

No. 12-41015

**In the United States Court of Appeals
for the Fifth Circuit**

WILLIAM E. CHANCE, JR.,
Plaintiff-Appellant

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE; BRAD LIVINGSTON, in his
official capacity as Executive Director of the Texas Department of Criminal
Justice; CYNTHIA LOWERY, in her individual capacity; BILL PIERCE, in his
individual capacity; EDGAR BAKER, in his individual capacity; WARDEN
JOHN RUPERT; WARDEN TODD FOXWORTH,
Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Texas, Tyler Division
Civil Action No. 6:11-cv-435-MHS-JDL

**Brief of Pan-American Indian Association, Reverend White Bear Barnard,
Huy, Native American Council of Tribes, and Dr. Elizabeth S. Grobsmith as
Amici Curiae in Support of Plaintiff-Appellant William E. Chance, Jr. and
Reversal of the District Court**

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William E. Chance, Jr. v. Texas Dep't of Criminal Justice, et al., No. 12-41015.

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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Dated: January 22, 2013

/s/ Todd Batson
Todd D. Batson

STATEMENT OF AMICI CURIAE

Amici are familiar with the parties' briefing and believe that additional argument is necessary. Though concurring in Appellant's legal analysis, Amici's discussion of the issues does not duplicate that briefing. Rather, Amici draw on their knowledge of, and experience with, the religious practices of Native Americans, and particularly, incarcerated Native Americans, in order to show that the Court should reverse the judgment of the district court.

STATEMENT IN ACCORDANCE WITH FRAP 29(c)(5)

No party's counsel authored this brief, in whole or in part. No party's counsel contributed money that was intended to fund preparing or submitting the brief. Further, no person—other than amici curiae, its members, and its counsel—contributed money that was intended to fund preparing or submitting the brief.

TABLE OF CONTENTS

	<u>Page</u>
IDENTITY AND INTEREST OF AMICI CURIAE	1
ARGUMENT	3
I. CHANCE’S RELIGIOUS PRACTICES ARE COMMON TO NATIVE AMERICAN FAITHS ACROSS THE GREAT PLAINS	8
A. Sacred Pipe Ceremony	8
B. Smudging.....	10
C. Keeping of the Soul.....	12
D. Teaching Ceremonies	14
E. Wiping Away the Tears.....	15
II. THE FACT THAT MANY INSTITUTIONS HAVE ACCOMMODATED SIMILAR, IF NOT MORE ONEROUS, RELIGIOUS PRACTICES CONFIRMS THAT TDCJ CANNOT SATISFY THE LEAST RESTRICTIVE MEANS TEST FOR PURPOSES OF SUMMARY JUDGMENT	18
A. Accommodations For The Sacred Pipe.....	19
B. Accommodations For Smudging.....	22
C. Accommodations For The Keeping Of The Soul	24
D. Accommodations For Teaching Ceremonies	25
E. Accommodations For Holy Days.....	26
F. Accommodations For Other Religious Practices	26
CONCLUSION.....	27
COMBINED CERTIFICATIONS OF COMPLIANCE AND SERVICE	29

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Blake v. Howland</i> , No. 20050497C, 2009 WL 5698078 (Mass. Super. Ct. Dec. 2, 2009).....	23, 26
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997).....	4
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<i>Cryer v. Clark</i> , No. 09-cv-10238 (PBS), 2009 WL 6345768 (D. Mass. July 9, 2009).....	23
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005).....	3
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<i>Fegans v. Norris</i> , 537 F.3d 897 (8th Cir. 2008)	5
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No. 1:10-cv-00404 (SKO)23

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No. 3:09-cv-737 (VLB), 2011 WL 2471295 (D. Conn. June 21, 2011)23, 26

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418 F.3d 989 (9th Cir. 2005)5, 18, 19

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497 F.3d 272 (3d Cir. 2007)4

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 No. 208.01 (rev. Oct. 31, 2011).....21, 25

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 No. CD-101101 (rev. Oct. 27, 2010)21, 22, 25, 27

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici Pan-American Indian Association, Reverend White Bear Barnard, Huy, Native American Council of Tribes (“NACT”), and Dr. Elizabeth S. Grobsmith respectfully submit this brief to assist the Court to address the central question raised in this case: whether the Texas Department of Criminal Justice (“TDCJ”) has accommodated Appellant William Chance, Jr.’s religious beliefs in accordance with the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. § 2000 *et seq.* All parties have consented to the filing of this brief.

The **Pan-American Indian Association**, led by **Reverend White Bear Barnard**, is a fellowship of Native Americans, non-Natives, and mixed lineages dedicated to the celebration, promotion, and preservation of Native American relations. The Association has over 5,000 members in all 50 states and 18 foreign countries and offers programs to educate individuals on Native American spirituality (so they may volunteer to serve incarcerated populations).

Huy is a non-profit 501(c)(3) organization founded in 2012 to enhance religious, cultural, and other rehabilitative opportunities for imprisoned Native Americans. In the traditional Coast Salish language known as Lushootseed, huy (pronounced “hoyt”), means: “See you again/we never say goodbye.” Huy’s directors include, among others, elected chairpersons of federally recognized tribal

governments, a former Washington State legislator, and the immediate past Secretary of the Washington State Department of Corrections.

NACT is a non-profit organization dedicated to Native American issues at South Dakota Department of Corrections facilities, primarily at the Penitentiary. NACT oversees activities such as sweat lodge ceremonies, pipe ceremonies, and powwows, all of which occur within the various South Dakota penal institutions.

Dr. Elizabeth S. Grobsmith is a cultural anthropologist with extensive field experience with the Western Apache, Tlingit, Lakota, and Ponca tribes. She holds a Ph.D. and an M.A. in Anthropology. She began teaching Anthropology in 1971, first as an adjunct professor and later as a tenured Professor of Anthropology at the University of Nebraska-Lincoln. She is currently Senior Advisor to the President for Strategic and International Initiatives at Northern Arizona University, and she continues to hold the rank of Tenured Professor of Anthropology. Her book, Indians in Prison: A Study of Incarcerated Native Americans (1994), won the CHOICE, 1994 Outstanding Academic Award.

ARGUMENT

*Following the path of Native American spirituality and cultural identity in today's prison system . . . is usually impossible, often banned, and always very, very difficult. And yet, for some Native American prison inmates, walking the red road in the white man's iron house is the path to salvation, the way of beauty, and the only road to rehabilitation and survival.*¹

Congress enacted RLUIPA, in part, to curb frivolous and arbitrary rules and regulations that had plagued prisoners' free religious exercise. *See* 146 Cong. Rec. S7774-01, Exh. 1 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy), 2000 WL 1079346. Prisoners "are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter v. Wilkinson*, 544 U.S. 709, 721 (2005). RLUIPA sought to relieve some of this burden by requiring "that prison officials refrain from (1) substantially burdening an inmate's free exercise of his religion unless, when strictly scrutinized, (2) the burden 'is in furtherance of a compelling governmental interest' and 'is the least restrictive means of furthering that compelling interest.'" *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 331 (5th Cir. 2009) (quoting 42 U.S.C. § 2000cc-1(a) (2006)).

RLUIPA is an individualized inquiry. *Moussazadeh v. Tex. Dep't of Criminal Justice*, No. 09-40400, --- F.3d ----, 2012 WL 6635226, at *7 (5th Cir.

¹ Suzanne J. Crawford & Dennis F. Kelley, American Indian Religious Traditions: An Encyclopedia 774 (2005).

Dec. 21, 2012).² Blanket regulations “grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act’s requirements.” 146 Cong. Rec. S7775 (quoting S. Rep. No. 103-111, at 10 (1993)). Rather, prison administrators must explain how the imposition of an identified substantial burden furthers a compelling governmental interest and why it is the least restrictive means of doing so, with reference to the circumstances presented by an individual case. *See Sossamon*, 560 F.3d at 334.

RLUIPA sets a high bar. “Requiring a State to demonstrate . . . that it has adopted the least restrictive means of achieving [a compelling] interest is the most demanding test known to constitutional law.” *Moussazadeh*, 2012 WL 66335226, at *12 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)) (alteration in original). When there is evidence that other institutions have accommodated a religious exercise or otherwise utilized less restrictive means of furthering their interests, prison administrators must explain why they cannot make similar accommodations or adopt the less restrictive means. *E.g.*, *Moussazadeh*, 2012 WL

² *See also Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (concluding that the Religious Freedom Restoration Act, RLUIPA’s predecessor, requires individualized review); *Koger v. Bryan*, 523 F.3d 789, 796, 800 (7th Cir. 2008) (RLUIPA, unlike the First Amendment, requires individualized review); *Washington v. Klem*, 497 F.3d 272, 285-86 (3d Cir. 2007) (the appropriate inquiry is whether the government action is the least restrictive means as applied to the individual); *Spratt v. R.I. Dep’t of Corr.*, 482 F.3d 33, 39 (1st Cir. 2007) (prisons “must . . . establish that prison security is furthered by barring [the individual] from engaging in” the disputed conduct).

6635226, at *12 (finding requirement that a Jewish prisoner purchase Kosher food not the least restrictive means because TDCJ offered free Kosher food to Jewish inmates at another facility).³ Granted, “evidence of policies at one prison is not conclusive proof that the same policies would work at another institution.” *Spratt v. R.I. Dep’t of Corr.*, 482 F.3d 33, 42 (1st Cir. 2007). Absent significant differences between the facilities, however, an accommodation at one facility creates a genuine dispute of material fact over whether the challenged policy is least restrictive. *Id.*; see also *Moussazadeh*, 2012 WL 6635226, at *12.

In the case below, Appellant Chance requested to take part in certain Native American religious ceremonies: (1) a sacred pipe ceremony; (2) smudging; (3) teaching ceremonies; (4) the “Wiping Away the Tears” ceremony; and (5) the “Keeping of the Soul” rite. R.365-70.⁴ These practices are predicated on the Lakota “Way of the Pipe,” a pathway for American Indian prayer and healing. R.853. Native American prisoners incarcerated in the Great Plains (including Texas) generally follow a form of Lakota traditions. R.853-54. Their religious

³ See also *Fegans v. Norris*, 537 F.3d 897, 905 (8th Cir. 2008) (finding that other jurisdictions’ policies may demonstrate feasibility of less restrictive means, but rejecting alternatives because they were tried and failed); *Koger*, 523 F.3d at 801 (looking at federal system to determine whether less restrictive means existed); *Spratt*, 482 F.3d at 42 (absent significant differences between institutions, less restrictive policies in another institution suggest there are less restrictive means available); *Warsoldier v. Woodford*, 418 F.3d 989, 999-1000 (9th Cir. 2005) (other prisons’ practices inform the least restrictive means analysis).

⁴ “R. ___” indicates the page number(s) in the Record on Appeal.

practices have blended into a “Pan-Indian” style of practice (which eases the process of providing an accommodation):

[A]ll the tribes -- tribal affiliations of individuals who are incarcerated would become subscribers to this [Pan-Indian style of religious practice] because it’s the dominant religion. . . . [N]ot every kind of Christian faith would be observed in prison. You wouldn’t have a separate ceremony for the Lutheran or Methodist or the Catholic or the Episcopalian prisoners, but there would be a Christian church ceremony. And, similarly, the Native Americans have come together, whether they’re Sioux, Omaha, Cheyenne, Ponca, Arapaho.

R.863-64, 85:15-86:2.

These Native Americans’ worship involves prayer with the sacred pipe. R.854; R.864, 86:12-14. It also involves smudging with medicinal plants, such as sweet grass, sage, cornmeal, and cedar. R.854. Smudging is associated with spiritual blessing and cleansing, and it is necessary before praying with the sacred pipe. R.854. These inmates often mourn the death of relatives by “keeping the soul”—one of the Seven Sacred Rites⁵—which involves keeping something from the deceased (most often, a lock of hair) for a period following the death. *Id.* It is also common for Native American inmates to revere—as a religious practice—dates significant to Indian culture, including the Trail of Tears, Sand Creek Massacre, Battle of Little Bighorn, and Wounded Knee Massacre. *Infra* 15 to 18.

⁵ The Seven Sacred Rites include: (1) The Keeping of the Soul; (2) The Rite of Purification (the sweat lodge); (3) Crying for a Vision; (4) The Sun Dance; (5) The Making of Relatives; (6) Preparing a Girl for Womanhood; and (7) The Throwing of the Ball. *See generally* Black Elk, The Sacred Pipe vii (Joseph E. Brown, rec., ed.) (1953).

Accordingly, many institutions have accommodated Native American religious practices. Many allow inmates to personally smoke the sacred pipe; many, including those in locations with harsher climates than Texas (*e.g.*, Massachusetts, Connecticut, and Wisconsin) accommodate smudging; many allow Native Americans to congregate weekly for worship; and many allow them to keep items with religious significance on their person in a small medicine bag. Many allow inmates to observe dates that are important to their culture; and many allow practices that are *difficult* to accommodate, like sweat lodges. *Infra* 26 to 27.

Native American religious practices are often unfamiliar, but are engrained in Native American faith and culture. R.1188 (“There is no clear distinction between spiritual life and cultural life. Spirituality is a total way of life practiced 24 hours of every day.”). Prohibiting these practices denies Native American inmates the right to practice their faith, which for many, may be the only path to rehabilitation and survival. Crawford & Kelley, *supra*, at 774.

Amici, therefore, urge the Court to reverse the judgment below. After explaining the religious practices that Chance requested, Amici survey accommodations made for these practices by other penal institutions,⁶ concluding

⁶ Amici will focus on accommodations made by other penal institutions. The Court should note, however, that TDCJ itself has accommodated these religious practices in the past. Appellant’s Br. 33-41.

that the availability of those accommodations creates a genuine issue of material fact as to whether TDCJ has used the least restrictive means to further its interests.

I. CHANCE’S RELIGIOUS PRACTICES ARE COMMON TO NATIVE AMERICAN FAITHS ACROSS THE GREAT PLAINS

Incarcerated Native Americans, and particularly, those across the Great Plains, generally follow a religion predicated on the Lakota Sioux. R.853; Elizabeth S. Grobsmith, Indians in Prison: Incarcerated Native Americans 47 (1994). Their faith revolves around worship with the sacred pipe, smudging, and certain of the Seven Sacred Rites, including the Keeping of the Soul.⁷ They congregate weekly for teaching ceremonies and frequently gather on Holy Days. Prohibiting their religious practices violates their religious rights.

A. Sacred Pipe Ceremony

“The Sacred Pipe is the cornerstone of the spiritual teaching of most Native American tribes.” Fed. Bureau of Prisons (“BOP”), Native Am. Religious Beliefs & Practices, No. T5360.01 at 11 (Mar. 27, 2002); R.1191. For Lakota-based faiths, the pipe represents life and is used to offer prayers to the Great Spirit. R.854; *see also* Native Am. Council of Tribes v. Weber, No. CIV. 09-4182-KES, --- F. Supp. 2d ----, 2012 WL 4119652, at *3 (D.S.D. Sept. 19, 2012). When Native Americans smoke the pipe, the resulting smoke conveys their prayers. *Id.* An individual must personally inhale and exhale the smoke to convey prayers. *See*

⁷ *See supra* note 5.

R.837, ¶ 10; 860, 32:11-17. Denying this right, as TDCJ and the district court did, is akin to forbidding personal prayer. *See* R.860, 32:11-17.

The pipe was gifted to the Lakota many years ago. According to Lakota lore, two Lakota warriors were hunting when they came across a beautiful woman dressed in white buckskin and bearing a bundle on her back (also known as the “White Buffalo Calf Woman”). Black Elk, The Sacred Pipe 3 (Joseph E. Brown, rec., ed.) (1953). The woman asked to speak with the Lakotas’ chief; when she did, she took the bundle from her back and explained that it was very sacred because it contained the pipe. *Id.* at 4-5. With the pipe, the Lakota could send prayers to the Great Spirit (known as “*Wakan-Tanka*”). *Id.*

The woman explained that each piece of the pipe was sacred: the bowl (often made of red stone) represented the Earth; the buffalo calf carved into the bowl represented all “four-leggeds”; the wooden stem represented everything that grows on the Earth; and the twelve feathers hanging from the pipe represented “all the winged of the air.” *Id.* at 6. She explained that the pipe binds the smoker with his ancestors and was a direct gift from the Great Spirit, given “so that through it you may have knowledge.” *Id.* at 7-8.

Sharing the pipe can be an integral part of its use. Each of the Seven Sacred Rites involves the pipe, and in all but one (Preparing for Womanhood), ceremonial participants pass and share the pipe. Black Elk, *supra*, at 13 (Keeping of the Soul),

26 (Releasing of the Soul); 36, 38, 40-41 (Rite of Purification (sweat lodge)); 47, 52, 54-56, 61 (Crying for a Vision); 70, 82, 98 (Sun Dance); 105, 114 (Making of Relatives); and 137 (Throwing of the Ball); *see also* Crawford & Kelley, *supra*, at 938 (one of the four significant aspects to the ritual of the sacred pipe is “that the pipe is frequently used communally.”).

Accordingly, personally smoking the pipe is a cornerstone of Native American faith. Crawford & Kelley, *supra*, at 940 (“Because it is a major means of both offering tobacco to the spirit realm as well as communicating with the spirits, it often forms a major part of larger rituals. Indeed, there are few major rituals that do not include pipe rituals as a subsidiary part.”).

B. Smudging

Like the sacred pipe, smudging is fundamental to Lakota-based religious practices. It is the traditional way to bless oneself or others, or to cleanse a ceremonial space. R.854. The Lakota must smudge before engaging in any ritual activity, “such as attending a sweat lodge ceremony, a Sun Dance, or smoking the Sacred Pipe.” *Id.*; *see also* R.841-44, ¶¶ 56-63, 83-84 (Chance declaring he must be “ritually cleansed” in order to “appear appealing to a Spiritual Being”; also stating “[i]f the ceremonial site is not properly cleansed, a Spiritual Being may not hear me during a Sacred Pipe prayer ceremony, may not accept my offering, or may not answer my prayers.”). Smudging involves smoldering grasses and

medicinal plants. R.854. Generally, the grasses or plants are smoldered in a small shell and “the smoke from these burning plants is waved, using a feather, over the participants, the sacred items to be used, and the area in which the ceremony will be performed.” *Fowler v. Crawford*, 534 F.3d 931, 936 n.7 (8th Cir. 2008). “As herbs are burned, the smoke purifies the body so nothing unclean participates in the ceremony.” R.1191.⁸ Smudging involves only a small amount of smoke.⁹

Smudging is vital to the Seven Sacred Rites. For instance, as part of the Keeping of the Soul, the ceremonial object (most often, but not limited to, a lock of hair) is purified by smoke from the sweet grass. Black Elk, *supra*, at 12. The pipe is purified in the same manner before being lit and smoked by ceremonial participants. During the “releasing” of the soul, smoke again cleanses the ceremonial materials. *Id.* at 23, 28. In the Rite of Purification, the sweat lodge leader purifies the pipe and lodge with smoke from the sweet grass. *Id.* at 34. Those entering the lodge must first be cleansed by rubbing smoke over their bodies, feet, heads, and hands. *Id.* at 34-35. Following each round of “sweating,”

⁸ See also *Crawford & Kelley, supra*, at 938 (“The purpose of the smudging is to purify, in the sense of removing any and all negativity.”).

⁹ See, e.g., Wash. Dep’t of Corr., Handbook of Religious Beliefs & Practices, 72 (rev. 2012), available at <http://www.doc.wa.gov> (enter “Handbook of Religious Beliefs” as a keyword search; then follow first hyperlink to document) (“Small amounts of sage, sweet grass, or a high grade tobacco, with as few additives in it as possible are used to produce smoke.”) (emphasis added). This Court may take judicial notice of a state agency’s policies and practices available on the agency’s website. *Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005) (per curiam).

the leader re-purifies the pipe, “lest some impure person may have touched it.” *Id.* at 36. As part of the Crying for a Vision, as with the Rite of Purification, the sweat lodge, along with other ceremonial equipment, is purified with smoke from the sweet grass. *Id.* at 49-51. And in the Sun Dance ceremony, Making of Relatives, Preparing a Girl for Womanhood, and Throwing of the Ball, all sacred things to be used during the ceremonies (including equipment) are purified with smoke from the sweet grass. *Id.* at 76, 93, 103, 106, 108, 119, 130.

C. Keeping of the Soul

The Keeping of the Soul is one of the Seven Sacred Rites. The White Buffalo Calf Woman foretold:

It should be for you a sacred day when one of your people dies. You must then keep his soul as I shall teach you, and through this you will gain much power; for if this soul is kept, it will increase in your concern and love for your neighbor. So long as the person, in his soul, is kept with your people, through him you will be able to send your voice to *Wakan-Tanka*.

Black Elk, *supra*, at 8 (footnotes omitted). Failure to observe the Keeping of the Soul rite is believed to cause the spirits unrest, which causes harm to others. R.854.

According to the Lakota, years after the White Buffalo Calf Woman gave the sacred pipe, a beloved child died and his father went to the then-keeper of the pipe (High Hollow Horn) for guidance on keeping the child’s soul. Black Elk,

supra, at 11. High Hollow Horn took a lock of the child's hair,¹⁰ purified it with smoke from the sweet grass, and wrapped the lock of hair in sacred buckskin. *Id.* at 12-13. He then explained that keepers of the soul must live in a sacred manner until the soul is released, *id.* at 14, and that in keeping the soul, one gains great knowledge from the Great Spirit, *id.* at 12.

The sacred bundle is “always carri[ed] against the heart, in the crook of the left arm, for this is the arm that is nearest to the heart.” *Id.* at 18. While the soul is kept, it is cared for until the keeper may gather the “many things” needed to release the soul: “Before the rites for the releasing of the soul can be made, many things must be gathered together, *and for poor people this may take several years, but the usual length of time for keeping a soul is one year.*” *Id.* (emphasis added).

Thus, the period for “keeping” may extend beyond one year—the “keeping” ends when the soul is released, which cannot happen until the keeper has gathered what is necessary to release the soul (which may take several years). *Id.* Moreover, the period for “keeping” does not *begin* until the soul has been “taken,” purified, and venerated. In the description of the rite, the period for “keeping” did not begin when the child died, but only once the father (the keeper) took the child's hair, purified it, prayed to the Great Spirit, and placed the soul in its sacred place

¹⁰ Some Native Americans observe the Keeping of the Soul rite without using the deceased's hair, and instead, use other objects with ceremonial meaning (*e.g.*, one's dried umbilical cord, teeth, bones, or other sacred objects that may have been obtained during a Vision Quest or other spiritual journey). R.854.

for keeping. *Id.* at 12-15. It follows that the time to keep a soul cannot begin to run (or expire) until the soul has been “obtained.” The district court thus wrongly concluded that the time for Chance to keep his parents’ soul had passed. R.1223.

Once the soul has been kept for a sufficient length of time, it is released through a ceremony called “The Making of Sacredness.” Black Elk, *supra*, at 19. The entire community participates and the participants pray and observe ceremony. The keeper releases the soul, at which point the soul begins its journey down the “‘spirit trail’ leading to *Wakan-Tanka*.” *Id.* at 29; *see also* Crawford & Kelley, *supra*, at 580.

D. Teaching Ceremonies

Teaching ceremonies are educational gatherings that occur every week. They are the Native American equivalent of Christian “Sunday School”—they teach how to prepare for the sacred pipe ceremonies and otherwise educate participants about Native American faith. *See* R.1188 (“Teachings are passed on in an oral tradition by recognized elders who lead the ceremonies according to their personal religious experience.”). Outside of prison, these teachings occur naturally and within cultural/family groups, but within prison, the formal ceremonies provide inmates an opportunity to learn tenets of their faith.

Before a teaching ceremony, the meeting space must be purified through smudging. This smudging is the equivalent of Christians offering a prayer before a

Bible Study. The area is blessed with prayers and an offering of a small amount of cornmeal. A medicinal bundle is then placed in the center of the prayer area and four stones are placed along the circular edge to mark the four cardinal directions. Observants arrive, are purified by smudging, and seated in a circle around the ceremonial area. R.367-68. following an opening prayer, the leader provides teaching. Afterwards, participants break into smaller teaching circles for discussions. And at the conclusion of the ceremony (which lasts about two hours), observants gather in a circle around the ceremonial area for a closing prayer.

E. Wiping Away the Tears

The “Wiping Away the Tears” ceremony involves congregation and fellowship with other Native Americans on certain days of remembrance. R.846, ¶ 112; R.861, 48:6-19. Chance wishes to remember the Trail of Tears, Sand Creek Massacre, Battle of Little Bighorn, and Wounded Knee Massacre. These days are significant to Native American culture in the Great Plains (and thus, the “Pan-Indian” culture). *See* R.863-64, 85:15-86:14. Observing days of remembrance allows for grieving and cleansing of animosity.

1. Trail of Tears

The Trail of Tears generally “refers to the 1838-1839 forced migration of the Cherokee people from their traditional homeland in Georgia, North Carolina, and Tennessee to ‘Indian Territory’ west of the Mississippi River—territory that later

became Arkansas and Oklahoma.” Crawford & Kelley, *supra*, at 1106. Approximately one in four of 16,000 Cherokee died during the migration. *Id.* More broadly, the Trail of Tears “refers to the larger experience of Indian Removal set in motion by the Removal Act, which passed the U.S. Congress in 1830.” *Id.*

The Trail of Tears was devastating—“[r]emoval from their traditional homelands provoked for Indian peoples a profound spiritual crisis that served to make the obvious political and personal crises even more acutely felt, both by individuals and by each nation as a whole.” *Id.* at 1114-15. The round-up of Cherokees in Tennessee began on June 5, 1838; the following day, Brig. Gen. Scott commenced their removal at Ross’s Landing (in present day Chattanooga).¹¹

2. Sand Creek Massacre

On November 29, 1864, volunteers from the Colorado militia attacked a Cheyenne and Arapaho village along Sand Creek in eastern Colorado. The militia killed over 150 Cheyenne and Arapaho, many of whom were women, children, or

¹¹ John Lamb, June 5: Cherokee Removal starts in Tennessee, Hispanic Nashville (June 5, 2011, 3:36 AM), <http://www.hispanicnashville.com/2011/06/june-5-choerokee-removal-starts-in-tn.html>; *see also* Barry Springs / Fort Likens, Cherokee Cnty. Historical Soc., <http://www.cherokeecountyhistory.com/barry-springs-fort-likens.html> (last visited Jan. 19, 2013); A Brief History of the Trail of Tears, Cherokee Nation, <http://www.cherokee.org/AboutTheNation/History/TrailofTears/24496/Information.aspx> (last visited Jan. 19, 2013).

elderly.¹² Today, Native Americans and their descendants observe days of remembrance for the Sand Creek Massacre.¹³

3. Battle of Little Bighorn

On June 25 and 26, 1876, Lakota and Cheyenne warriors attacked the U.S. Army's 7th Cavalry and defeated Lt. Colonel George A. Custer.¹⁴ The Battle of Little Bighorn was a major Native American victory (and one of the last). Tensions had grown between the Native Americans and federal troops after gold was discovered on Native lands, culminating in the Battle.¹⁵

4. Wounded Knee Massacre

On December 29, 1890, members of the U.S. Army's 7th Cavalry attacked the Pine Ridge Reservation in South Dakota and killed over 153 Lakota Sioux.¹⁶ "Although a comparatively small number of Sioux died at Wounded Knee, the

¹² Sand Creek Massacre, Nat'l Park Serv., <http://www.nps.gov/sand/historyculture/stories.htm> (last visited Jan. 19, 2013).

¹³ See, e.g., Photos: Sand Creek Massacre descendants honor past, Denver Post (Dec. 29, 2012), <http://photos.denverpost.com/2012/12/29/sand-creek-massacre/>.

¹⁴ Little Bighorn Battlefield, Nat'l Park Serv., <http://www.nps.gov/libi/index.htm> (last visited Jan. 19, 2013).

¹⁵ Battle of Little Bighorn, History, <http://www.history.com/topics/battle-of-the-little-bighorn> (last visited Jan. 19, 2013).

¹⁶ Wounded Knee Battlefield, Nat'l Park Serv., http://www.nps.gov/history/history/online_books/soldier/siteb30.htm (last visited Jan. 19, 2013).

Sioux Nation died there too.”¹⁷ Today, Native Americans gather each year for the “Wiping Away the Tears” ceremony at Wounded Knee to remember those lost. Tim Giago, Wiping Away the Tears at Wounded Knee, Huffington Post (Dec. 31, 2012 11:42 AM), http://www.huffingtonpost.com/tim-giago/wiping-away-the-tears-at_b_2385110.html (“Each year a ceremony known as ‘Wiping Away the Tears’ is held at the gravesite as a reminder of that tragic day and of the many years of tragedy that followed.”).

II. THE FACT THAT MANY INSTITUTIONS HAVE ACCOMMODATED SIMILAR, IF NOT MORE ONEROUS, RELIGIOUS PRACTICES CONFIRMS THAT TDCJ CANNOT SATISFY THE LEAST RESTRICTIVE MEANS TEST FOR PURPOSES OF SUMMARY JUDGMENT

Evidence that other prison systems have accommodated a religious exercise or otherwise utilized less restrictive means of furthering a compelling interest informs the RLUIPA analysis. *Moussazadeh*, 2012 WL 66335226, at *12.¹⁸ In *Moussazadeh*, a TDCJ facility required a Jewish inmate to purchase Kosher meals

¹⁷ *Id.*

¹⁸ *See also Spratt*, 482 F.3d at 42 (“[I]n the absence of any explanation by [the state prison system] of significant differences between the [state and] federal prison that would render the federal policy unworkable, the Federal Bureau of Prisons policy suggests that some form of inmate preaching could be permissible without disturbing prison security.”); *Warsoldier*, 418 F.3d at 1000 (“[W]e have found comparisons between institutions analytically useful when considering whether the government is employing the least restrictive means. Indeed, the failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means.”).

from the commissary while a separate TDCJ facility provided Jewish inmates with free Kosher meals. *Id.* at *2-3. This Court compared the different practices and held there was a genuine issue of material fact over TDCJ's alleged use of "least restrictive means." *Id.* at *12.

Many institutions accommodate religious practices similar to those practiced by Chance. Further, many accommodate difficult practices, like sweat lodges.¹⁹ Absent explanation by TDCJ of why it cannot make similar accommodations or use similar less restrictive means, there is a genuine dispute of material fact over whether its policies satisfy RLUIPA's mandate. *See Spratt*, 482 F.3d at 42; *Warsoldier*, 418 F.3d at 1000.

A. Accommodations For The Sacred Pipe

Many institutions allow inmates to smoke the sacred pipe. Many further allow these inmates to keep a personal pipe in their cells, and even more allow them to share the pipe during ceremony.

¹⁹ The sweat lodge is a dome-shaped structure made of willow or other saplings indigenous to the area. The saplings are lashed together with twine or bark. The structure is then covered with a tarpaulin, blankets or canvas to make it light proof. As a receptacle for the rocks, a small pit is dug in the center of the lodge. R.1195. Outside the lodge is a fire pit for heating the rocks. A rake and scoop are needed to carry the rocks into the lodge. Rocks are brought in at the beginning of the rounds, often using deer antlers. Water is sprinkled on the hot rocks, producing steam and heat. There are generally four "rounds" of sweat, and the sweat lodge ceremony may last up to eight hours. *Id.*; *see also* N.M. Corr. Dep't, Religious Prog., No. CD-101301, Attach. at 2 (rev. Dec. 28, 2011) (sweat lodges may last up to eight hours) (link to policy in note 25); Colo. Dep't of Corr., AR 800-01, Attach. E (rev. June 14, 2012) (same) (link to policy in note 33).

Consider the federal BOP. The BOP allows Native American inmates to keep a *personal* pipe and small amount of sacred herbs in their cell (though BOP limits lighting and smoking the pipe to the chapel and outdoor worship areas). R.1181-82, 1192. BOP also provides for a community pipe, which is secured in the chapel or sweat lodge area. *Id.* 1183, 1192. BOP recognizes that the pipe *may be shared* in group gatherings. *Id.* 1193 (“The sacred pipe is often passed during deliberations of this nature.”).

Likewise, many state institutions accommodate the pipe. Oklahoma allows Native American faith groups to store a communal ceremonial pipe and kinnick-kinnick²⁰ in an area for religious objects (as well as other small amounts of sacred herbs). Okla. Dep’t of Corr. (“OKDOC”), Religious Serv., OP-030112, at 11-12 & Attach. A (effective July 24, 2012).²¹ Arizona allows “group and personal . . . pipe ceremonies.” Ariz. Dep’t of Corr. (“AZDOC”), Inmate Religious Activities/Marriage Requests, No. 904.04, § 1.4.3 (effective Feb. 12, 2011).²² Inmates store ceremonial pipes “in a secure area supervised and inventoried by Chaplains.”²³ New Mexico allows inmates to keep a personal pipe with small

²⁰ Kinnick-kinnick is a Native American tobacco mixture. R.854.

²¹ <http://www.doc.state.ok.us/offtech/op030112.pdf>. The Court may take judicial notice of these public policies. *Coleman*, 409 F.3d at 667.

²² <http://www.azcorrections.gov/Policies/900/0904.pdf>.

²³ *Id.* § 1.4.5.3.1.

amounts of sacred herbs in their cell. It also allows the larger Native American group a communal pipe and herbs (pipes may not be lit or smoked except in the sweat lodge and other specifically designated areas). N.M. Corr. Dep't ("NMCD"), Native Am. Counseling Act, No. CD-101101 (B), (C) & (O) (rev. Oct. 27, 2010).²⁴ Inmates store congregate religious items in a storage facility located on the sweat lodge grounds. *Id.* (K)(2); *see also* NMCD, Religious Prog., No. CD-101300, Attach. (rev. Dec. 28, 2011).²⁵

Nebraska allows inmates to keep a personal pipe and small amount of sacred herbs in their cell. Neb. Dep't of Corr. Serv. ("NDOC"), Religious Serv., Admin. Reg. No. 208.01(VI)(A) & Attach. F at 6 (rev. Oct. 31, 2011).²⁶ It also allows a communal pipe and herbs.²⁷ So does Washington State. *See* Wash. Dep't of Corr. ("WDOC"), Religious Programs, No. 560.200(IV)(E)(1).²⁸ In Alabama, Administrative Memorandum No. 5-98 explains, "Native American inmates shall be allowed to keep and maintain a personal prayer pipe in addition to a prayer pipe

²⁴ <http://corrections.state.nm.us/policies/docs/CD-101100.pdf>.

²⁵ <http://corrections.state.nm.us/policies/docs/CD-101300.pdf>.

²⁶ <http://www.corrections.nebraska.gov/pdf/ar/rights/AR%20208.01.pdf>.

²⁷ *Id.*

²⁸ <http://www.doc.wa.gov/policies/showFile.aspx?name=560200> (Policy); <http://www.doc.wa.gov/policies/showFile.aspx?name=560200a1> (Attachment).

for use by the group to be kept by the pipe keeper.”²⁹ Pipes may only be used while on ceremonial grounds.³⁰ They may be stored with the inmate’s personal possessions, at the ceremonial grounds, in the area specifically provided for Native American activities, or with the chaplain.³¹ And in West Virginia, the Mt. Olive Correctional Complex has allowed Native Americans a personal prayer pipe to use during pipe ceremonies, classifying the pipe as an “In-Cell” item.³²

In addition to these states, Appellant Chance presented evidence that Colorado and Montana accommodate pipe smoking ceremonies, and case law confirms that the South Dakota, Massachusetts, Maryland, and Florida prisons do so as well. R.952-53; Appellant’s Br. 35-36 (collecting cases). *Thus, federal prisons and at least 13 states allow personal smoking.*

B. Accommodations For Smudging

Many institutions accommodate smudging. The BOP allows smudging in the chapel and outdoor worship area. R.1181, 1191. Arizona permits smudging outdoors, “including group and personal smudging ceremonies.” AZDOC, 904.04, §§ 1.1.8.1 & 1.4.3.1. So do New Mexico and Colorado. NMCD, CD-

²⁹ See Pl.’s Opp’n to Def.’s Mot. for Summ. J., Ex. D., at 8, *Presley v. Edwards*, No. 2:04-CV-729-WKW (M.D. Ala. Jan. 11, 2008), ECF No. 128-4.

³⁰ *Id.*

³¹ *Id.*

³² See Defs.’ Mot. for Summ. J., Ex. 2, Attach. 2 at (A)(1)(a), *Delgado v. Ballard*, No. 2:09-cv-1252 (S.D. W. Va. Mar. 30, 2011), ECF No. 75-1 (“Mt. Olive Policy”).

101101(A)(5); NMCD, CD-101300, Attach. (allowing personal and group smudging); Colo. Dep't of Corr. ("CDOC"), AR 800-01, Attach. E (rev. June 14, 2012).³³ Washington State provides an outdoor area designated for individual prayer/religious observance where inmates may use "smoke-producing substances" twice each day. WDOC, No. 560.200(IV)(C)(1)(c)

In Massachusetts, "[o]n the first Monday of each month, the Native American circle, led by [the volunteer], meet [sic] outdoors in a fenced area within the prison's South yard. At that time, the inmates may conduct the smudge and pipe ceremonies in which they burn and smoke kinnik-kinnik, sweet grass, and sage." *Cryer v. Clark*, No. 09-cv-10238 (PBS), 2009 WL 6345768, at *4 (D. Mass. July 9, 2009); *see also Blake v. Howland*, No. 20050497C, 2009 WL 5698078, at *2 (Mass. Super. Ct. Dec. 2, 2009) (since 2004, the Nemasket Correctional Center has conducted smudging and pipe ceremonies outdoors). In Connecticut, Native Americans may smudge *daily*. *Vega v. Rell*, No. 3:09-cv-737 (VLB), 2011 WL 2471295, at *3 (D. Conn. June 21, 2011) ("Native American inmates are permitted to smudge daily."). In California, some facilities have allowed for smoke in the chapel. *Taylor v. Hubbard*, No. 1:10-cv-00404 (SKO) (PC), 2010 WL 3033773, at *2 (E.D. Cal. July 30, 2010) (recognizing prison allowed for "tobacco to be used for religious ceremonies in the prison's chapel.").

³³ http://www.doc.state.co.us/sites/default/files/ar/0800_01_061512.pdf.

And in Wisconsin, “[e]ach institution will allow opportunities for ceremonial smoking, smudging, and the use of incense consistent with its policy on the use of smoking materials. Ceremonial smoking, smudging and the use of incense will be authorized as set forth by the institution *in the chapel or other designated areas.*” *Greybuffalo v. Frank*, No. 03-C-559-C, 2003 WL 23211615, at *3 (W.D. Wis. Nov. 4, 2003) (emphasis in original).

TDCJ could allow smudging in the prison’s gym. If TDCJ is concerned about the smoke, a less restrictive means is limiting the frequency of indoor smudging. *See Hyde v. Fisher*, 146 Idaho 782, 800, 203 P.3d 712, 731 (Ct. App. 2009) (under RLUIPA, finding prison did *not* demonstrate that ban on smudging was least restrictive means of promoting safety). It could also provide an outdoor accommodation, like a pop-up canopy, at minimal cost.

C. Accommodations For The Keeping Of The Soul

The key to the Keeping of the Soul is possessing a symbolic object from the deceased that embodies the soul – frequently, but not always, a lock of the deceased’s hair. Alternatives to hair may include, but are not limited to, “teeth, bones . . . or other sacred objects that may have been obtained during a Vision Quest or other spiritual journey.” R.854. TDCJ prohibits Chance from this practice.

D. Accommodations For Teaching Ceremonies

Many institutions accommodate teaching. As time and space permit, the BOP provides *weekly* sweat lodges,³⁴ talking circles, other educational opportunities, and ceremonial song/drum practices (in facilities that provide a sweat lodge, teaching often occurs during the sweat). R.1181. Likewise, Arizona policies contemplate *weekly* religious ceremonies. *See* AZDOC, 904.04, §§ 1.4.1.3 (providing for weekly sweat lodges), 1.4.2 (providing weekly multi-faith gatherings for faiths lacking scheduled weekly services). New Mexico generally provides for *weekly* “Native American Religious Programs,” which include the sweat lodge, talking circle and blessing way ceremonies, the pipe ceremony, and smudging/traditional cleansing. NMCD, CD-101101(A) & (J)(1). Colorado does the same. CDOC, AR 800-01, Attach. E. Nebraska allows each religion a *weekly* opportunity for religious education and study. NDOC, No. 208.01(II)(C)(1). Further, Nebraska does not require a volunteer for worship or group study: “With staff supervision and approval religious groups may conduct worship or study *without a volunteer present.*” *Id.* at (II)(C)(2) (emphasis added). Washington State allows inmates to participate in weekly religious activities. WDOC, No. 560.200(IV)(D)(4).

³⁴ *See supra* note 19.

In West Virginia, the Mt. Olive Correctional Complex has allowed Native American inmates to smudge and pray together without a volunteer (but requires a volunteer to lead or conduct ceremonies and religious services). Mt. Olive Policy, Attach. 2 at (A)(2).³⁵ That facility has also provided for *weekly* Native American prayer services. *Id.* at (D)(1). In Massachusetts, at least one facility conducts *weekly* worship services for Native Americans, *Blake*, 2009 WL 5698078, at *2, and in Connecticut, Native American religious groups may congregate *weekly*, *Vega*, 2011 WL 2471295, at *3.

E. Accommodations For Holy Days

Many institutions allow Native Americans to observe special days of remembrance. For instance, the BOP specifically recognizes “American Indian Days” on September 24th and 25th, but it also recommends that its facilities accommodate “opportunities to sweat in mourning” on other important dates, like the Trail of Tears or Battle of Little Bighorn. R.1182. In West Virginia, the Mt. Olive Correctional Complex has allowed additional services and programs for religious holidays. Mt. Olive Policy, at (V)(C)(3).³⁶

F. Accommodations For Other Religious Practices

Many institutions accommodate religious practices that are more difficult than those sought by Chance (like a sweat lodge). Sweat lodges require a

³⁵ *See supra* note 32.

³⁶ *See supra* note 32.

concealed space (the lodge), along with the use of fire, hot rocks, and sharp tools to carry the rocks.³⁷ Nevertheless, many institutions have recognized the significance of the sweat lodge and have accommodated its use. R.1202 (BOP allowing weekly sweat lodges); AZDOC, 904.04, § 1.4.1.3 (same in Arizona); NMCD, CD-101101(J); NMCD, CD-101301, Attach. A (same in New Mexico); CDOC, AR 800-01, Attach. E & K (same in Colorado); WDOC, No. 560-200(IV)(C)(3) (Washington State allows sweats twice a month, and once more per quarter for Change of Seasons ceremonies). Some institutions also have provided an annual special gathering, like a “pow wow.” *See* R.1181 (BOP provides for an occasional “Annual Spiritual Gathering”); WDOC, No. 560-200(IV)(B)(2) (Washington State allows each “cultural/diversity group” one special event each year). If facilities can accommodate practices more difficult than those sought by Chance, TDCJ can accommodate Chance, who only seeks an accommodation for a sacred pipe ceremony, smudging, teaching ceremonies, the “Wiping Away the Tears” ceremony, and the “Keeping of the Soul” rite. R.365-70.

CONCLUSION

It is difficult for Native Americans to practice their faith in prison, but often, their faith is the road to rehabilitation and survival.

³⁷ *See supra* note 19.

For those [prisoners] who attend the Inipi [sweatlodge], they must be willing to forsake the Black Road and become a new man or woman. We call this the Red Road, or the Beauty Road. When we walk the Black Road [that is, the way of alcohol, drug, and tobacco abuse], we are slowly drained of life, our spirit becomes silent, and death follows quickly on our heels. When we make a conscious decision to walk in the spirit (The Red Road or Beauty Road), our life is changed and the Great Spirit fills us with a greater portion of life than we've previously experienced.

Crawford & Kelley, *supra*, at 774 (alterations in original) (citation omitted). Many institutions have accommodated the Native American religious practices that Chance seeks, which are all non-intrusive and inexpensive to accommodate. Accordingly, Amici respectfully request that the Court reverse the judgment and re-affirm the religious liberties that RLUIPA provides.

Dated: January 22, 2013

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COMBINED CERTIFICATIONS OF COMPLIANCE AND SERVICE

I, Todd D. Batson, counsel for Amici, certify:

1. Under Fifth Cir. Rule 32.2 and 32.3, that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), in that it contains 6,553 words, excluding the parts of the brief exempted by Fifth Cir. R. 32.2; and further that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fifth Cir. R. 31.1, and the type style requirements of Fed. R. App. P. 32(a)(6), in that it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font.

2. The undersigned understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7), may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

3. I further certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system in No. 12-41015 on January 22, 2013.

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/s/ Todd Batson
Todd D. Batson