while smoke smudging had previously been allowed in the gymnasium, that was no longer possible because smoke would trigger the fire alarm. R.1230 (E.21). The record contained no evidence, however, that the fire alarm had ever actually been triggered.

Moreover, the only alternatives that the Magistrate Judge considered were turning off the alarm system and installing a $130,000 fire suppression system in the gym, similar to the one found in the Unit's kitchen. *Id.* Finding that turning off the fire alarm would violate state law, and that the cost of installing a fire suppression system was too great, the Judge agreed that banning indoor smudging was the least restrictive means of furthering the TDCJ's interest in safety. R.1231 (E.22). The Judge did not consider any other less restrictive means, such as using a tent or other structure to enable the Smudging ritual to be performed outside during inclement weather. *See* R.817 (suggesting these alternatives).

With respect to the frequency of Teaching ceremonies, the Magistrate Judge held that because the TDCJ could not offer religious services for each of the 230 faith groups in the TDCJ, defendants could not be expected to provide services that accommodated Chance. R.1231-32 (E.22-23). In support, the Judge relied upon *Freeman v. TDCJ*, 369 F.3d 854 (5th Cir. 2004), a *constitutional* free exercise case that applied a much lower standard of scrutiny, stating without analysis or citation to authority that this standard was "equally applicable to claims filed under RLUIPA." R.1232 (E.23). The Judge also failed to note that, despite the diversity of faith groups across the TDCJ, the Michael Unit is specifically "designated to house Native American faith adherent[s]." R.980.

With respect to Chance's request for recognition of the four Native American holy days, the Magistrate Judge stated once again that because volunteers were not available, the TDCJ could not be expected to recognize the holy days, and that it was impossible for the prison to accommodate every religious group. R.1232-33 (E.23-24). The Judge gave no consideration to Chance's showing that, up until 2009, the TDCJ had recognized these holy days.

Finally, with respect to the Keeping of Souls ritual, the Magistrate Judge noted that it had already held that it was "too late for relief" on this claim. R.1233 (E.24). He also noted that the Fifth Circuit had upheld limits on a prisoner's use of a medicine bag in *Adkins v. Kaspar*, 393 F.3d 559 (5th Cir. 2004), which involved only limited restrictions on the time and place in which a prisoner could carry his medicine bag. *Id.* The Judge also agreed with defendants that a total ban on all items received from relatives was the least restrictive means of furthering the government's interest in security. *Id*.

G. The District Court's Decision

The district court adopted the R&R as its own, affirming summary judgment on all claims for defendants and entering final judgment.[2] This appeal followed.

[2] Because the district court simply adopted the Magistrate Judge's R&R as its own and conducted no independent analysis, and for convenience, we refer below simply to "the district court."

STANDARD OF REVIEW

The Court reviews de novo a grant of summary judgment (*Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011)), which is warranted only if "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute regarding a material fact is genuine if the evidence would permit any reasonable jury to return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The reviewing court "may not make credibility determinations or weigh the evidence"; those are functions of the fact-finder. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477 U.S. at 253-55. Rather, "a court is to make all reasonable inferences in favor of the nonmovant." *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 456 (5th Cir. 2005) (emphasis omitted).

When the moving party will bear the burden of proof on an issue at trial, that party "must come forward with evidence which would 'entitle it to a directed verdict if the evidence went uncontroverted at trial.'" *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1264-65 (5th Cir. 1991) (citation omitted). The nonmoving party can then defeat the motion "by merely demonstrating the existence of a genuine dispute of material fact." *Id.* at 1265. Under RLUIPA, the government bears the burden of proving that its policy is the least restrictive means of further-

ing a compelling governmental interest. 42 U.S.C. § 2000cc-1(a); *O Centro*, 546 U.S. at 429 (under RFRA, this burden "is placed squarely on the Government").

SUMMARY OF ARGUMENT

I. The district court improperly granted summary judgment to defendants, finding that each of the burdens that they had placed on Chance's religious exercise was the least restrictive means of furthering compelling governmental interests in health, safety, or controlling costs. The court reached this conclusion despite Chance's uncontroverted evidence that defendants previously permitted each of these practices, in many cases for years, without incident or excessive cost.

For example, to offer prayer to the spirits during the Sacred Pipe ceremony, Chance's faith requires that he personally smoke a pipe. Defendants previously permitted Native American prisoners to do just that, and several times they even allowed Chance to smoke a separate pipe. None of defendants' concerns—medical problems, security issues, or jealousy and retaliation—ever materialized. In fact, when litigation began, defendants themselves argued that Chance's diseases are "not spread in a way that would preclude [Chance and others] in sharing the pipe." R.251. Now, however, defendants prohibit Chance and every other Native American practitioner from personally smoking *any* pipe.

The same is true for each of Chance's other religious practices: bi-monthly Sacred Pipe ceremonies, the Smudging ritual, weekly Teaching ceremonies, the four annual holy days, and the Keeping of Souls ritual. All of these ceremonies were previously permitted without incident and with minimal cost.

As both this Court and others have recognized, evidence involving prior policies that were less restrictive of religious liberty but capable of serving the government's critical interests is highly relevant if not dispositive of RLUIPA's least restrictive means inquiry. *See Spratt*, 482 F.3d at 40-41; *see also Merced*, 577 F.3d at 587-88, 593-94 (applying Texas RFRA, which incorporates same standard as RLUIPA). The common sense of these decisions is that, if something worked before, it can probably work again. At a minimum, therefore, evidence of successful past practice creates a disputed factual issue to be resolved at trial. Yet the district court essentially ignored this evidence in granting summary judgment.

Worse yet, the district court ignored or dismissed several of Chance's simple alternative policies. Each of these alternatives is capable of addressing the TDCJ's concerns while allowing Chance to practice his faith. But rather than credit his evidence or require the TDCJ to explain why his alternatives were infeasible, the court deferred to defendants' assertions that accommodating him would create a "slippery slope" scenario resulting in exorbitant costs or difficulties—something RLUIPA forbids. *See O Centro*, 546 U.S. at 435-36; *Warsoldier v. Woodford*, 419 F.3d 989, 999 (9th Cir. 2005). The court utterly failed to engage in the requisite case-by-case analysis that RLUIPA requires. Indeed, in one instance, the court justified its ruling by invoking precedent under *the Free Exercise Clause* (R.1232 (E.23)), ignoring this Court's teaching that "RLUIPA imposes a higher burden than

does the First Amendment." *Mayfield v. TDCJ*, 529 F.3d 599, 612 (5th Cir. 2008). The court's entry of summary judgment for defendants must therefore be reversed.

II. Finally, as to Chance's claim concerning the Keeping of Souls ritual, the district court incorrectly held that there was no substantial burden on Chance's faith because, the court reasoned, his one-year mourning period had passed. This conclusion not only rests on an improper determination of "true" Native American religious practice; it was made in the face of contradictory evidence that the time for mourning does not begin until the adherent receives the locks of hair. Here again, this evidentiary dispute should have been resolved at trial, not on summary judgment.

ARGUMENT

Under RLUIPA's plain terms, the government may not "impose a substantial burden on [a prisoner's] religious exercise" unless it can demonstrate that "imposition of the burden on *that* person … is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000cc-1(a) (emphasis added). Thus, where a prisoner carries "the burden of persuasion ... on whether the ... government practice" at issue "substantially burdens the ... exercise of [his] religion," (§ 2000cc-2(b)), the government must prove that denying religious ac-

commodation is justified by "interests of the highest order and those not otherwise served." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).[3]

RLUIPA's stringent standards are not satisfied by a showing that the government's actions serve a compelling interest in some abstract way. Strict scrutiny "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law … [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *See O Centro*, 546 U.S. at 430-31. Put another way, the court must "'searchingly examine the interests that the State seeks to promote … and the impediment to those objectives that would flow from recognizing *the claimed … exemption*.'" *Id.* at 431 (quoting *Yoder*, 406 U.S. at 213, 221).

Moreover, while some deference is due to the government's experience with prison security, this does not "relieve prisons from the express mandate placed on them by Congress: that policies which substantially burden the religious practice of inmates be predicated on a compelling interest, that they further that interest, and that they do so in the least restrictive manner possible." *Garner v. Morales*, 2009 WL 577755, at *5 (5th Cir. Mar. 6, 2009) (per curiam); *see also Couch v.*

[3] RLUIPA's predecessor statute, RFRA, adopted the *Yoder* standard. *See O Centro*, 546 U.S. at 431. RLUIPA, in turn, adopted the RFRA standard. *Cutter v. Wilkinson*, 544 U.S. 709, 716-17 (2005).

Jabe, 679 F.3d 197, 201 (4th Cir. 2012) ("'a court should not rubber stamp or mechanically accept the judgments of prison administrators.'" (citation omitted)). This standard is the "'most demanding test known to constitutional law,'" and Congress, in enacting RLUIPA, has imposed it upon prisons. *Moussazadeh v. TDCJ*, — F.3d —, 2012 WL 6635226, at *12 (5th Cir. Dec. 21, 2012) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)).

Here, there is no dispute that Chance's religious beliefs are sincere. Further, defendants did not object to the district court's findings that, with one exception (the Keeping of Souls ritual), defendants' actions substantially burdened the exercise of those beliefs.[4]

Accordingly, the main issue before this Court is whether the district court properly found that defendants—as the moving parties who bore the burden on the compelling interest and least restrictive means issues—set forth evidence sufficient to support a directed verdict in their favor. *Int'l Shortstop*, 939 F.2d at 1264-65. If Chance, as the nonmoving party, presented a disputed issue of material fact on the compelling interest or least restrictive means issues, the decision below must be reversed. *Id.* at 1265. And, as shown in Part I (below), when the facts are inter-

[4] Thus, defendants may not now challenge the Magistrate Judge's substantial burden findings, except for plain error. *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

preted in the light most favorable to Chance, the government has not satisfied RLUIPA's stringent standards. *Infra* at 27-57.

In Part II, we demonstrate that the district court erred in finding that defendants' actions in denying his participation in the Keeping of Souls ritual did not substantially burden his faith.

I. In granting summary judgment to defendants, the district court misapplied the "compelling governmental interest" and "least restrictive means" prongs of RLUIPA.

The district court failed to hold the government to its burden of proving that its actions are the least restrictive means of furthering a compelling governmental interest. The court ignored evidence that defendants previously permitted each religious ceremony at issue without incident. It also ignored evidence that federal and other state prisons routinely permit many of the very same religious practices that defendants have banned here. For purposes of summary judgment, therefore, the government cannot possibly satisfy RLUIPA—a point confirmed by the precedents of both this Court and a host of other circuits.

A. The district court incorrectly held that there is no genuine factual dispute as to whether prohibiting Chance from personally smoking a pipe was the least restrictive means of serving a compelling governmental interest.

It is undisputed that Chance's sincerely held religious beliefs require him to take part in the Sacred Pipe ceremony by smoking the pipe personally—not simply by observing a chaplain smoking. R.1220-21 (E.11-12); *see also* R.1220 (E.11)

(noting Chaplain Bouse's "acknowledg[ment] that smoking the pipe herself ... does not constitute prayer for or on behalf of [Chance], but rather her personal prayer for him"). In addition, the district court correctly held (without objection by defendants) that Chance presented sufficient evidence that denying him that opportunity substantially burdened his religious exercise—his ability to pray. R.1220-21 (E.11-12); *see also* R.1225 (E.16) (noting this Court's holding in *Thunderhorse v. Pierce*, 364 F. App'x 141 (5th Cir. 2010), "that the pipe ceremony is a religious exercise and that the prohibition on its use was a substantial burden").

The district court went on, however, to find no genuine factual dispute "that the prison system has a compelling interest in preventing the spread of disease and prison security in not permitting [Chance] and other [Native American] adherents from having their own pipes and that the prohibition is the least restrictive means of doing so." R.1227 (E.18). For several reasons, this was reversible error.

Most fundamentally, the decision below is belied by the TDCJ's own practice—which not only long permitted *all* Native American adherents to use a communal pipe, but several times permitted *Chance* to use a separate individual pipe. Indeed, both the prior practice of the TDCJ and that of other state and federal authorities confirm that these were feasible forms of accommodation here. There is no evidence that the TDCJ's prior practice created health risks, led to an unmanageable flood of requests for individual pipes, or resulted in "[j]ealousy and retalia-

tion" (R.1226 (E.17))—much less that the TDCJ had to purchase individual pipes for *everyone*. The district court's contrary holding rests on "speculation"—on unfounded "slippery-slope concerns" that "echo[] the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *O Centro*, 546 U.S. at 435-36. That approach cannot be squared with RLUIPA. *See id.*

In addition, however, Chance suggested other feasible forms of accommodation—most notably, use of sanitizing wipes to clean the pipe's mouthpiece after each use. Just as many churches prevent the spread of disease by sanitizing their common Communion cups between uses, so too may ceremonial pipes be cleansed in this manner. Yet one searches the opinion below in vain for any discussion of Chance's suggestion in this regard—much less an explanation why that evidence did not create a factual dispute sufficient to defeat summary judgment.

1. RLUIPA precludes summary judgment where there is evidence that the defendant prison system, or other prison systems, have accommodated religious exercise in the manner sought by the claimant.

In concluding that there was no genuine factual dispute as to whether denying Chance the ability to personally smoke a pipe satisfied RLUIPA, the district court ignored both the past practice of the TDCJ and the practice of many other prison systems. But even assuming, *arguendo*, that preventing the spread of disease is both a compelling governmental interest and what motivated defendants'

actions here, the district court committed reversible error. There is unquestionably a genuine factual dispute as to whether defendants' actions satisfy RLUIPA's "least restrictive means" prong.

In conducting RLUIPA's "least restrictive means" analysis, federal courts across the circuits have unanimously recognized the importance of evidence that the defendant prison previously used a less restrictive policy without incident.[5] And for good reason: If a past policy served the government's essential objectives without burdening the claimant's faith, then the current policy cannot be the least restrictive means of serving a compelling governmental interest. In sum, as the au-

[5] *See Williams v. Sec'y Penn. Dep't of Corr.*, 450 F. App'x 191, 195-96 (3d Cir. 2011) (reversing grant of summary judgment where designated prayer room for Muslim inmates may have been viable because it had been used previously); *Spratt*, 482 F.3d at 40-41 (reversing summary judgment regarding policy banning inmate preaching in light of "seven-year track record" under the prior policy); *Stoner v. Stogner*, 2007 WL 4510202, at *6 (D. Nev. Dec. 17, 2007) (denying summary judgment where factual issue remained as to whether banned religious symbol previously caused "security issues"); *Williams v. Bitner*, 359 F. Supp. 2d 370, 377 (M.D. Pa. 2005) (denying summary judgment where prison previously accommodated inmate's refusal to prepare pork by transferring inmate to different job "with no concomitant loss of efficiency"), *aff'd*, 455 F.3d 186 (3d Cir. 2006); *see also Leonard v. Louisiana*, 2010 WL 1285447, at *12-13 (W.D. La. Mar. 31, 2010) (granting prisoner's motion for summary judgment where prison banned previously permitted religious publications), *aff'd*, 449 F. App'x 386 (5th Cir. 2011); *Merced*, 577 F.3d at 593 (reversing district court where plaintiff had performed animal sacrifices for sixteen years without incident before city banned them).

thorities cited above (at n.5) confirm, a defendant's failure to rebut the prior less restrictive policies leaves a disputed factual issue that defeats summary judgment.

Similarly, the federal courts have universally recognized that the policies of *other* prisons are highly probative of whether a governmental policy is the least restrictive means of furthering the government's interest. That is, "comparisons between institutions [are] analytically useful when considering whether the government is employing the least restrictive means." *Warsoldier*, 418 F.3d at 1000-01. "[T]he 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." *Jova v. Smith*, 582 F.3d 410, 416 (2d Cir. 2009) (quoting *Warsoldier*, 418 F.3d at 1000).

At the very least, a showing that other prisons use another means of serving their security- and safety-related objectives while permitting the exercise of similar inmates' faiths creates a disputed factual issue sufficient to defeat summary judgment. In *Koger v. Bryan*, 523 F.3d 789, 801 (7th Cir. 2008), for example, the Seventh Circuit reversed summary judgment for a state prison where federal prisons used a less restrictive policy to further the same compelling interest in managing special religious dietary needs. *Accord Shakur v. Schriro*, 514 F.3d 878, 890-91 (9th Cir. 2008). Similarly, the Ninth Circuit in *Warsoldier* reversed summary

judgment for the defendant prison officials where they did not explain how another prison was able to accommodate the same religious hair-length requirements, despite having the same compelling interests. 418 F.3d at 1000-01. The Third and First Circuits have issued similar rulings. *See Washington v. Klem*, 497 F.3d 272, 285-86 (3d Cir. 2007) (reversing summary judgment where other prisons permitted inmates to possess more books than defendant prison's policy); *Spratt*, 482 F.3d at 42-43 (reversing summary judgment where other prisons were able to accommodate inmate preaching).

Nor is this surprising. Where strict scrutiny applies outside of RLUIPA cases, "the Government must consider and reject other means before it can conclude that the policy chosen is the least restrictive means." *Washington*, 497 F.3d at 284 (free speech claim); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (equal protection)). As courts across the circuits have recognized, this requirement applies to RLUIPA.[6] In short, "the absence of any explanation … of significant differences … that would render the [other policies] unworkable" con-

[6] *E.g.*, *Couch*, 679 F.3d at 203 (4th Cir.) ("[W]e have required that the government, consistent with the RLUIPA statutory scheme, acknowledge and give some consideration to less restrictive alternatives."); *Jova*, 582 F.3d at 416 (2d Cir.); *Washington*, 497 F.3d at 284 (3d Cir.) ("[T]he phrase 'least restrictive means' … necessarily implies a comparison with other means."); *Warsoldier*, 418 F.3d at 999 (9th Cir.) ("[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"); *Spratt*, 482 F.3d at 42-43 (1st Cir.) (same).

firms that defendants could implement a less restrictive policy. *Spratt*, 482 F.3d at 42. And "[i]f a less restrictive alternative is available, RLUIPA commands that TDCJ adopt it." *Moussazadeh*, 2012 WL 6635226, at *12.

As shown below, however, the district court ignored both Chance's evidence of the TDCJ's prior practice and the government's failure to show that those practices generated difficulties. That was reversible error—a point confirmed by the evidence of the practice of the federal and other state prison systems.

2. The TDCJ's own prior practice, and that of the federal and several state prison systems, confirm that denying Chance accommodation is not the least restrictive means of serving the TDCJ's interest in preventing the spread of disease.

As the district court noted, it is undisputed "that [Chance] was once allowed to participate in a communal pipe ceremony in which one pipe was shared with all participants. But the policy was changed," thus "rais[ing] the issue of what compelling interest is now at stake and whether the new policy is the least restrictive means of furthering [that] interest[.]" R.1225 (E.16). The court went on to conclude, however, that denying Chance (and others) the ability to take part in communal pipe-smoking was the "least restrictive means" of serving the TDCJ's "compelling interest in preventing the spread of disease," and that denying Chance a personal pipe was the least restrictive means of "controlling costs." R.1227 (E.18). On both scores, the court committed reversible error—even assuming that preventing the spread of disease amounts to a compelling governmental interest.

a. Defendants cannot dispute that, from at least 1999 to 2011—a 12-year period—they allowed all Native Americans to personally participate in communal pipe-smoking during the pipe ceremony. R.472; R.838-40 (C.3-4), ¶¶ 20-36. But in September 2011, after this litigation began, the TDCJ changed its policy to ban communal pipe-smoking. R.837 (C.2), ¶ 14.

Defendants have produced no evidence that this decade-plus of communal pipe-smoking ever caused any medical problems. There are no reports of even a single person getting sick, let alone of an outbreak. R.900, at 77:2-15. Nor is there is any evidence that the Native American prison population had a higher rate of infection than the general prison population. Indeed, in the court below, defendants' first response to Chance's claim for a *separate* pipe was that it was unnecessary because he could simply share the communal pipe like every other Native American participant. R.251. There was no risk, defendants stated, of transmitting disease. *Id.* (arguing that the diseases are "not spread in a way that would preclude [Chance and others] in sharing the pipe").

Having allowed practicing Native American inmates to engage in communal pipe smoking for years without incident, and having argued below that communal pipes posed no health risks, defendants simply cannot show that banning the practice is the least restrictive means of furthering its interest in preventing disease—even assuming that interest is compelling. At the very least, defendants' past prac-

tice creates a material fact dispute barring summary judgment. *E.g.*, *Spratt*, 482 F.3d at 40-43 (reversing summary judgment on defendants' policy banning inmate preaching based on "seven-year track record" under prior policy).

Indeed, this Court has recognized as much in non-prison religious liberty cases. In *Merced*, for example, the Court reversed a verdict finding that a city's ban on animal sacrifice, essential to the Santeria religion, was the least restrictive means of furthering the city's interest in protecting public health. 577 F.3d at 593-94 (applying Texas RFRA). As the Court recognized, the fact that the plaintiff had performed such sacrifices for sixteen years without incident foreclosed any finding that the city's actions satisfied strict scrutiny. *Id.* That principle applies with even greater force here, where communal pipe-smoking did not cause any problems for twelve years, and yet the district court did not even permit the issue to be tried. *See also Thunderhorse*, 364 F. App'x at 146 n.3 (5th Cir. 2010) (noting relevance of evidence that plaintiff had previously been allowed to have long hair, but finding accommodation under RLUIPA foreclosed by prior circuit precedent).

That summary judgment was wrongly granted is further confirmed by the policies of other prisons that allow communal pipe-smoking. Chance submitted evidence that federal and state prisons throughout the country allow inmates to partake in the pipe ceremony by smoking the pipe themselves. R.952-53. Case law confirms as much. *See Native Am. Council of Tribes v. Weber*, — F. Supp. 2d —,

2012 WL 4119652, at *3 (D.S.D. Sept. 19, 2012) (pipe shared during sweat lodge ceremony in South Dakota prison); *Blake v. Howland*, 2009 WL 5698078, at *3 (Mass. Super. Ct. Dec. 2, 2009) (weekly pipe ceremony with shared pipe in Massachusetts facility); *Hunnicutt v. Md. Dep't of Corr.*, 2005 WL 3877406, at *2 (D. Md. Jan. 19, 2005) (weekly group pipe-smoking in Maryland prison); *Wilson v. Moore*, 270 F. Supp. 2d 1328, 1344 (N.D. Fla. 2003) (Florida state prison policy permits "pipe sharing"). The government's interest in preventing the spread of disease among prisoners is hardly unique to the Texas prisons. Yet other prisons routinely permit sharing communal pipes for religious purposes without incident.

At the very least, this evidence creates a disputed issue of material fact as to whether less restrictive alternatives could feasibly accommodate Chance's faith. In *Thunderhorse*, this Court favorably discussed the plaintiff's arguments that other prisons permitted long hair. 364 F. App'x at 146 n.3. The Court noted that the plaintiff's argument found "support in *Warsoldier*," where the Ninth Circuit looked to prison policies from "the federal government, Oregon, Colorado, and Nevada." *Id.* The Ninth Circuit found that because those prison systems "all permit long hair or provide religious exemptions to their hair-length restrictions," the defendant prison's contrary policy did not satisfy the least restrictive means test. *Id.* This Court declined to adopt that reasoning only because it found itself bound by circuit precedent upholding the challenged policy. *Id.* Here, however, there is no such

precedent regarding communal pipe-smoking. And here, as in *Warsoldier*, defendants can "offer[] no explanation why these [other] prison systems are able to meet their indistinguishable interests without infringing on their inmates' right to freely exercise their religious beliefs." 418 F.3d at 1000. In sum, Chance's evidence that TDCJ and other prisons have viably used less restrictive policies creates an issue of material fact for resolution at trial.

b. Given the evidence that all Native American inmates, including Chance, were previously allowed to personally smoke a communal pipe, the only remaining issue involving the pipe ceremony is whether denying Chance the use of a *separate* personal pipe is the least restrictive means of furthering a compelling interest. As noted above, Chance personally used the same communal pipe that others used for years without incident. But, aware that he has two diseases (tuberculosis and Hepatitis C), Chance, in an abundance of caution, requested a separate pipe. R.840 (C.5), ¶¶ 48-50.[7]

In so doing, Chance was simply requesting a return to one of the TDCJ's prior practices. It is undisputed that on numerous occasions in 2008, under the supervision of Chaplain Nieto, Chance was permitted to use an old community pipe

[7] As noted above, defendants themselves initially argued that Chance could share the communal pipe with other Native American participants without risk of transmitting these diseases. R.251.

belonging to the Michael Unit's Native American community while the rest of the community used Chaplain Nieto's pipe. R.839 (C.4), ¶¶ 27-32. Moreover, defendants have presented no evidence that this caused any actual difficulty.

Notwithstanding Chance's undisputed evidence regarding the TDCJ's past practice, the district court accepted defendants' argument that allowing Chance to smoke a separate pipe would result in "[j]ealousy and retaliation," creating a security risk. R.1226 (E.17). Past experience, however, belies this concern. Defendants pointed to no evidence that allowing Chance to smoke a separate pipe ever resulted in any jealousy or retaliation—let alone creating a security risk. R.925, at 97:5-8; R.926, at 98:25-99:4, 100:4-16. And as RLUIPA precedent makes clear, a defendant's alleged compelling interest may not be "grounded on mere speculation" or "exaggerated fears." *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1318 (10th Cir. 2010) (citing 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy)). Yet the district court did not require defendants to explain why it is not feasible for Chance to smoke his own pipe, as before. *See Spratt*, 482 F.3d at 40-41. It simply blindly deferred to defendants' concerns.

In fact, it is worse than that. Even crediting defendants' own testimony, the practice of allowing Chance to smoke a separate pipe was discontinued not because of complaints, jealousy, or retaliation, but simply because the pipe was damaged and had to be disposed of. R.705; R.840 (C.5), ¶ 42. As this same testimony

establishes, moreover, the only reason that this pipe has not yet been replaced is that the prison chaplain, Chaplain Lowry, does not have the Native American spiritual authority to acquire a proper pipe for the Sacred Pipe ceremony. R.705.

Having accepted defendants' unfounded assertions that allowing Chance to smoke a separate pipe would engender such extreme jealousy and retaliation as to satisfy strict scrutiny, the district court was compelled to consider whether the TDCJ had a compelling interest in declining to purchase separate pipes for each and every Native American inmate. Accepting defendants' worst-case scenario, the court calculated that (1) if all 300 Native American inmates attended every Sacred Pipe ceremony, this would require (2) 300 separate pipes and (3) at least ten security officers—at (4) a cost of $80,000 to over $100,000 for just twelve Sacred Pipe ceremonies a year. R.1227 (E.18). But this analysis is both unrealistic and foreclosed by RLUIPA's text and binding Supreme Court precedent.

Under RLUIPA's plain terms, the government may not substantially burden an inmate's faith unless it can demonstrate that "imposition of the burden on *that* person … is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000cc-1(a) (emphasis added). The question, therefore, is not whether the TDCJ has a compelling interest in denying pipes to each and every practicing Native American inmate (only one of whom is before the Court), but whether it has a compelling interest in denying *Chance* an accommodation.

If the text of RLUIPA left any doubt in this regard, it would be dispelled by the Supreme Court's decision in *O Centro*. In interpreting parallel provisions of RFRA, the Court there rejected such "slippery-slope argument[s]." 546 U.S. at 436. As Chief Justice Roberts wrote for a unanimous Court, to accept such arguments would be to accept the "classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Id.*; *see also Merced*, 577 F.3d at 593 n.18 (rejecting argument that if exception to killing animals were allowed for plaintiff, it would be a burden to public health, where only five Santeria priests lived in the city).

Chance is asking only for a separate pipe for himself;[8] no one else has ever requested one.[9] In fact, the only evidence that defendants cited regarding the feelings of other Native Americans shows that they would *prefer* that Chance smoke a separate pipe. TDCJ regional director Robert Eason testified that he had received a

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[8] If cost were a compelling concern, RLUIPA would require permitting Chance to purchase his own pipe. *Cutter*, 544 U.S. at 720 n.8 ("RLUIPA does not require a State to pay for an inmate's devotional accessories" (citing *Charles v. Verhagen*, 348 F.3d 601, 605 (7th Cir. 2003) (overturning ban on possession of Islamic prayer oil but leaving inmate-plaintiff with responsibility for purchasing the oil))).

[9] Further, the district court ignored that 300 inmates have never participated in the Sacred Pipe ceremony, with or without personal pipe smoking. R.920, at 70:8-11 (Eason Dep.). The evidence shows that, at most, 150 have attended. R.920, at 72:24-73:5. And even if 300 prisoners attended, defendants' estimates regarding the number of officers needed to supervise the ceremony show that the same number would be needed *regardless* of whether individual pipe smoking was allowed. R.923, at 87:10-17.

complaint from an unidentified Native American prisoner who complained of having to *share* a pipe with Chance. R.626-27, at 19:3-20:4. Reversal is warranted.

c. Even if this Court otherwise found the district court's reasoning sound, the court ignored Chance's evidence that another less restrictive alternative would accommodate his faith: using sanitizing wipes to clean the communal pipe after each use. This alternative would address each of defendants' asserted interests. It would address the spread of disease by preventing an unclean pipe from touching anyone's mouth. It would eliminate any risk of jealousy and retaliation, because every prisoner would be treated the same. And it would involve minimal cost.

Although Chance suggested this less restrictive alternative below (R.805), the district court did not so much as mention it, much less cite any evidence from defendants demonstrating that it was not feasible. At a minimum, defendants were required to show that they had considered and rejected this alternative. *Washington*, 497 F.3d at 284; *Warsoldier*, 418 F.3d at 999. The district court's failure to hold them to that burden requires reversal.

B. The district court incorrectly held that there is no genuine factual dispute as to whether failing to provide monthly Sacred Pipe ceremonies was the least restrictive means of serving a compelling governmental interest.

The district court also erred in granting summary judgment to defendants on Chance's challenge to the frequency of the pipe ceremony. Here too, the TDCJ's prior practice confirms as much: Using contract chaplains, volunteers, or the unit's

own chaplain, the Michael Unit previously held the pipe ceremony twice a month. R.838 (C.3), ¶ 21; R.839 (C.4), ¶¶ 34-35. Indeed, defendants' own evidence establishes this. R.1404, at 22:14-24.

Chance's sincerely held religious beliefs require him to participate in a pipe ceremony twice a month—at the full moon and the new moon. R.838 (C.3), ¶¶ 22-24. Despite the unit's prior practice, however, Chaplain Bouse currently conducts the pipe ceremony only occasionally—at most once a month. R.704.

Noting that prior cases had upheld the volunteer policy, the district court granted summary judgment based on defendants' explanation that the frequency of ceremonies was limited by the availability of outside Native American volunteers. R.1227-29 (E.18-20) (citing *Mayfield*, 529 F.3d at 613-14; *McAlister v. Livingston*, 348 F. App'x 923, 936-37 (5th Cir. 2009); *Newby v. Quarterman*, 325 F. App'x 345, 350-52 (5th Cir. 2009)). This was error. The court utterly failed to test these assertions under RLUIPA's compelling interest or least restrictive means tests, much less against the TDCJ's past practice. Further, as the very cases cited by the court below make clear, RLUIPA requires a case-by-case analysis of the facts, including those involving the volunteer policy.

In *Mayfield*, for example, this Court explained that RLUIPA "counsels a fact-specific, case-by-case review," and that "we do not believe that *Adkins* [*v. Kaspar*, 393 F.3d 559 (5th Cir. 2004),] laid down a *per se* rule that the TDCJ's

volunteer requirement could never impose a substantial burden on a prisoner's exercise of religion." 529 F.3d at 614; *accord McAlister*, 348 F. App'x at 937; *Newby*, 325 F. App'x at 351 ("[W]e evaluate whether the policy is the 'least restrictive means of furthering [a] compelling governmental interest' by examining the particular facts of the case."). Indeed, all three cases cited by the district court found that the volunteer policy was valid on its face, but went on to find that issues regarding the frequency of religious services compelled reversing summary judgment for the defendants. *Mayfield*, 529 F.3d at 614; *McAlister*, 348 F. App'x at 937; *Newby*, 325 F. App'x at 351 ("At this stage of the litigation, we cannot see 'why many of the security concerns voiced by Texas cannot be met by using less restrictive means, even taking into account cost.'" (citation omitted)).

That approach is confirmed by this Court's decision in *Odneal v. Pierce*, which held that "RLUIPA's standards cannot be applied to a particular governmental policy in a generic fashion; it is not enough to say that the '[particular] policy' has been upheld when the case at hand deals with something potentially very different." 324 F. App'x 297, 300 (5th Cir. 2009); *see also Moussazadeh*, 2012 WL 6635226, at *12 (prior rejection of similar challenge to Kosher meal policy did not "foreclose a finding that TDCJ's current program is not the least restrictive means available"). In short, the fact that a policy has been upheld in one situation does not make it immune from challenge in situations with distinguishable facts.

The TDCJ's volunteer policy permits contract chaplains or qualified Native American or non-Native American volunteers to lead religious ceremonies in prison. R.882-83. The policy previously permitted unit chaplains to lead the ceremonies as well. R.942. The district court thus quoted chaplaincy director Bill Pierce's affidavit discussing the unit's measures to locate volunteers and/or paid outside chaplains to lead Native American services. R.1227-29 (E.18-20). But the court focused exclusively on defendants' efforts to find *Native American* chaplains or *Native American* volunteers; it did not consider the possibility of using *non*-Native American volunteer supervisors. *Id.* The TDCJ's policy explicitly allows for this option (though Native Americans are preferred). R.883 (Chaplaincy Manual Policy 9.03 (rev. 4) (Nov. 2008) ("Native American Volunteer preferred or a volunteer willing to facilitate the circle.")).

Even more importantly, from 2004 to 2008, the TDCJ allowed either non-Native American volunteers or the unit chaplains themselves to supervise various ceremonies at the Michael Unit, including the pipe ceremony. R.839 (C.4), ¶¶ 34-35; R.942 (Oct. 2000 policy); R.1404, at 22:14-24 (Lowry Dep.). At the very least, this evidence creates a disputed issue of material fact, sufficient to defeat summary judgment, as to whether RLUIPA requires use of such volunteers to accommodate Chance's faith. Reversal is warranted.

C. The district court incorrectly held that there is no genuine factual dispute as to whether prohibiting the Smudging ritual indoors was the least restrictive means of serving a compelling governmental interest.

The district court also erred in granting summary judgment to defendants on Chance's claim to participate in the Smudging ritual indoors in cases of inclement weather.

Chance believes that he needs to perform the Smudging ritual using smoke from certain burned herbs prior to each Sacred Pipe ceremony and each Teaching ceremony. R.842 (C.7), ¶¶ 59-63. Defendants admit that they currently allow him to perform the Smudging ritual with smoke only once a month, when Chaplain Bouse visits, and then only when the ceremonies are held outdoors. R.843 (C.8), ¶¶ 70-74. In the event of inclement weather such as rain, the TDCJ does not provide an alternative to outdoor smudging; the ritual is cancelled and at least two months pass before Chance can take part in it. *Id.*

The district court held that denying accommodation to Chance was justified by the TDCJ's compelling interests in ensuring safety and limiting costs, and that forbidding any type of smoke indoors was the least restrictive means of furthering those interests. R.1229-31 (E.20-22). Here again, however, that finding was foreclosed by the TDCJ's own past practice, which the district court failed to give due weight.

Specifically, Native Americans at the Michael Unit were allowed to smudge indoors for eleven years—from 1998 to 2009—but are no longer allowed to do so. R.843 (C.8), ¶¶ 75-80. The district court deferred to defendants' explanation that indoor smudging is no longer possible due to the activation of a new fire alarm system in the gymnasium, where the ritual was previously performed. R.1230 (E.21). The record contains no evidence, however, that the fire alarm was ever ***triggered*** by the ritual. *E.g.*, R.596, at 35:17-19 (defendant Foxworth testimony that he had no knowledge of the Smudging ritual ever triggering the fire alarm). Defendants produced evidence only that the "fire alarm system became active" (R.593, at 19:16-20)—that is, turned on. Their assertion concerning the risk of triggering the alarm—which, it bears emphasis, is distinct from the risk of *fire*—is thus based on speculation rather than fact. There is no evidence that indoor smudging has ever resulted in any safety or security problems, or other problems. The evidence is thus insufficient to satisfy RLUIPA—which demands that the prison's actions further "interests of the highest order and those not otherwise served." *Yoder*, 406 U.S. at 215—and certainly at the summary judgment stage. *E.g.*, *Spratt*, 482 F.3d at 42-43 (reversing summary judgment regarding policy banning preaching to other inmates in light of the "seven-year track record" under the prior policy).

Even if the risk of triggering the fire alarm were sufficient to warrant denying indoor smudging, however, the district court failed to consider other means of

accommodation. The court reasoned that it would be impossible to turn off the fire alarm in the gymnasium, as that would endanger the facility and violate state law. R.1230 (E.21). It further held that an alternative to the fire alarm, such as an Ansul fire suppression system like the one installed in the kitchen, was inappropriate for a room the size of the gymnasium, and would cost more than $134,000. *Id.* But these are red herrings, and the court never considered other, less burdensome means of accommodating Chance's faith.

For example, Chance submitted evidence that the Smudging ritual could be performed outdoors, even in the event of bad weather, provided inmates had access to some sort of tent or shed to shield them from the rain. R.817; R.1363. As many reported decisions confirm, other prison systems have provided outdoor tents or structures to accommodate Native American rituals. *See Pounders v. Kempker*, 79 F. App'x 941, 943 n.2 (8th Cir. 2003) (sweat lodge); *Native Am. Council of Tribes*, 2012 WL 4119652, at *23 (same); *Crocker v. Durkin*, 159 F. Supp. 2d 1258, 1264 (D. Kan. 2001) (same); *Skenandore v. Endicott*, 2006 WL 2587545, at *4 (E.D. Wis. Sept. 6, 2006) (same); *Morrison v. Cook*, 1999 WL 717218, at *4 (D. Or. Apr. 27, 1999) (same).

Alternatively, smudging could be permitted in a room where there is no risk of triggering the fire alarm. Reported decisions of other courts confirm the feasibility of this approach. *E.g.*, *Wilson*, 270 F. Supp. 2d at 1344 (smudging permitted

in prison chapel); *see also Morrison*, 1999 WL 717218, at *4 (smudging permitted in prison "Visiting Room"). And use of any room with adequate ventilation would dispel concerns about triggering the alarm as a result of the ritual (which, again, has never happened).

The district court, however, did not so much as mention these possibilities—and thus did not hold defendants to their burden of "consider[ing] and reject[ing] the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier*, 418 F.3d at 999. At a minimum, the record creates a factual dispute as to the feasibility of these unaddressed less-restrictive means of ensuring safety while accommodating Chance's faith.

D. The district court incorrectly held that there is no genuine factual dispute as to whether failing to conduct weekly Teaching ceremonies was the least restrictive means of serving a compelling governmental interest.

Nor can summary judgment for defendants be justified as to Chance's claim to take part in weekly Teaching ceremonies.

It is undisputed that Chance's faith requires him to participate in weekly Teaching ceremonies in a smoke-wafted room, and that the TDCJ met this need for more than a decade (until May 2009) without incident. R.845-46 (C.10-11), ¶¶ 101-10. There is no evidence that this practice created budgetary or logistical concerns, let alone that it caused an explosion of requests for religious meeting space.

Since May 2011, however, the Teaching ceremonies have been held only once per month (R.846 (C.11), ¶ 104), and the district court granted summary judgment to defendants on the basis that "it would be virtually impossible for numerous reasons to provide weekly or even monthly religious services to all members of the 230 faith groups in TDCJ." R.1232 (E.23).[10] But this decision is baffling in light of defendants' admission that the Michael Unit is specifically "designated to house Native American faith adherent[s]." R.980.

The court below could justify its decision only by relying on an erroneous legal standard. Citing *Freeman*—a case arising under *the Free Exercise Clause*—the court believed that it should focus not on "whether the inmates have been denied specific religious accommodations, but whether, more broadly, the prison affords the inmates opportunities to exercise their faith." R.1231-32 (E.22-23); *see Freeman*, 369 F.3d at 861. Without citation of authority, the court asserted that

[10] The R&R erroneously stated that "[t]he Fifth Circuit has clearly stated that TDCJ 'simply cannot be expected to provide group services catering to the desires of each individual inmate.'" R.1231 (E.22) (citing *Freeman*, 369 F.3d 854). But the quotation that begins "simply cannot be expected ... " does not come from *Freeman* or any other Fifth Circuit case. Rather, it comes from the Magistrate Judge's own prior R&R in this case. *See* R.319.

While the TDCJ provides other activities for Native American prisoners, such as a "talking circle" and video presentations, these are not Teaching ceremonies. The district court held that Chance's claim survived summary judgment with respect to whether these alternative activities still resulted in a substantial burden. R.1221-22 (E.12-13).

"[*Freeman*'s] discussion regarding accommodations to the specific desires of an individual inmate is equally applicable to claims filed under RLUIPA." R.1232 (E.23). But as this Court has explained, "RLUIPA imposes a higher burden than does the First Amendment in that the statute requires prison regulators to put forth a stronger justification for regulations that impinge on the religious practices of prison inmates." *Mayfield*, 529 F.3d at 612; *see also, e.g.*, *Odneal*, 324 F. App'x at 301 (faulting the district court for using a "rational basis" test "rather than ... RLUIPA's compelling interest/least restrictive means standard").

Specifically, to justify imposing a substantial burden on Chance's religious exercise, RLUIPA requires the TDCJ to prove that "imposition of the burden on *that* person ... is the least restrictive means of furthering [a compelling governmental] interest." 42 U.S.C. § 2000cc-1(a) (emphasis added). The explicit premise of the statute is that religious accommodation will sometimes be required "even if the [government-imposed] burden results from a rule of general applicability." *Id*. § 2000cc-1(a); *accord O Centro*, 546 U.S. at 436. The Free Exercise Clause, by contrast, requires far less of prison officials. *See Turner v. Safley*, 482 U.S. 78, 91 (1987) (policy must be "reasonably related to legitimate security interests"). And the difference between these standards is often dispositive. *See, e.g.*, *Mayfield*, 528 F.3d at 609-17 (granting summary judgment to prisoner on free exercise claims, but denying summary judgment with respect to identical RLUIPA claims).

If the notion that the TDCJ cannot possibly accommodate *every* prisoner's religious preferences is ever a valid basis for denying a *particular* accommodation, it is only where the TDCJ satisfies RLUIPA's case-specific requirements. That notion cannot be used as a blanket excuse for substantially burdening prisoners' religious beliefs. *See Rust v. Neb. Dep't of Corr. Servs. Religion Study Comm.*, 2010 WL 1440134, at *2 (D. Neb. Apr. 9, 2010) (argument that prison "might be required to provide separate worship times for all religious sects" if it provided worship time for plaintiff's religious group was "speculative and [did] not satisfy RLUIPA[]"). Other than general allegations that weekly Teaching ceremonies will involve additional cost, however, defendants have not provided any cost figures. They have not shown the specific cost of the accommodation that Chance requests, let alone that this cost precludes the TDCJ from providing the very services they earlier provided without incident. R.485-86. The court below thus erred in adopting the age-old argument that RLUIPA was designed to preclude: "If I make an exception for you, I'll have to make one for everybody, so no exceptions." *O Centro*, 546 U.S. at 435-36. Reversal is warranted.

E. The district court incorrectly held that there is no genuine factual dispute as to whether prohibiting Chance from recognizing four holy days was the least restrictive means of serving a compelling governmental interest.

As with the foregoing Native American ceremonies, the TDCJ's past practice likewise precludes the grant of summary judgment to defendants on Chance's claim to participate in the Wiping Away the Tears ceremony.

The Wiping Away the Tears ceremony involves congregating for worship on four Native American holy days, including the Sand Creek Massacre, the Trail of Tears, the Battle of Wounded Knee, and the Battle of Little Big Horn. R.846-47 (C.11-12), ¶¶ 111-16. For several years prior to 2009, Chance and other Native American inmates were allowed to observe these holy days corporately. R.79, ¶ 37. Indeed, the TDCJ's Chaplaincy Policies provided in writing for their observance:

> Though tribes may vary slightly in annual observances of holidays, for the American Indian the following historic dates are significant. While there is no mandatory lay-in for the observance of these days, a special service may be held. These dates are:
>
> | | |
> |---|---|
> | June 26 | Greasy Grass (Little Big Horn, June 26, 1876) |
> | November 29 | Stone Creek (Sand Creek) |
> | December 29 | Historic Date of Prayer Remembrance (Wounded Knee) |

R.937 (TDCJ Chaplaincy Policy 9.01 (Oct. 2000)); *see also* R.693 (Pierce Aff.) (all four days were recognized until 2008); R.847 (C.12), ¶ 114 (same).

Without acknowledging the TDCJ's prior practice, the district court again noted that "the Fifth Circuit has upheld the volunteer policy" and granted summary judgment to defendants based on their assertion that "it would be virtually impossible … to provide ceremonies for all of [the] holidays of the various [Native American] faith groups, along with the holidays of every other religion." R.1232-33 (E.23-24). But as we have shown (at 49-51), RLUIPA does not permit the government to rely on such "slippery slope" arguments. *O Centro,* 546 U.S. at 436. Further, the court did not conduct any sort of factual analysis as to what prevented the TDCJ from providing the holy day ceremonies.[11] And the fact that the TDCJ previously recognized these holy days without incident at a minimum creates a factual dispute sufficient to defeat summary judgment. *See Spratt*, 482 F.3d at 40-41.

[11] Below, defendants noted that another prisoner disagreed with Chance's designated holy days, believing other dates were holy (R.486-87)—prompting the TDCJ to conclude that "[i]n the [Native American] culture every day is considered a holy day" and to eliminate the observance of *all* holy days. R.487 (quoting R.703). But this policy, which has the TDCJ resolving disputed matters of religious doctrine, not only fails to overcome strict scrutiny; it does not even serve a *legitimate* government purpose. *See Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith."); *see also, e.g., Native Am. Council of Tribes*, 2012 WL 4119652, at *16 (rejecting prison's explanation that total ban on ceremonial tobacco was consistent with some Native American leaders' beliefs). For purposes of Chance's RLUIPA claim, all that matters is whether he sincerely holds a religious belief requiring observance of these holy days. *McAlister*, 348 F. App'x at 935.

F. The district court incorrectly held that there is no genuine factual dispute as to whether prohibiting Chance from performing the Keeping of Souls ritual was the least restrictive means of serving a compelling governmental interest.

The district court also erred in granting summary judgment to defendants on Chance's claim seeking to participate in the Keeping of Souls ritual.

Chance's faith requires him to mourn the death of his parents by possessing a lock of their hair for a period of one year. Unlike his other claims, the district court found no substantial burden on Chance's religious beliefs because the time for mourning had passed (R.1222-23 (E.13-14))—an issue addressed below (57-59). The court also adopted defendants' argument, however, that a total ban on personal items sent from outside the prison, including a lock of hair, was the least restrictive means of furthering defendants' interest in security. R.1233 (E.24). This too was reversible error.

To begin with, the district court ignored the factual dispute concerning defendants' actual reasons for denying Chance the ability to perform the Keeping of Souls ritual. Defendants have given shifting explanations for that refusal, first stating that the locks of hair posed a "health hazard" (R.92 (Office to Offender Correspondence (June 3, 2010))), and later stating that it was a "security concern" (R.252). This lack of a consistent explanation itself warrants denying summary judgment. *See Salahuddin v. Goord*, 467 F.3d 263, 277 (2d Cir. 2006) (court must

look to rationale at time burden is imposed); *Spratt*, 482 F.3d at 41-42 (defendants may not rely on "post hoc rationalization" to justify burden imposed).

Further, Chance presented evidence that at least one other inmate in the Michael Unit, John Rose, was previously allowed to keep a lock of his deceased daughter's hair. R.845 (C.10), ¶¶ 97-99. Moreover, Chance presented expert testimony that at least one other prison permits the same practice—casting further doubt on defendants' security-related assertions. R.864, at 88:7-15. At a minimum, this evidence raises a factual dispute as to whether the policy of banning possession of such hair is the least restrictive means of furthering safety. *McAlister*, 348 F. App'x at 937 (evidence of uneven application of rule raised issue of fact precluding summary judgment on RLUIPA claim). Insofar as "a law cannot be regarded as protecting an interest 'of the highest order' ... when it leaves appreciable damage to that supposedly vital interest unprohibited" (*Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (quotation omitted))), the TDCJ's lack of uniformity in denying inmates from possessing locks of hair confirms that its interest in security is either less than compelling or can be served by other means.

Ignoring this evidence, the district court adopted the defendants' security rationale and joined them in speculating that the "[h]air could contain a controlled substance, such as having been dipped in embalming fluid, which could be smoked

like PCP." R.1233 (E.24); *id*. (citing testimony of regional director Eason that "[a]ny time we open the door for individuals to send items in, it breaches the security of our institution"). But this argument proves too much. The pages of a personal letter, for example, could likewise be coated with fluids, rolled, and smoked. But that risk does not warrant denying prisoners the ability to receive all mail from outside the prison's walls—a point confirmed by TDCJ policy. R.745-58; R.599, at 39:13-22 (TDCJ allows prisoners to receive paper or cardboard, despite risk that it has been dipped in contraband and could be smoked). Moreover, defendants fail to explain how a small lock of hair poses a greater risk than other Native American religious items (*e.g*., teeth, feathers, bones, and shells), which the TDCJ currently allows. R.949-50. These factual issues alone preclude summary judgment.

Further, the court below never addressed the various measures that Chance identified as means of mitigating any such risks. For example, a one-time test or chemical analysis of the hair could be performed before allowing the hair into the facility. Further, as the record indicates, inmates may receive items from approved donors or approved vendors. R.588. Thus, whatever safeguards are applied to those items could be applied to the locks of hair.

Alternatively, policies and procedures could be established for security as it relates to the handling of hair, and personnel could be trained as they are for other scenarios. R.949-50. Still further, TDCJ could enact policies to verify that the

prisoner's family member has died, such as requesting the death certificate—or participation in the ritual could be limited to a small number of family members, such as those listed on the prisoner's visitors' lists.

The court below did not consider any of this; it simply stated that Chance "is not the only person who wants to keep special items." R.1233 (E.24). But as we have shown, RLUIPA does not permit the TDCJ to rely on such "slippery slope" arguments, without more. *Supra* at 49-51. The district court thus erred in holding that there was no genuine factual dispute as to whether banning the lock of hair was the least restrictive means of furthering a compelling governmental interest.

II. In granting summary judgment with respect to the Keeping of Souls ritual, the district court incorrectly held that Chance's sincerely held religious beliefs were not substantially burdened.

Finally, the district court incorrectly held that, regardless of the TDCJ's interests or the means used to further those interests, preventing Chance from observing the Keeping of Souls ritual did not substantially burden his faith. According to the court, because Chance's parents died in 2008 and 2009 respectively, the one-year period for mourning had already passed. R.1223 (E.14). The court further reasoned that, because prohibiting the use of a medicine bag did not amount to a substantial burden, it was lawful to prohibit Chance from holding locks of his parents' hair. *Id.* (citing *Adkins*, 393 F.3d at 568 n.35). This too was error.

The evidence is uncontroverted that, according to Chance's religious beliefs, the time to mourn begins one year after the mourner takes possession of the lock of hair—not one year after the relative's death. R.844-45 (C.9-10), ¶¶ 91-94; R.1364. Indeed, the court below recognized as much in stating that "the year of mourning commences when the hair bundles are prepared and presented to the mourner at the Keeping of Souls ceremony." R.1223 (E.14). Nor have defendants suggested that Chance's belief is insincere. Yet the court ignored the fact that Chance had never received his parents' locks of hair, such that the one-year period had not yet begun to run. It simply asserted, without citation of either legal authority or factual support, that "the time for pursuing relief had long expired by the time [he] filed his lawsuit in 2011." *Id.*

Even if the court below believed that the one-year mourning period should begin at the time of the loved one's death, the court erred in taking sides in the parties' debate over the "correct" religious doctrine. *Thomas*, 450 U.S. at 716. What matters is Chance's sincerely held religious belief. *McAlister*, 348 F. App'x at 935. At the very least, therefore, there is a disputed issue of material fact regarding the timeframe for the ritual, precluding summary judgment on the substantial burden issue.

The court also improperly short-circuited Chance's RLUIPA claim by pointing to past precedent upholding an unrelated prior policy. The court cited a foot-

note in *Adkins* (393 F.3d at 568 n.35), where this Court noted that limiting the use of a medicine bag did not constitute a substantial burden. But the RFRA case cited in that footnote, *Diaz v. Collins*, 114 F.3d 69 (5th Cir. 1997), upheld only a *temporary* restriction on the *time period* during which the prisoner could possess a medicine bag. R.1223 (E.14); R.1233 (E.24). *Diaz* did not authorize a complete or permanent prohibition. *See* 114 F.3d at 72. To the contrary, the court stated:

> While "[a] prohibition against the possession of a medicine bag [or headband] could, for those faiths for whom the symbol has sufficient importance, qualify as a 'substantial burden' under the Act," ***this case does not involve a complete ban upon the possession of such sacred items***. The pertinent prison regulations allow a Native American practitioner to possess a medicine pouch and headband while in his or her cell, prohibiting only the wearing of such items outside of the cell. Thus, ... the regulations only prevent [Diaz] from wearing a medicine pouch or headband for up to two hours a day.

Id. (emphasis added).

Here, in contrast to *Diaz*, defendants *do* seek to completely and permanently ban Chance from possessing a lock of his parents' hair—an object with enormous importance to his faith. And unlike the inmate in *Diaz*, Chance is not in administrative segregation, where security concerns are much greater. *See id.* Moreover, RLUIPA, like RFRA, "requires a case-by-case, fact-specific inquiry." *Adkins*, 393 F.3d at 571. Having failed to engage in that analysis, the district court's decision must be reversed.

CONCLUSION

For the foregoing reasons, the district court's summary judgment decision should be reversed and the case remanded for trial.

Respectfully submitted,

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JANUARY 14, 2013

CERTIFICATE OF SERVICE

I, Benjamin Ellison, an attorney, certify that on this day I caused the foregoing document to be served via the Court's CM/ECF system on the following parties, who have consented to service in such a manner:

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I, Benjamin Ellison, an attorney, certify that all privacy redactions in this filing, if required, have been made in compliance with Circuit Rule 25.2.13; that the electronic submission is identical to the paper copy, in compliance with Circuit Rule 25.2.1; and that the TrendMicro Office Scan virus detection program was run on the PDF version of this filing and no virus was detected.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I, Benjamin Ellison, an attorney, certify that I have complied with the above-referenced rule, and that according to the word processor used to prepare this brief, Microsoft Word, this brief contains 13,941 words and therefore complies with the type-volume limitation of Rule 32(a)(7)(B) and (C).

Dated: January 14, 2013

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