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.

On Appeal from the United States District Court for the Eastern District of Texas

BRIEF OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit 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

Defendants-Appellees submit that oral argument would assist the Court given the length of the record and the complexity of the legal issues.

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INTRODUCTION

Under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq.*, prisons are free to reject "religious accommodations [that] become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution." *Cutter v. Wilkinson*, 544 U.S. 709, 726 (2005). To that end, the Supreme Court has emphatically declared that courts must defer to prison administrators' experience and expertise. *Id.* at 717, 722-23, 725 n.13. RLUIPA thus does not demand a one-size-fits-all rule to which each correctional institution must conform despite officials' contrasting judgments. Nor does it prevent an institution from enacting a new policy based on its officials' reasoned evaluation that a change in policy best promotes the prison's security and efficient operation.

For the requisite deference to be anything more than a triviality, summary judgment must be affirmed in this case. Defendants did not proceed impulsively or without justification—they thoroughly examined Chance's complaints, considered multiple alternatives, and acted

deliberately to protect the security and effective functioning of their prison. Their reasoned decisions do not violate RLUIPA.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. On August 8, 2012, the court entered final judgment granting summary judgment to Defendants-Appellees on all claims. USCA5.1557. Plaintiff filed a timely notice of appeal on September 6, 2012. USCA5.1558. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Under RLUIPA, a state prison that receives federal funds may not "impose a substantial burden on the religious exercise" of an inmate, unless the State "demonstrates that the imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a).

Chance claims that Defendants violated RLUIPA by preventing him from (1) participating in a bimonthly pipe ceremony; (2) personally smoking a pipe during the pipe ceremony; (3) participating in weekly

teaching ceremonies; (4) participating in a smudging ritual before pipe and teaching ceremonies; (5) participating in a "wiping away of tears" ceremony on four specific dates each year; and (6) as part of a mourning practice, possessing locks of his deceased parents' hair. USCA5.366-70.

This appeal presents the question whether summary judgment was appropriate on Chance's claims because Defendants' policies are the least restrictive means of furthering compelling government interests, where Defendants offered evidence justifying their rejection of various alternatives, including explanations for why changes to prior policies were necessary.

STATEMENT OF THE CASE

Chance sued the Texas Department of Criminal Justice, Brad Livingston in his official capacity (together "TDCJ"), and individual defendants in the Western District of Texas on June 16, 2011. USCA5.14. The case was transferred to the Eastern District of Texas on August 10, 2011. USCA5.206. Chance filed an amended complaint on January 9, 2012, alleging violations of RLUIPA, the First Amendment's Free Exercise Clause, and the Fourteenth Amendment's Equal Protection Clause. USCA5.363-74. He sought injunctive and

declaratory relief, plus damages from the individual defendants. USCA5.374.

After a discovery period, Defendants moved for summary judgment on Chance's claims. USCA5.456. The magistrate judge recommended granting the motion. USCA5.1238. The magistrate held that genuine issues of material fact existed regarding whether TDCJ's policies substantially burdened Chance's religious exercise on all RLUIPA claims except his desire to keep locks of his parents' hair, USCA5.1223, but that no factual issues remained regarding whether the policies were the least restrictive means of furthering compelling governmental interests. USCA5.1223-33. The magistrate also recommended dismissing all claims against the individual defendants. USCA5.1234-38.

Chance objected only to the dismissal of his RLUIPA claims. USCA5.1345-46. Defendants filed no objections. The district court adopted the magistrate's report and entered summary judgment for Defendants. USCA5.1555-57. Chance timely appealed. USCA5.1558. He contests only the denial of his RLUIPA claims. Chance Br. 1.

STATEMENT OF FACTS

Chance is an inmate at TDCJ's Michael Unit, serving a sentence for aggravated sexual assault and indecency with a child. Chance originally claimed "Disciples of Christ" as his religious preference upon entering TDCJ custody but later changed his preference to Native American. USCA5.1171.

Pipe ceremonies. Chance avers that the pipe ceremony is a sacred Native American ritual during which he must personally smoke the pipe to pray; someone else smoking on his behalf does not suffice. USCA5.837-38. He says these ceremonies must occur twice monthly in conjunction with the waxing and waning of the moon. USCA5.838.

TDCJ previously permitted Native American faith adherents to share a communal pipe. USCA5.629. But then TDCJ received administrative grievances from inmates, including Chance, complaining about the risk of communicable diseases. USCA5.626. Chance wrote that, because of his tuberculosis and hepatitis, he "would be placing all of those individuals at risk of contracting my diseases." USCA5.539. His concern was not merely altruistic; rather, the potential to spread diseases violated his religious beliefs: "To knowingly commit a harm to

a person . . . is against [my] religious precepts . . . . The use of a communal Prayer Pipe during Native American Pipe Ceremony precludes me from offering my prayers with this Pipe." USCA5.541. Consistent with his asserted religious principles, Chance demanded a separate pipe rather than use of the communal pipe. *See id.*; USCA5.373; USCA5.539.

Far from rejecting Chance's complaints outright, TDCJ officials, including Correctional Institutions Division Director R. C. Thaler and Manager of Chaplaincy Operations Billy Pierce, met to examine the shared communal pipe practice along with numerous alternatives that would allow Native American religious adherents to personally smoke during ceremonies. USCA5 886. They considered health, security, logistical, and operational issues—all detailed below—before Director Thaler concluded that only the chaplain (or volunteer) could smoke. USCA5 886-89.

Regarding health risks associated with communal pipe use, Dr. Robert Williams, Deputy Director of TDCJ's Health Service Division, submitted an opinion and later issued a report as part of this litigation. His expert opinion rested on documents, his background, and his

experience. USCA5.895. Dr. Williams explained: "There are [a] whole host of communicable diseases that would be easily shared via a fomite like a communal pipe such as flu, strep throat, norovirus, and mononucleosis just to name a few." USCA5.576-77. Many diseases are transmissible before the disease is detectable. USCA5.578. Infected individuals can transmit diseases through both sharing of saliva and touching the pipe with their hands. USCA5.576-77. Dr. Williams considered alternative measures like "sterilization between users or individual mouth pieces," but decided that they could not sufficiently reduce risk. USCA577; *see, e.g.*, USCA5.903 (explaining that inmates would still contaminate the pipe by touching it with their hands). Mouthpieces would also pose cost and administrative burdens. *See* USCA5.886.

Communicable diseases are particularly problematic for prisons because "in a closed population," diseases "can spread much more easily and be very difficult to contain." USCA5.577-78. "Quarantines of units with such diseases may require the lockdown of all offenders, creating a severe burden on Health Services and prison management." USCA5.578; *see* USCA5.997. Dr. Williams ultimately concluded that

Health Services could not condone inmates sharing the pipe: "There is no way to share an object designed to be placed in one's mouth outside of a clinical setting with enough certainty that diseases cannot be transmitted for Health Services to advocate instituting this practice." USCA5.577; *see also* USCA5.1156. Dr. Williams noted that he was unaware of any particular instances of disease transmission during the pipe ceremony, but explained: "The ability of us to identify the source of an outbreak to . . . any particular practice is extremely limited." USCA5.900. Based on Dr. Williams' expert opinion, TDCJ stopped letting inmates smoke the communal pipe. *See* USCA5.584, 737.

Director Thaler determined, based on his consultation with officials and his expertise molded from thirty years of experience at TDCJ: "The duty to maintain a safe and appropriate confinement for offenders requires that the system be operated to prevent communicable diseases from spreading through the offender population. The threat of communicable diseases affects not only offenders, but visitors and prison staff. In addition, the impact of an outbreak is severe, both on health services and operations, and may include locking down a unit." USCA5.737.

Attempting to accommodate Chance and other Native American religious adherents, TDCJ also explored allowing separate, individual pipes. But Robert Eason, a regional director with over twenty years at TDCJ, explained why this was not feasible. As of March 31, 2012, there were 342 Native American faith adherents in the Michael Unit, though typically 125-150 attended ceremonies. USCA5.585, 920. Because TDCJ's experience with contraband (and tobacco specifically) suggested that more inmates would attend, Eason based his judgment on 300 attendees. USCA5.920. Regardless of whether the pipes were disposable or non-disposable, it would be "impossible to conduct the ceremony as Chance demands." USCA5.585. He elaborated:

> At each pipe ceremony, the contract chaplain with the assistance of a correctional officer would have to inventory the pipes before each service. Security would have to match commissary receipts to offender lay-ins to count enough disposable pipes for the service, or to pull out the non-disposable pipes for those attending the service. A copy of the property papers for each offender would be attached to the box. The pipes would then have to be transported under security observation to the ceremony site where the offenders were assembled. Once at the ceremony, the offenders who have paid for a disposable pipe would have to be identified so they could be given pipes. If non-disposable pipes are used, offenders who have non-disposable pipes would have to be identified and given their own pipes.

USCA5.585; *see also* USCA5.996-97 (logistical issues). Ten security officers would be required because an officer can effectively supervise no more than 30 inmates handling contraband, whereas only one officer is needed where the chaplain alone smokes. USCA5.586. These extra staff hours would jeopardize security in other parts of the prison because TDCJ "would have to pull these positions off the unit from somewhere. We don't have extra positions out there for that." USCA5.925. In sum, Eason estimated that it would take 170.4 security-staff hours to conduct the ceremony with disposable pipes and 181.2 hours with non-disposable pipes; but with the current practice—only the chaplain smoking—just one security-staff hour (in addition to the chaplain) was needed. USCA5.590.

Moreover, the length of the ceremony would be prohibitive due to the number of pipes and inmates involved. Chief Chari Bouse, the Native American contract chaplain who has been conducting the ceremonies, explained that it would take 26.4 hours to complete the service with disposable pipes and 37.9 hours with non-disposable pipes. USCA5.705, 707. One factor behind the length of the ceremony is that the chaplain would have to pack and light all the pipes because, for

understandable reasons, inmates are not allowed to possess "any devices used to create fire." USCA5.586.

Based on these estimates of staff hours and duration of the ceremony, the ceremony would cost $8,716 with non-disposable pipes (or $209,184 annually based on Chance's requested two ceremonies per month) and $6,811 with disposable pipes (or $163,464 annually). USCA5.698.

Eason noted several other problems as well: the difficulty in storing the pipes before use (whether disposable or non-disposable), the increase in opportunities for inmates to hide tobacco or pipes on their persons, strip-searching the inmates to combat that risk, and potential liability problems with staff handling the pipes. *See* USCA5.585-87. For non-disposable pipes, there would also be problems storing them after use, including a lack of space, sanitation issues, and identifying each inmate's pipe. USCA5.695, 741.

Another significant concern for TDCJ was the possibility that inmates would try to steal tobacco. USCA5.586 ("Allowing every [Native American] adherent offender their own tobacco would substantially increase the risk of dangerous contraband being stolen at

the ceremony and passed to other offenders in 'trafficking and trading.'"); USCA5.740 (reports that tobacco distributed for ceremony at another TDCJ unit kept disappearing); USCA5.923. Just in 2011, there were 506 incidents of tobacco confiscation. USCA5.587.

As for letting Chance alone have a pipe, TDCJ officials decided that such special treatment would jeopardize security. For instance, Eason explained the importance of uniformity: "it makes a huge difference [that one inmate possesses an item that another inmate does not] . . . . [I]t makes that offender a target. . . . Everything is uniform. And when one particular offender gets something that others do not get, they have that special privilege, then it creates problems for that one particular offender. Other offenders get jealous. They could retaliate." USCA5.610-11; *see also* USCA5.650; USCA5.1419 (stating that giving only certain individuals a pipe would create "animosity" and "jealousy" which could lead to assaults). Moreover, it would be impossible to grant Chance's request for a pipe but not other Native American religious adherents' identical requests without seeming arbitrary. USCA5.919.

Ultimately, Director Thaler concluded, given security, cost, and operational concerns, "[a]s the least restrictive alternative, the Native

American Chaplain now smokes the pipe and offers the offenders' prayers in the ceremony." USCA5.737.

Frequency of Ceremonies. TDCJ currently provides four Native American services each month—a pipe ceremony, a teaching service using DVDs, and two talking circles. USCA5.692. Chance wants six ceremonies per month—two pipe ceremonies plus weekly teaching ceremonies. USCA5.838, 845-46. Chance says "[t]he Teaching ceremony is a comprehensive ceremony that usually lasts two hours and teaches congregants how to prepare for the Sacred Pipe ceremonies." USCA5.846. It includes a blessing of the center prayer area, opening and closing prayers, and a "community teaching." USCA5.74.

TDCJ policy requires that religious services be supervised by the unit chaplain, an approved religious volunteer, or, in the absence of either the chaplain or an approved volunteer, unit security staff. USCA5.587-88. The unit chaplain thus has obligations regarding the other 230 faith groups at TDCJ, and she already oversees at least one Native American service each month. *See* USCA5.690, 692.

Finding a volunteer for Native American services has been difficult. USCA5.588. For example, TDCJ's Daniel Unit went thirteen

months without a volunteer despite efforts to locate one. *Id.* No services at all occurred at Chance's unit from June 2009 through May 2010 "because there was no approved religious volunteer available to conduct" them. USCA5.690. Pierce stated that he "routinely send[s] letters and make[s] telephone calls to each of the 60+ known [Native American] resource groups in the region, but rarely get[s] a response or follow-up commitment." USCA5.691.

Though TDCJ policy permits security staff to oversee properly scheduled services if the volunteer cannot attend, doing so "overtax[es] the available security staff." USCA5.588. And even more officers are needed to supervise inmates handling contraband. If more officers are needed for a Native American service, that necessarily means fewer officers in other parts of the prison. *See* USCA5.871 (explaining that warden would need "to reshuffle what he currently has on that unit" because "[h]e's not going to get" more officers). As described above, the ceremonies that Chance envisions would require a substantial investment of staff time.

It is especially difficult to secure a volunteer for the pipe ceremony because the volunteer also must supply the pipe. Though the Michael

Unit had a communal pipe before 2007, it broke, and so the pipe ceremony subsequently depended on volunteers—"pipe carriers"—bringing their own pipes. *See* USCA5.1001; USCA5.1002; USCA5.704. As Chance's expert explained, a "pipe carrier is someone who is considered allowed to carry the pipe; that they are considered sincere in their beliefs; that they have worked with or been blessed by a medicine man." USCA5.859. And some tribes reportedly refused to assist in donating pipes because the inmates, who include violent felons, "lost [the] right to take of the pipe." USCA5.742.

Finally, more frequent ceremonies—of any kind—would be problematic because TDCJ "would also have to find time and space to hold these additional [Native American] services given the many other scheduling demands at the" prison. USCA5.588; *see also* USCA5.1001 (noting that most religious services at Michael Unit are conducted in gymnasium).

Smudging. Chance claims that he needs to smudge before each teaching and pipe ceremony. USCA5.353-54. "Smudging involves lighting and burning herbs (sage, cedar, or sweet grass) in a smudge container, such as a shell or bowl, and then wafting the smoke from the

smudge container onto a person and the ceremonial site in order to cleanse, for example, using a feather." USCA5.842. Chance complains that TDCJ does not permit smudging indoors when inclement weather prevents smudging outdoors. Chance Br. 45.

TDCJ used to permit smudging in the unit's gymnasium, where nearly all religious services at the unit occurred, but stopped that practice when the gymnasium's fire-alarm system became active. USCA5.593. TDCJ was concerned that the smoke from smudging would set off the alarm. USCA5.596.

Holy days. In addition to weekly teaching ceremonies, bimonthly pipe ceremonies, and pre-ceremony smudging rituals, Chance demands four additional "wiping away of tears" pipe ceremonies each year to commemorate anniversaries of important dates in Native American history. USCA5.368; *see also* USCA5.846-47.

TDCJ had previously designated four days as holy days for Native American adherents, but another Native American religious adherent, Iron Thunderhorse, sued TDCJ claiming that the policy favored certain Native American tribes over others. USCA5.693; *see Thunderhorse v. Pierce*, No. 9:04-CV-222 (E.D. Tex.). That lawsuit produced a court

order that obligated TDCJ to designate the Equinoxes and Solstices as holy days for Native American Shamanism. *Id.* Subsequently, however, the Native American contract chaplain and a volunteer objected because those days were not holy for all Native American sects, and "every day is a holy day for Native Americans." *Id.* TDCJ thus instituted a neutral policy recognizing all days as holy for Native American faith adherents because it would be infeasible to designate the different holy days desired by each Native American adherent. USCA5.693-94; *see* USCA5.1006 (noting that different Native American faith groups recognize different holy days); USCA5.685 (list of Narragansett holidays); USCA5.688 (list of Navajo Nation holidays).

"Keeping of souls." Chance wants to keep a small lock of hair from each of his deceased parents to properly mourn them and "to reconnect with them later in the afterlife." USCA5.369, 844. TDCJ offered evidence supporting several ways in which allowing inmates to receive hair would jeopardize the prison's security. Items may be received only from approved vendors, USCA5.588, 613-14, because, for example, they could be dipped in dangerous fluids or chemicals, USCA5.598, 614, 619-20. Moreover, hair is contraband, and TDCJ

prohibits inmates receiving items from individuals. USCA5.588. Thus permitting Chance a special dispensation would breed resentment and jealousy and make him a target. USCA5.269, 615.

Chance noted that inmates are allowed other items like a tooth, bone, or feather. USCA5.875. Unlike his parents' hair, however, these items must be purchased through an approved vendor. USCA5.877. And Chance claimed that another inmate kept some of his deceased daughter's hair, USCA5.845, but TDCJ had no record of that inmate possessing hair. USCA5.1207.

STANDARD OF REVIEW

This Court "review[s] the district court's decision granting summary judgment *de novo*, applying the same standards as the trial court." *Milton v. TDCJ*, --- F.3d ----, No. 12-20034, 2013 WL 490176, at *2 (5th Cir. Feb. 8, 2013).

SUMMARY OF THE ARGUMENT

Summary judgment was appropriate because no genuine issue of material fact exists regarding whether TDCJ's policies are the least restrictive means of furthering compelling governmental interests.

I. TDCJ's ban on pipe-smoking furthers its compelling interests in security, cost control and the effective functioning of the prison. TDCJ considered several alternatives to a complete ban on Native American religious adherents personally smoking the pipe, but each would jeopardize security or impose unmanageable costs or operational burdens.

First, based on uncontroverted expert medical testimony, TDCJ officials determined that sharing the pipe posed unacceptable health risks. TDCJ's medical expert explained that it was infeasible to identify any possible previous outbreaks due to communal pipe use. The fact that other prisons may permit communal pipe use does not force TDCJ to do the same. Before the district court, Chance never explained how those other prisons combated the health risks—or whether they even tried. The purpose of looking to other prisons isn't to force prison administrators to implement another prison's policy against their better judgment, but rather to ensure that the administrators *used judgment* instead of arbitrary decisionmaking or conclusory assertions. RLUIPA does not require that every state prison system adhere to the most risk-tolerant system's policies, and TDCJ considered and rejected the

alternatives Chance mentioned below. He cannot now claim that TDCJ must address unmentioned alternatives from other prisons.

Second, TDCJ rejected letting Chance alone have a separate pipe. TDCJ reasoned, based on its officials' experience and expertise, that this special treatment would cause resentment and make him a target. TDCJ also presented evidence supporting its conclusion that if Chance received a separate pipe, other identically situated inmates would request one as well.

Third, to that end, TDCJ considered letting all Native American faith adherents smoke their own pipes. Evidence showed this option was infeasible, however, due to unmanageable cost, operational, and security concerns—pipe ceremonies under this scenario would require too many security officers, take too long, and pose an unacceptable risk of inmates hiding contraband tobacco or pipes on their persons.

II. Holding more pipe ceremonies and teaching ceremonies—TDCJ currently provides four services per week, but Chance requests a total of six, including several longer ceremonies—would be infeasible. TDCJ policy requires that all religious meetings be supervised. Chance does not challenge that facial requirement, and TDCJ presented

evidence demonstrating that qualified volunteers could not be located and that using security officers would jeopardize safety in other areas of the prison.

III. There is no viable, less-restrictive alternative to preventing Chance from smudging indoors. The smoke from the ritual would trigger the fire alarm in the gymnasium where services are held. Though smudging used to occur indoors, that was before the fire alarm became active. Chance's other alternatives were not properly raised below and are infeasible regardless.

IV. Chance wants to celebrate four holy days each year with additional pipe ceremonies. TDCJ has instituted a neutral policy recognizing all days as holy for Native American religious adherents. Allowing Chance to hold ceremonies on his desired four days—and not, for instance, allowing Iron Thunderhorse to congregate on his own specified holy days—would risk an Establishment Clause violation. Furthermore, additional pipe ceremonies would impose unmanageable staffing, cost, and operational burdens.

V. Prohibiting Chance from possessing locks of his deceased parents' hair furthers TDCJ's compelling interest in security. TDCJ

officials explained that there was no feasible way to test the hair for contraband. Furthermore, allowing Chance the special benefit of receiving an item from an individual would breed resentment and make him a target for other jealous inmates.

ARGUMENT

I. RLUIPA REQUIRES DEFERENCE TO PRISON OFFICIALS' EXPERTISE AND EXPERIENCE.

"While [RLUIPA] adopts a 'compelling governmental interest' standard, '[c]ontext matters' in the application of that standard." *Cutter*, 544 U.S. at 722-23 (alteration in original) (citation omitted); *see* S. REP. NO. 103-111, at 11 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1899-1900 (RFRA Senate Report stating that standard "is flexible enough to serve the unique governmental interests implicated in the prison context" and that "'courts may not substitute their judgments for those of prison administrators'" (citation omitted)). RLUIPA does not "elevate accommodation of religious observances over an institution's need to maintain order and safety." *Cutter*, 544 U.S. at 722; *see also, e.g.*, *Baranowski v. Hart*, 486 F.3d 112, 125 (5th Cir. 2007) (RLUIPA "is not meant to elevate accommodation of religious observances over the institutional need to maintain good order, security, and discipline or to

control costs"). Congress, noted the Supreme Court, expected that "courts would apply [RLUIPA] with 'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.'" *Cutter*, 544 U.S. at 723 (quoting 146 CONG. REC. 16,698, 16,699 (2000)). The Supreme Court summed up: "Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition." *Id.* at 726.

Proper deference to prison officials' expertise isn't simply a matter of pursuing sound policy or divining legislative intent; rather, courts have found this deference necessary to uphold RLUIPA's constitutionality. In *Cutter*, for instance, the Supreme Court dismissed an Establishment Clause claim because RLUIPA does not permit an accommodation to "override other significant interests," including "consideration of costs and limited resources." *Id.* at 722-23 ("We have no cause to believe that RLUIPA would not be applied in an

appropriately balanced way, with particular sensitivity to security concerns.").

In rejecting a Spending Clause challenge, the Seventh Circuit explained that "Congress permissibly conditioned the receipt of money in such a way that each State is made aware of the condition and is simultaneously given the freedom to tailor compliance according to its particular penological interests and circumstances." *Charles v. Verhagen*, 348 F.3d 601, 608 (7th Cir. 2003); *see Van Wyhe v. Reisch*, 581 F.3d 639, 650 (8th Cir. 2009) (stating that "[p]urely local matters of prison administration are not jeopardized because RLUIPA permits even substantial burdens on religious exercise to be imposed when the state uses the least restrictive means of pursuing its compelling government interests"). And addressing the Tenth Amendment, the Ninth Circuit stated: "RLUIPA does not regulate the operation of prisons. Under the statute, prison officials remain free to run their prisons as they see fit." *Mayweathers v. Newland*, 314 F.3d 1062, 1069 (9th Cir. 2002); *cf. Woodford v. Ngo*, 548 U.S. 81, 94 (2006) ("[I]t is 'difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations,

and procedures, than the administration of its prisons.'" (citation omitted)).

Chance's brief evinces a notable lack of appreciation for the requisite deference to prison officials. He never mentions *Cutter*'s repeated statements that courts must defer to prison officials' expertise, only conceding without citation that "some deference is due to the government's experience with prison security." Chance Br. 25. His other references to deference are complaints about the magistrate deferring to TDCJ officials' experience. *See id.* at 23, 38, 46. To be sure, courts should not "blindly accept any policy justification offered by state officials," but they also must not "substitute[] [their] judgment for that of prison officials." *Hoevenaar v. Lazaroff*, 422 F.3d 366, 370, 371 (6th Cir. 2005); S. Rep. No. 103-111, at 11 (1993), *reprinted in* 1993 U.S.S.C.A.N. 1892, 1899 (RFRA Senate Report stating that "'courts may not substitute their judgments for those of prison administrators'" (citation omitted)). "It bears repetition . . . that prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area." *Cutter*, 544 U.S. at 725 n.13.

With that framing in mind, we turn to Chance's challenges.

II. FORBIDDING INMATES TO PERSONALLY SMOKE THE PRAYER PIPE IS THE LEAST RESTRICTIVE MEANS OF ADVANCING TDCJ'S COMPELLING INTERESTS IN SECURITY, COST CONTROL, AND EFFECTIVE FUNCTIONING OF THE UNIT.

After an extensive review process, TDCJ decided that permitting Native American faith adherents to personally smoke a pipe—either the communal pipe or individual pipes—was not feasible due to security, cost, and administrative concerns. *See, e.g.*, *Cutter*, 544 U.S. at 725 n.13 ("prison security is a compelling state interest"); *id.* at 723 (noting appropriate "consideration of costs and limited resources" (citation and internal quotation marks omitted)); *DeMoss v. Crain*, 636 F.3d 145, 154 (5th Cir. 2011); *Baranowski*, 486 F.3d at 125 (noting "maintaining good order and controlling costs"). TDCJ considered several alternatives, including continuing the communal pipe practice and allowing separate pipes, but each option jeopardized prison security or imposed unmanageable financial or administrative costs.

A. The Communal Pipe's Health Risks Threatened Security.

Prompted by inmate grievances, including Chance's, complaining about the risk of disease transmission from sharing the pipe, TDCJ consulted its medical staff. USCA5.626. Health Services stated that it

"cannot condone" communal pipe use because "[t]here are [a] whole host of communicable diseases that would be easily shared . . . such as flu, strep throat, norovirus, and mononucleosis just to name a few." USCA5.576-77. Because TDCJ has a compelling interest in "provid[ing] safe and healthful conditions of confinement for the offender population and [in] prevent[ing] the spread of diseases to the offender population, to staff and ultimately to the public," TDCJ banned communal pipe-smoking. USCA5.1156. As Director Thaler explained, "the impact of an outbreak of disease is severe, both on health services and operations, and may include locking down a unit." USCA5.737 (concluding that sharing a communal pipe "would impair our mission to provide safe and secure facilities").

Chance does not seriously challenge TDCJ officials' determination that the spread of disease is a security issue. *See* Chance Br. 29-30. He instead argues that TDCJ's concerns are essentially baseless and communal pipe-smoking is a less restrictive alternative because TDCJ "produced no evidence that this decade-plus of communal pipe-smoking ever caused any medical problems." Chance Br. 34. But Dr. Williams explained the absence of such evidence: "The ability of us to identify the

source of an outbreak to . . . any particular practice is extremely limited . . . ." USCA5.900; *see also* USCA5.577 (noting greater incidence of tuberculosis and hepatitis in prison population versus general population). Chance has never addressed this explanation with competent summary-judgment evidence, and RLUIPA cannot require prison officials to incur the enormous expense and burden of conducting an impractical study, particularly where uncontroverted expert testimony establishes the risk.

Moreover, the State need not wait until security is actually breached to institute preventative measures. *See, e.g.*, *Fowler v. Crawford*, 534 F.3d 931, 939 (8th Cir. 2008) ("Prison officials need not endure assaults, drug indulgence, or sexual improprieties before implementing policies designed to prevent such activities in an uneasy atmosphere. Nor do prison officials charged with managing such a volatile environment need present evidence of actual problems to justify security concerns."); *Hoevenaar*, 422 F.3d at 371 (officials' testimony countered absence of evidence regarding safety problems under prior policy); *Versatile v. Johnson*, No. 3:09-CV-120, 2011 WL 5119259, at *27 (E.D. Va. Oct. 27, 2011) ("While the Defendants have not made any

strong showing that [the relevant faith] adherents are currently disrupting [prison] facilities, they are not legally obligated to wait until the 'ever-present potential for violent confrontation and conflagration' has actually manifested." (quoting *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132 (1977)[1]), *aff'd*, 474 F. App'x 385 (4th Cir. 2012); *Abordo v. Hawaii*, 938 F. Supp. 656, 662 (D. Haw. 1996) ("[T]he *threat* alone to prison safety and security arising from allowing long hair at [state prison] is not an insufficient justification for a hair length regulation."). The communal-pipe ban rested on expert medical judgment and prison officials' interpretation of that judgment using their experience and expertise, and Chance presented no record evidence or testimony refuting Dr. Williams' medical conclusion.

1. TDCJ explained why a policy change was necessary.

Chance emphasizes that courts should examine prisons' own prior, less restrictive policies. *See* Chance Br. 30-31 & n.5. But the opinions in the cases he cites do not indicate that the defendants explained the absence of specific incidents under the previous policy (or in some cases

[1] *Jones* is a First Amendment case, but *Cutter*'s and Congress's emphasis on prison security suggest that the quoted sentiment is just as apt under RLUIPA. The *Versatile* Court appropriately cited it.

addressed any alternatives at all).[2] Here that is not so—TDCJ presented uncontroverted expert medical testimony establishing the risk the prior policy posed and explaining why it was infeasible to identify particular disease outbreaks. Prison officials' judgment based on that established risk is entitled to deference under *Cutter*. RLUIPA does not require the ossification of prison rules where the prisons have offered a reasoned justification for changing policy and no record evidence refutes that judgment beyond the mere lack of concrete, identifiable harm. *See Hoevenaar*, 422 F.3d at 371-72 (though "prison did not produce data demonstrating that" prior policy "resulted in more dangerous prisons," defendants' testimony about dangers sufficed). And

[2] *See Williams v. Sec'y Penn. Dep't of Corrs.*, 450 F. App'x 191, 196 (3d Cir. 2011) (per curiam) (defendants did not even "acknowledge" testimony about prior practice); *Spratt v. R.I. Dep't of Corrs.*, 482 F.3d 33, 39-41 (1st Cir. 2007) (defendants offered only a conclusory affidavit that "merely assert[ed] a security concern," and "offer[ed] *no* explanation for why alternative policies would be unfeasible" (emphasis added)); *Stoner v. Stogner*, No. 3:06-cv-00324-LRH (VPC), 2007 WL 4510202, at *6 & n.5 (D. Nev. Dec. 17, 2007) (defendants presented "no evidence" of security problems, and court does not note any explanation for lack of evidence); *Leonard v. Louisiana*, No. 07-0813, 2010 WL 1285447, at *12 (W.D. La. Mar. 31, 2010) (no apparent explanation of lack of evidence); *Williams v. Bitner*, 359 F. Supp. 2d 370, 376-77 (M.D. Pa. 2005) (same). In *Merced v. Kasson*, 577 F.3d 578 (5th Cir. 2009), which was not a prison case, the parties had stipulated that the plaintiff's conduct had caused no harm. *Id.* at 593-94. TDCJ of course does not concede that the communal pipe-smoking has caused no harm, only that detecting it is nigh-impossible.

RLUIPA cannot ask prison doctors to be deliberately indifferent to medical risks. *Cf. Estelle v. Gamble*, 429 U.S. 97 (1976).

2. Other prisons' policies do not reveal an alternative that would succeed for TDCJ.

Chance's other attempt to refute these concerns is to claim that other prisons allow communal pipe-smoking, so Dr. Williams must be wrong and TDCJ's concerns must be illusory. *See* Chance Br. 35-36. He is correct that some courts "have found comparisons between institutions analytically useful when considering whether the government is employing the least restrictive means." *Warsoldier v. Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005); *see* Chance Br. 31.[3] But courts also "have repeatedly recognized that 'evidence of policies at one prison is not conclusive proof that the same policies would work at another institution.'" *Fowler*, 534 F.3d at 941 (quoting *Spratt*, 482 F.3d at 42) (affirming summary judgment for prison officials). Other prisons' policies do not invalidate TDCJ's judgment here.

[3] Chance reads too much into the Court's opinion in *Thunderhorse v. Pierce*, 364 F. App'x 141 (5th Cir. 2010) (per curiam). The Court noted simply that *Warsoldier* supported the plaintiff's argument about "other prisons" evidence, but it did not adopt *Warsoldier*'s reasoning. *See id.* at 146 n.3.

First and most fundamentally, Chance does not explain the other prisons' procedures or their outcomes as they relate to TDCJ's concerns. Citing pages 952-53 of the record, Chance says he "submitted evidence that federal and state prisons throughout the country allow inmates to partake in the pipe ceremony by smoking the pipe themselves." Chance Br. 35. But those pages simply list sketchy "excerpts" from policies of four state prisons that purportedly "have allowed Smudging and/or prayer pipes"—Arizona, Colorado, Montana, and New Mexico. USCA5.952.[4] Those excerpts do not explain how the pipe ceremonies are conducted—e.g., using a communal pipe without safeguards, a communal pipe with safeguards, or individual disposable or non-disposable pipes. And Chance has never said what those four prisons (or the other prisons he cites in his opening brief but failed to mention before the magistrate, *see* Chance Br. 35-36) do that TDCJ has not already considered. Moreover, it is unclear whether those other prisons

[4] Chance's only reference to these policies before the magistrate was a vague statement—in a different section than his discussion of TDCJ's medical concerns—that "[p]rison administrators routinely implement mitigation measures, including procedures, policies, staffing, training, and supervision, for addressing safety and security concerns throughout the prison units." USCA5.810 (footnote citing the excerpts). TDCJ concedes that prisons around the country use various measures to maintain safety and security.

even considered health risks from communal pipe-smoking or whether those prisons have effectively—and resource-efficiently—prevented outbreaks from communal pipe use. An alternative is not a less restrictive means of furthering the State's compelling interest if it does not further that interest.

The lack of detail is important. The purpose of looking to other prisons isn't to force prison administrators to implement another prison's policy against their better judgment. Rather, the purpose is to ensure that the administrators *used judgment* rather than arbitrary decisionmaking or conclusory assertions. After all, "RLUIPA 'mandates a uniform test, not a uniform result.'" *Fowler*, 534 F.3d at 942 (citation omitted). Here TDCJ made a reasoned decision, based on expert medical testimony, that communal pipe-smoking jeopardizes prison security by risking the health of inmates and staff. Nothing presented before the district court counters this conclusion other than the mere fact that other prisons allow inmates to share a pipe.[5] But that fact is insufficient to prevent summary judgment.

[5] And, again, many of these other prisons were never mentioned below.

This conclusion is apparent from considering the possible, unstated bases of those prisons' policies. Perhaps those prisons never considered the health risks. Indeed, TDCJ itself did not realize the seriousness of the danger for years—until officials investigated the matter in response to inmate grievances. RLUIPA does not command a prison that has discovered a problem to ignore it because another prison has not been so diligent. Or perhaps those prisons recognized the health concerns, yet concluded the risks were acceptable. But RLUIPA does not preach a lowest-common-denominator outcome pegged to the most risk-tolerant prison administrators in the country. *See Daker v. Wetherington*, 469 F. Supp. 2d 1231, 1239 (N.D. Ga. 2007) (holding that RLUIPA does not "impose[] a 'lowest common denominator' standard which requires state prison officials to adopt any religious accommodation that is recognized by other institutions"); *cf. Williams*, 450 F. App'x at 196 (rejecting inmate's suggestion of another prison's policy because it left inmates unsupervised). Finally, suppose those prisons somehow have mitigated the health risks. Chance has wholly failed to explain how they did so. If they used mouthpieces, for

example, TDCJ explained why that option is unfeasible for TDCJ. *See* USCA5.577, 739, 902-03.

We stress that we do not argue that the burden is on Chance to demonstrate a less restrictive alternative exists. But we do submit that RLUIPA does not require prison officials "'to refute every conceivable option in order to satisfy the least restrictive means prong of [RLUIPA].'" *Fowler*, 534 F.3d at 940 (citation omitted); *see Spratt*, 482 F.3d at 41 n.11. As detailed in this Part, TDCJ considered multiple alternatives and offered reasons and data supporting their rejection. If there is some mysterious other option, Chance should have mentioned it in his grievances, during the discovery period, or in his district-court briefing.[6] *See, e.g.*, *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993). He did not, and TDCJ's comprehensive decisionmaking process shows that it carried its summary-judgment burden without having to contact every prison warden in the country to question whether another option was available.

[6] *Amici* Pan-American Indian Association et al. also claim that other prisons allow personal pipe-smoking. Br. 19-22. On appeal, those suggestions are no substitute for competent summary-judgment evidence and arguments before the district court.

This point is important because RLUIPA targets the imposition of "frivolous or arbitrary rules." 146 CONG. REC. S7774, S7775 (2000). Here TDCJ examined several alternatives and fully explained its reasoning. There is nothing frivolous or arbitrary about making a decision based on the considered advice of medical and security experts. And, notably, Chance's brief never attacks Dr. Williams' medical opinion that underlies the ban on communal pipe-smoking.

The cases Chance and *amicus* Christian Legal Society cite regarding "other prisons" evidence support the conclusion that TDCJ did not violate RLUIPA. Those courts did find other prisons' policies informative, but nothing in the opinions suggests that the defendants addressed the specific proffered alternative (or in some cases any alternatives at all). *See Warsoldier*, 418 F.3d at 999 ("[The prison] does nothing . . . to discuss whether it has *ever* considered a less restrictive approach." (emphasis added)); *Shakur v. Schriro*, 514 F.3d 878, 890 (9th Cir. 2008) ("[T]he record contains only conclusory assertions that denying Shakur the kosher diet was the least restrictive means of furthering its interest in cost containment."); *Koger v. Bryan*, 523 F.3d 789, 801 (7th Cir. 2008) ("[The prison officials] do not support their

assertion that a clergy verification requirement was the least restrictive means of achieving these ends."); *Washington v. Klem*, 497 F.3d 272, 285 (3d Cir. 2007) (noting that prison system failed to explain why different units within its system applied the policy unevenly); *Lindh v. Warden*, No. 2:09-cv-00215-JMS-MJD, 2013 WL 139699, at *14-15 (S.D. Ind. Jan. 11, 2013) (wardens considered only alternatives that did not remove burden on plaintiff's religious exercise); *Native Am. Council of Tribes v. Weber*, No. CIV 09-4182-KES, 2012 WL 4119652, at *21, *24 (D.S.D. Sept. 19, 2012) (stating that "defendants offered *no evidence* that defendants considered *any* of plaintiffs' proposed alternatives"); *Hummel v. Donahue*, No. 1:07-cv-1452-DFH-TAB, 2008 WL 2518268, at *8 (S.D. Ind. June 19, 2008) (plaintiff presented testimony about other prisons, but defendants did not address specific solutions employed by other prisons). By contrast, TDCJ presented unrefuted evidence showing how it considered but rejected multiple alternatives for failing to further its compelling interests.

In any event, the policies of the four state prisons Chance mentions at pages 952-53 of the record would not provide useful comparisons because those systems house far fewer Native American

religious adherents than does TDCJ. *See Fowler*, 534 F.3d at 942 ("[P]rison officials may, quite reasonably, exercise their discretion differently based upon different institutional circumstances."). As of last year, 4243 TDCJ inmates had designated their faith preference as Native American. USCA5.694-95. By contrast, Colorado has 532 ethnic Native American inmates;[7] Arizona has 2000 ethnic Native American inmates;[8] Montana has 407 Native American faith adherents;[9] and New Mexico has only 6700 inmates *total* in its entire system.[10] *Cf.* USCA5.736 (140,000 inmates across TDCJ facilities). Here, as in *Fowler*, the inmate-population size differences alone are sufficient to discount these comparisons. *See* 534 F.3d at 942 & n.12 (affirming summary judgment and stating that fact that defendant institution's "inmate population is over twice the size of [comparison institution's]

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[7] COLO. DEP'T OF CORRS., COLORADO INMATE POPULATION 2 (Dec. 31, 2012), available at http://www.doc.state.co.us/sites/default/files/opa/General%20Statistics%2012312012 .pdf.

[8] ARIZ. DEP'T OF CORRS., INMATE ETHNIC DISTRIBUTION BY UNIT (January 2012), available at http://www.azcorrections.gov/adc/reports/stats_ethnic.aspx.

[9] MONT. DEP'T OF CORRS., MONTANA INMATE RELIGIOUS DECLARATIONS (June 11, 2012), available at http://www.cor.mt.gov/content/Resources/Reports/InmateReligiousPreference.pdf.

[10] NEW MEXICO CORRECTIONS DEPARTMENT, http://www.corrections.state.nm.us/ (last visited Mar. 8, 2013).

inmate population . . . alone suggests that officials at [defendant institution] may well be unable to accommodate religious practices that [comparison institution] may accommodate"). "Although prison policies from other jurisdictions provide some evidence as to the feasibility of implementing a less restrictive means of achieving prison safety and security, it does not outweigh the deference owed to the expert judgment of prison officials who are infinitely more familiar with their own institutions than outside observers." *Hamilton v. Schriro*, 74 F.3d 1545, 1556 n.15 (8th Cir. 1996).

3. TDCJ validly rejected other communal-pipe safeguards.

Before the district court, TDCJ also justified its decision not to permit communal pipe use with various safeguards, namely mouthpieces and sanitizing between users.[11] Dr. Williams explained that neither option would reduce the risk of disease transmission to an acceptable level. USCA5.577, 902-03. Chance cites no evidence to rebut this conclusion; instead he contends without citation that sanitizing wipes "would address the spread of disease by preventing an unclean pipe from touching anyone's mouth." Chance Br. 41. But the

[11] On appeal Chance urges only the latter. *See* Chance Br. 41.

unreasoned, unsupported assertion in an appellate brief is no response to expert testimony. *Cf. Borzych v. Frank*, 439 F.3d 388, 391 (7th Cir. 2006) ("Borzych asserts that the warden has exaggerated the security concerns, but a prisoner's view of what promotes prison security is hardly objective."). Summary judgment was proper.

4. Chance did not ask to share the communal pipe.

In any event, TDCJ should not be required to justify discontinuing the communal pipe practice because both Chance's administrative grievances and his live complaint specifically request a personal pipe while disclaiming a desire to share one. *See* USCA5.541 (Step 1 grievance stating "[t]he use of a communal Prayer Pipe [during] Native American Pipe Ceremon[ies] precludes me from offering my prayers with this Pipe"); USCA5.539 (Step 2 grievance stating "[b]ecause of my religious beliefs and my communicable diseases, I am prohibited from offering my prayers with the communal Prayer Pipe"); USCA5.367 (Amended Complaint: "Because of [Chance's] communicable diseases, he cannot smoke from the communal pipe used during pipe ceremonies. He needs a personal pipe to use during the pipe ceremony to protect the health and safety of the other members of the Native American

congregation."); USCA5.373 (requesting injunction enjoining TDCJ from "denying Mr. Chance a personal pipe for use during Native American pipe ceremonies"). Chance cannot whipsaw the warden and demand an accommodation that contradicts his grievances and complaint. *See, e.g.*, *Cutter*, 544 U.S. at 723 n.12 ("State prison officials make the first judgment about whether to provide a particular accommodation, for a prisoner may not sue under RLUIPA without first exhausting all available administrative remedies."); *Fowler*, 534 F.3d at 940 (stating that if plaintiff "was willing to accept" a certain accommodation, "he should have said so" instead of saying "exactly the opposite").

B. Allowing Chance to Smoke a Separate Pipe Would Jeopardize Security.

As to Chance's personal pipe request, TDCJ validly rejected letting Chance—and Chance alone—smoke a separate pipe because special exemptions provoke jealousy and resentment, which in turn threaten safety and security. *See, e.g.*, USCA5.610-11 ("[I]t makes a huge difference [that one inmate possesses an item that another inmate does not] . . . . [I]t makes that offender a target. . . . Everything is uniform. And when one particular offender gets something that others do not get, they have that special privilege, then it creates problems for

that one particular offender. Other offenders get jealous. They could retaliate."); USCA5.650 ("[I]f [Chance] was allowed something that not everyone was allowed, that . . . might make him a target, you know, for other offenders to maybe single him out and that might put him in some jeopardy there."); USCA5.1419 (stating that giving only certain individuals a pipe would create "animosity" and "jealousy" which could lead to assaults).

Federal courts, including this Court, have recognized that these concerns justify the denial of religious accommodations. *See, e.g.*, *Baranowski*, 486 F.3d at 125 (affirming summary judgment and noting that plaintiff's preferred alternative "would breed resentment among other inmates"); *Hoevenaar*, 422 F.3d at 371-72 (crediting warden's testimony that requested exemption would "cause resentment among the other inmates"); *Jihad v. Fabian*, No. 09-1604 (SRN/LIB), 2011 WL 1641885, at *9 (D. Minn. Feb. 17, 2011) (noting "appearance of favoritism"); *Massingill v. Livingston*, No. 1:05-CV-785, 2006 WL 2571366, at *8 (E.D. Tex. Sept. 1, 2006) (stating that allowing special religious meal would "generate resentment among prisoners who do not receive special meals"), *aff'd*, 277 F. App'x 491 (5th Cir. 2008); *Gibb v.*

Crain, No. 6:04-CV-81, 2008 WL 4691049, at *14 (E.D. Tex. Oct. 21, 2008) (requested accommodation "would breed resentment among other inmates"); *Wilkerson v. Beitzel*, No. JFM-05-1270, 2005 WL 5280675, at *4 (D. Md. Nov. 10, 2005) (noting "compelling interest in avoiding perceived favoritism between religious groups"), *aff'd*, 184 F. App'x 316 (4th Cir. 2006); *Abordo*, 938 F. Supp. at 662 ("Exempting certain individuals or types of hair from the policy 'would be perceived as arbitrary,' causing resentment . . . ."); *cf. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) ("We do not doubt that there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA.").

Chance claims that he smoked a separate pipe during three ceremonies in 2008, and other inmates did not retaliate. Chance Br. 37-38 (citing USCA5.839). The absence of such record evidence does not negate TDCJ's security concerns. Three occurrences is a vanishingly small sample size on which to formulate a policy that Chance would have govern 24 ceremonies per year going forward. More importantly, the specter of violence or pressure against inmates with special

privileges is not idle speculation—Eason noted that he was aware of specific instances of such retaliation. *See* USCA5.621. These examples show that TDCJ's interests are not "exaggerated fears" or "grounded on mere speculation." 146 Cong. Rec. at 16,699; *cf.* Chance Br. 38.

That these examples did not involve Chance (or pipes) is unimportant. It would be impractical and unsafe for prison officials to await a specific incident before taking steps to prevent it. *See, e.g.*, *Fowler*, 534 F.3d at 939 ("Prison officials need not endure assaults, drug indulgence, or sexual improprieties before implementing policies designed to prevent such activities in an uneasy atmosphere. Nor do prison officials charged with managing such a volatile environment need present evidence of actual problems to justify security concerns."); *Versatile*, 2011 WL 5119259, at *27 ("While the Defendants have not made any strong showing that [the relevant faith] adherents are currently disrupting [prison] facilities, they are not legally obligated to wait until the 'ever-present potential for violent confrontation and conflagration' has actually manifested." (citation omitted)). Moreover, that prison officials in other jurisdictions have offered jealousy and

retaliation as threats to security interests supports the validity of TDCJ's concerns. Summary judgment was appropriate.

These concerns suffice to require affirmance, but TDCJ offered yet another reason why a separate pipe for Chance is impossible: giving him a separate pipe would subject TDCJ to other inmates' requests for separate pipes (and other special benefits). *See, e.g.*, USCA5.693 ("If TDCJ were to grant one offender's request for a special diet or religious item, numerous offenders would request similar special privileges."); USCA5.919 ("I can't give Chance a pipe and not [let] the other guys smoke a pipe, have the opportunity to smoke a pipe."); USCA5.996 ("usually when we give an offender an exception to the rule, then other offenders want the exception"). This prediction is based on TDCJ officials' experience with special requests from inmates. *See, e.g.*, USCA5.693 (noting that TDCJ already receives "numerous requests" for special religious accommodations); *cf. O Centro*, 546 U.S. at 436 (criticizing slippery-slope argument, in a non-prison case, that rested on mere "speculation").

Experience with tobacco and other contraband puts TDCJ's concerns on firm ground. One official noted that inmates "do all they

can to get contraband into our institution." USCA5.920. Tobacco in particular is "highly-demanded" due to its ban in 1995. USCA5.586. Before the ban was announced, just 0.03% of offenders identified as Native American faith adherents. USCA5.694. That proportion steadily rose to 2.7% in February 2012, an 8900% increase in the proportion of adherents. USCA5.694-95. (The number of adherents rose from 24 to 4243, more than a 17,500% increase. *Id.*) And of the over 300 Native American adherents at the Michael Unit, only 19 designated as Native American when they entered TDCJ. USCA5.695. TDCJ officials drew the fair conclusion that some inmates were identifying their faith as Native American to receive special benefits like access to tobacco. *Id.*; *see* USCA5.266 (stating that increased use of tobacco would encourage others to declare faith as Native American); USCA5.587 (same). Moreover, tobacco "kept *disappearing*" during Native American ceremonies at TDCJ's Daniel Unit. USCA5.740; *see* USCA5.587 (noting 506 incidents of tobacco confiscation in 2011 alone). These facts justify TDCJ's concern that other inmates would request separate pipes if Chance were given one.

Chance argues that this kind of analysis is impermissible under RLUIPA, citing *Merced v. Kasson*, 577 F.3d 578 (5th Cir. 2009), and *O Centro*'s rejection of "'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.'" Chance Br. 40 (quoting 546 U.S. at 436). But neither case involved the special context of prisoner RLUIPA litigation. That factor in itself is sufficient to distinguish them. *See, e.g.*, *Cutter*, 544 U.S. at 723. Indeed, in the years since *O Centro*, numerous courts, presumably recognizing the realities of prisoner litigation, have approved of justifications like TDCJ's here. *See, e.g.*, *Baranowski*, 486 F.3d at 125 (affirming summary judgment based in part on conclusion "that there would be an increased demand by other religious groups for similar diets"); *McRae v. Johnson*, 261 F. App'x 554, 559 (4th Cir. 2008) (crediting official's testimony that requested accommodation "would not be feasible because the sheer numbers of persons who would seek exemption would not allow it"); *Jihad*, 2011 WL 1641885, at *9 & n.8 (stating, regarding least restrictive means, that "there is no way to accommodate [plaintiff's] request . . . without extending the same accommodation to all Muslim inmates who could

request it"); *Gibb*, 2008 WL 4691049, at *14 (stating that allowing accommodation "would create an increased demand by other religious groups for similar exemptions to the grooming policy"); *Massingill*, 2006 WL 2571366, at *8 ("granting plaintiff's request would almost certainly lead to more requests for special diets").

Even under the express language of *O Centro*, Chance's argument fails. First, unlike the defendants in *O Centro* and *Merced*, TDCJ offered evidence substantiating its judgment that other inmates would request exemptions, including pipes. *See* 546 U.S. at 436 (criticizing argument in previous case that rested on mere "speculation" that other claims would materialize and harm the program at issue); *Merced*, 577 F.3d at 593 n.18 (noting lack of evidence); *supra* at 45-46.

Second, *O Centro* and *Merced* do not foreclose all consideration of requested exemptions beyond the individual plaintiff's at issue. *O Centro* makes that clear by approving of *United States v. Lee*, 455 U.S. 252 (1982). *See* 546 U.S. at 435. *Lee* considered a single Amish's requested exemption from Social Security taxation. 455 U.S. at 254. Rejecting the claim, the Supreme Court explained, "it would be difficult to accommodate the comprehensive social security system with myriad

exceptions flowing from a wide variety of religious beliefs," and "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.* at 259-60. The $27,000 in unpaid taxes surely was not enough to destroy the then-$11-billion Social Security program, but the Supreme Court correctly noted that similar exemptions would seriously impact the program. *Id.*; *see id.* at 262 (Stevens, J., concurring in the judgment) ("The Court rejects the particular claim of this appellee, not because it presents any special problems, but rather because of the risk that a myriad of other claims would be too difficult to process."). Similarly, in *Merced*, this Court rejected an argument that letting the five local Santeria priests, including the lone plaintiff, "sacrifice four-legged animals" would mean that "everyone in [the city] will do it," because (unsurprisingly) no evidence suggested that average citizens would want to conduct sacrifices. 577 F.3d at 593 n.18. This Court thus implicitly left open the possibility that it may be proper to consider identically situated individuals (e.g., the four other non-plaintiff priests), and that adequate

evidence might justify defendants' concerns regarding even greater numbers engaging in the banned conduct. *Id.*

Like Social Security administrators, prison officials must consider the effects of an exemption on other inmates and the prison's effective functioning. As TDCJ officials explained, TDCJ cannot let Chance use a separate pipe without letting similarly situated inmates do the same; and their experience with tobacco suggests that this dilemma would arise. Indeed, how could TDCJ respond to another Native American religious adherent claiming, just as Chance did, that he wants a separate pipe because he sincerely believes he must personally smoke? There would be no way to distinguish that request from Chance's, and RLUIPA does not require federal courts to put state prison officials in the position of having to arbitrarily deny requests, particularly when those denials threaten prison security due to perceived favoritism. And because giving separate pipes to each inmate who requested one would be infeasible due to staffing, operational, and security concerns, *see infra* Part II.C, TDCJ has adequately explained why "granting the requested religious accommodations would seriously compromise its

ability to administer the program." *O Centro*, 546 U.S. at 435. Summary judgment should be affirmed.

C. Giving Separate Pipes to All Native American Adherents Would Pose Insurmountable Operational, Cost, and Security Concerns.

TDCJ decided that allowing each inmate a separate pipe would raise "prohibitive operational, cost and security concerns." USCA5.584; *see generally supra* at 9-12. Ten security officers would be required because an officer can effectively supervise no more than 30 inmates handling contraband, whereas only one officer is needed where the chaplain alone smokes. USCA5.590; USCA5.586. These additional security officers would have to come from other parts of the prison, thereby threatening security elsewhere. USCA5.871; *see also* USCA5.870. Additionally, it would be practically impossible for one chaplain to conduct this kind of ceremony. *See* USCA5.704, 707. Native American contract chaplain Bouse estimated that it would take her over 26 hours to perform all the necessary tasks with disposable pipes and over 37 hours with non-disposable pipes. USCA5.707.

Accordingly, using separate pipes would require 170.4 security-staff hours each ceremony for disposable pipes, at an annual cost of

$163,464 for Chance's desired two ceremonies per month, and 181.2 hours each ceremony for non-disposable pipes, at a cost of $209,184. USCA5.590, 698. These staffing and cost figures are fatal to Chance's claim. As the Supreme Court observed, allowing religious accommodations to trump "consideration of costs and limited resources" would violate the Establishment Clause. *Cutter*, 544 U.S. at 722-23, 726.

Chance challenges two aspects of this analysis. First, he complains that these figures are based on 300 inmates participating. Eason used that figure because 342 inmates at the Michael Unit designate their faiths as Native American, and his experience with contraband suggested that most of them would "participate in a pipe ceremony at Michael if they were allowed to smoke an individual pipe." USCA5.585. Chance says that this assumption is foreclosed by *O Centro* and notes that typically only 125-150 inmates attend the ceremonies. Chance Br. 39, 40 n.9.

We addressed *O Centro* above; as to the number of participants, we also explained that TDCJ justified its conclusion that the ceremonies would grow if TDCJ allowed personal pipe-smoking. *See supra* at 45-

46; *cf.* USCA5.920 ("[W]e would have a lot more Native American offenders wanting to participate in a prayer service because they're getting to smoke a pipe. . . . My basis is my experience with contraband introduction."). But even if the staff-hour and cost numbers were divided in half as Chance insists, the figures would remain prohibitively large—$80,000 to $100,000, 13 to 18 hours, and five security officers displaced from other areas of the prison.

Second, Chance challenges the TDCJ's staffing estimate even assuming 300 inmates attend, claiming that "the same number [of security officers] would be needed *regardless* of whether individual pipe smoking was allowed." Chance Br. 40 n.9 (citing USCA5.923 (Eason deposition)). Chance is correct that Eason agreed in deposition testimony that "ten officers are needed regardless of what the pipe arrangement is[,] of who has pipes." USCA5.923. But the context of that exchange between Eason and Chance's attorney shows that the term "pipe arrangement" refers to disposable or non-disposable pipes. Just two pages of deposition transcript later, Eason confirms Chance's counsel's statement that "what you're saying is, whether it's disposable or non-disposable pipes, you're still going to need three minutes per

pipe times 300 pipes, so ten officers, right?" *Id.*; *see also id.* (Eason agreeing that his report is "assuming that all 300 inmates are going to need individual pipes, whether disposable or non-disposable, right?"); USCA5.921 ("If they have individual pipes is what we based this [staffing estimate] on, the individual non-disposable pipes and disposable pipes."); USCA5.924 (Chance's counsel saying "just to be clear, to come up with these numbers, you're using 300 inmates with individual pipes as your basis, right?").[12] As discussed above, Eason detailed the reasons why ten security officers would be needed. *See, e.g.*, USCA5.585-86. Chance offered no evidence to contradict this judgment.

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[12] These statements confirm the basis for Eason's staffing estimate. Though not noted by Chance, Eason's report does state: "I estimate that if 300 offenders participate in the ceremony, *whether or not they had pipes*, 10 officers would be needed for safety and security." USCA5.586 (emphasis added). The meaning of the italicized aside is unclear from the record; it may allude to the fact that inmates who have not purchased pipes may show up at a ceremony from time to time. *See* USCA5.923 (explaining that "[j]ust because 300 inmates show up in that ceremony doesn't necessarily mean all of them bought a pipe," so "[w]e would have to compare the list" of inmates who did in fact purchase pipes to ensure that the pipes were correctly distributed). The "300" estimate is necessarily only an estimate. TDCJ recognizes, however, that a portion of Eason's deposition not included in the record suggests that ten officers would be needed even with just a communal pipe. But that excerpt was not included in the record or brought to the district court's attention, and thus it should not be considered here. *See, e.g.*, *McIntosh v. Partridge*, 540 F.3d 315, 327 (5th Cir. 2008). In any event, Eason's report and the portions of Eason's deposition testimony that were included in the record clearly describe how Eason arrived at his staffing estimates. *See, e.g.*, USCA5.585-86, 923-24.

Finally, attacking the staffing estimate leaves undisturbed TDCJ's other stated concerns, like contraband risks and how to store the pipes. *See* USCA5.585-87, 695, 741.

In sum, it is precisely this kind of situation—where a requested accommodation affects prison security, costs, logistics, and staffing—that shows why "[c]ontext matters" in RLUIPA cases. *Id.* at 723 (alteration in original) (internal quotation marks omitted). Summary judgment should be affirmed.

III. PROVIDING THE CURRENT FREQUENCY OF SERVICES IS THE LEAST RESTRICTIVE MEANS OF ADVANCING TDCJ'S COMPELLING INTERESTS IN SECURITY AND EFFECTIVE FUNCTIONING OF THE PRISON.

TDCJ holds Native American services once per week: a monthly pipe ceremony, a monthly teaching service using DVDs, and twice-monthly talking circles, which can include teaching messages. USCA5.692. Chance wants six ceremonies each month—two pipe ceremonies and four intricate teaching ceremonies—instead of the four services he currently receives. *See* USCA5.373; USCA5.692. TDCJ determined that more frequent meetings would be infeasible due to security and operational concerns. *See Cutter*, 544 U.S. at 726.

A. Qualified Volunteers Are Unavailable to Oversee Additional Ceremonies.

First is the problem of ceremony oversight. TDCJ policy requires that all ceremonies be held under the supervision of the unit chaplain, an approved religious volunteer, or security staff. USCA5.587-88. The availability of a supervisor is thus one factor dictating the frequency and length of ceremonies. This volunteer requirement "is supported by compelling interests in prison security." *McAlister v. Livinston*, 348 F. App'x 923, 937 (5th Cir. 2009) (per curiam). As to narrow tailoring, this Court has taken issue with the volunteer requirement only where the plaintiff submitted evidence the policy was not neutrally applied, *see id.*; *Mayfield v. TDCJ*, 529 F.3d 599, 615 (5th Cir. 2008), or where the defendants failed to fully explain why other prison staff could not supervise meetings, *see Newby v. Quarterman*, 325 F. App'x 345, 352 (5th Cir. 2009).

Chance has not alleged any uneven application of the policy, and the record explains why supervisors are unavailable. The unit chaplain's availability is limited because she has obligations regarding the other 230 faith groups at TDCJ, and she already supervises at least one Native American gathering per month. *See* USCA5.690, 692.

TDCJ also offered evidence demonstrating that security officers cannot be spared to supervise ceremonies: "[i]ncreasing the frequency of [Native American] services as sought by plaintiff Chance could impact the security and safety of the Michael [U]nit by overtaxing the available security staff." USCA5.588. As discussed above regarding providing more security to oversee inmates' handling of contraband, assigning security to a Native American (or other religious) ceremony displaces security from other areas. *See supra* Part II.C.

Approved volunteers are the only other option, but finding them for Native American ceremonies has been difficult. *See, e.g.*, USCA5.588; USCA5.528 (response to grievance stating "when an approved volunteer or contract Native American Chaplain is available Native American Services will resume"); USCA5.690-91. The volunteer pool for pipe ceremonies is especially limited because a "pipe carrier" must be found (or someone must at least donate a pipe). *See* USCA5.704, 742, 859-60, 1001; *cf.* USCA5.1002 (Chaplain Bouse brings pipe).

Chance does not complain about the volunteer requirement itself, nor does he assert that the availability of a volunteer is irrelevant to his

claim. Instead he argues that a less restrictive alternative would be to use non-Native American volunteers, claiming that, while TDCJ may have been unable to locate Native American volunteers, the policy permits TDCJ to use a non-Native American volunteer. Chance Br. 44 ("But the [district] 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.").

Chance's reading of the policy is correct but gets him nowhere because the record shows that TDCJ does use non-Native American supervisors and attempted to find other non-Native American, as well as Native American, volunteers. As noted, the unit chaplain (a non-Native American) supervises at least one ceremony per month. *See* USCA5.692. As to securing volunteers generally, Pierce stated, "The reason why TDCJ could not hold [any Native American] services from June 2009 to May 2010 [was] because there was no approved religious volunteer available to conduct the services." USCA5.690. To be sure, Pierce's affidavit focused on his diligent efforts "to locate persons who adhere to [Native American] spirituality as both volunteers and paid

contract chaplains." USCA5.691. But this focus is understandable given TDCJ policy's preference that the volunteers be Native American. *See* USCA5.883. Moreover, some of the individuals Pierce contacted provided Christian (as well as Native American) recordings in lieu of providing volunteers. USCA5.691. Had Pierce insisted exclusively on Native American volunteers, it would have been odd for the organizations to send non-Native American resources in return. And Pierce also noted that "[u]nit chaplains may refer possible religious volunteers to the chaplaincy department." *Id.*

In addition to this testimony, Chaplaincy responded to Chance's administrative grievance by stating, "when an approved volunteer *or* contract Native American Chaplain is available[,] Native American services will resume." USCA5.528 (emphasis added); *see also* USCA5.566 (grievance response: "Currently there is not an approved volunteer for Native American Services[,] nor is there a contract Native American Chaplain. Once a volunteer or a Chaplain can be present, services will continue.").

Chance's assertion is also belied by his own declaration—from 2004 to 2008, presumably when he had no complaints, *cf.* Chance Br.

44, pipe ceremonies were not held regularly due to lack of volunteers. *See* USCA5.353 ("Around 2004, the newer contract chaplain passed away. From then until[] 2008 we were allowed to perform the pipe ceremony under the supervision of either the Michael Unit Chaplain or a Christian volunteer. . . . [I]n 2008, TDCJ hired Guillermo Nieto to be our new Native American contract chaplain[] . . . and we *resumed* having our ceremonies twice a month." (emphasis added)).

Thus Chance's only rejoinder to TDCJ's evidence that the limited availability of qualified volunteers prevents holding some services is that during some periods qualified volunteers were available. But that is no response at all—TDCJ's requirement that services be supervised is unassailable on its face, and TDCJ cannot force a volunteer to appear.

B. Providing More Ceremonies Would Impose Costs on Other Faiths and Jeopardize Security.

Even if supervision were not an issue, TDCJ offered another reason why more frequent, longer ceremonies would be infeasible: "We would also have to find time and space to hold these additional [Native American] services given the many other scheduling demands at the [Native American] designated units." USCA5.588. Because all faiths' services are held in the gym at the Michael Unit (except for the Native

American pipe ceremony), scheduling additional Native American meetings there would impermissibly impose on other faiths. *See* USCA5.1001-02; *see also Smith v. Kyler*, 295 F. App'x 479, 484 (3d Cir. 2008) (per curiam) (paying for Rastafarian chaplain "would require the [state] to pay expenses for numerous other religious leaders . . . or else be exposed to a charge of religious favoritism" (second alteration in original) (citation and internal quotation marks omitted)); *United States v. Antoine*, 318 F.3d 919, 923 (9th Cir. 2003) ("an alternative can't fairly be called 'less restrictive' if it places additional burdens on other believers"). And, again, more (and longer) ceremonies would mean shifting security officers from other parts of the prison.

Chance claims that TDCJ held weekly teaching ceremonies "for more than a decade (until May 2009) without incident" and without these security and scheduling concerns arising. Chance Br. 48. TDCJ admits that it holds weekly services; the problem is that Chance asks for additional, longer ceremonies. No record evidence indicates that these longer, allegedly adequate ceremonies were ever held weekly. Chance's brief cites his declaration at pages 845-46 of the record, but the only reference to frequency there explicitly contradicts his assertion:

"Currently the Teaching ceremony is held once per month." USCA5.846. Accordingly, no competent summary-judgment evidence refutes TDCJ officials' statements that additional ceremonies would impose unmanageable burdens. The district court's judgment should be affirmed.

IV. PROHIBITING SMUDGING INDOORS IS THE LEAST RESTRICTIVE MEANS OF ADVANCING TDCJ'S COMPELLING INTEREST IN SECURITY.

Chance complains that TDCJ prohibits him from smudging "indoors in cases of inclement weather." Chance Br. 45. TDCJ no longer permits smudging indoors because officials had security concerns about the smoke activating the fire alarm. USCA5.593, 596.

Chance assails this concern on grounds that "[t]he record contains no evidence, however, that the fire alarm was ever *triggered* by the ritual." Chance Br. 46. But the simple reason that the alarm had never been triggered is that the alarm system had not previously been active. *See, e.g.*, USCA5.593, 1003 (confirming that "after the fire alarm was installed or activated, the smoke smudging ceremonies were moved outside"). Chance offers no record evidence to doubt TDCJ officials'

logic that smoke from 125 to 150 (or 300) inmates burning herbs and fanning the smoke with feathers would trigger the fire alarm.

Chance says that he "submitted evidence" about other options, like "some sort of tent or shed to shield them from the rain." Chance Br. 47. The only "evidence" of these options, however, was one unsupported line each in Chance's opposition to summary judgment and his objections to the magistrate's report. *See* USCA5.817, 1363. As such, the record does not indicate the host of problems that outdoor structures would present. Just to name a few: the structure would have to be extremely large to hold 150 inmates; if it were a permanent structure, it would seriously threaten security by providing a spot for inmates to hide outside; if it were not permanent, there would be additional administrative and time problems in erecting, dismantling, and storing it; and a structure like a shed or tent might protect against rain but not against extreme heat or cold.[13] Furthermore, any secure

[13] Chance argues that other prisons "have provided outdoor tents or structures." Chance Br. 47. This argument was not presented to the district court. *See* USCA5.815-18, 1362-63; *see, e.g.*, *Spotts v. United States*, 613 F.3d 559, 575 (5th Cir. 2010) (per curiam) (appellant forfeited argument by not asserting it in objections to magistrate's report). And in any event, the difference in inmate population alone serves to discount these comparisons. *See Fowler*, 534 F.3d at 942 & n.12; S.D. DEP'T OF CORRS., ADULT INMATES BY RACE/ETHNICITY, (Dec. 31, 2012), available at http://doc.sd.gov/about/stats/documents/InmatesbyRace12312012.pdf

structure large enough to hold 150 inmates and sturdy enough to protect against all inclement weather would likely be unduly costly. Indeed, *Cutter*—and the Establishment Clause—should preclude a court from requiring all but the most minor expenses—if "RLUIPA does not require a State to pay for an inmate's devotional accessories," *a fortiori* it should not require a State to erect an entirely new structure. 544 U.S. at 720 n.8;[14] *see id.* at 726.

Chance also says that "smudging could be permitted in a room where there is no risk of triggering the fire alarm" or in a "room with

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(1040 Native American inmates); ORE. DEP'T OF CORRS. INMATE POPULATION PROFILE (Mar. 1, 2013), available at http://www.oregon.gov/DOC/RESRCH/docs/inmate_profile.pdf (354 American Indian inmates); MO. DEP'T OF CORRS., A PROFILE OF THE INSTITUTIONAL AND SUPERVISED OFFENDER POPULATION ON JUNE 30, 2011 at 13 (Jan. 23, 2012), available at http://doc.mo.gov/Documents/publications/Offender%20Profile%20FY11.pdf (94 Native American offenders); WIS. DIVISION OF ADULT INSTITUTIONS, FY06 PROFILE at 3, available at http://www.wi-doc.com/FY06%20DAI%20Profile.pdf (658 American Indian inmates); KAN. DEP'T OF CORRS., FY 2010 OFFENDER POPULATION at 51 (Nov. 2010), available at http://www.doc.ks.gov/publications/archived-statistical-profiles-offender-population-reports/statistical-profile-fy-2010-offender-population/view (146 American Indian inmates).

[14] TDCJ acknowledges that this Court distinguished this *Cutter* footnote because *Cutter* "addressed an Establishment Clause challenge to RLUIPA. The Court was not focused on analyzing the question of a substantial burden." *Moussazadeh v. TDCJ*, 703 F.3d 781, 793 (5th Cir. 2012). That distinction should be confined to substantial-burden analysis. The Supreme Court's statement that RLUIPA does not require the purchase of devotional accessories was a necessary part of its holding that RLUIPA does not violate the Establishment Clause because courts must apply RLUIPA in a way that "does not override other significant interests." 544 U.S. at 722. Such cost considerations are thus a necessary part of any least-restrictive-means and compelling-interest analyses.

adequate ventilation." Chance Br. 47-48. Nothing in the record indicates that he raised these alternatives below. *See Yohey*, 985 F.2d at 225. TDCJ has explained that all religious meetings (other than the pipe ceremony) are conducted in the gymnasium, presumably because it is the only room at the Michael Unit accessible and large enough to hold these gatherings. USCA5.1001.

The Court should not countenance any complaint that the record does not adequately address these concerns about the newly proposed alternatives. Chance's suggested alternatives come too late—they were not noted until cursory statements in Chance's summary-judgment briefing or in his opening brief here.[15] "'It would be a herculean burden to require prison administrators to refute every conceivable option in order to satisfy the least restrictive means prong of [RLUIPA].'" *Fowler*, 534 F.3d at 940 (citation omitted); *Spratt*, 482 F.3d at 41 n.11. TDCJ considered and rejected the risk of triggering the fire alarm and turning the fire alarm off during smudging ceremonies, and offered water smudging as an alternative. Plaintiffs cannot—even unintentionally and in good faith—sandbag defendants by proposing

[15] Likewise, the suggested alternatives of *amici* Pan-American Indian Association et al. come too late. *See* Br. 22-24.

new alternatives in briefing after summary-judgment discovery has closed. The parties conducted hours of depositions, and Chance's attorneys apparently never asked the simple question, "Why can't smudging occur in an outdoor tent or shed?" TDCJ fulfilled its burden under RLUIPA by addressing various alternatives; it did not need to address *every* alternative that a creative attorney can dream up when the defendants have no opportunity to submit relevant testimony. Otherwise, summary judgment in favor of state prison officials would almost never issue from a district court or survive on appeal—all a plaintiff would have to do is propose a new accommodation in its briefing, when it is too late for the defendant to create a record.

V. PREVENTING CHANCE FROM CONGREGATING ON FOUR DAYS HE DEEMS HOLY IS THE LEAST RESTRICTIVE MEANS OF ADVANCING TDCJ'S COMPELLING INTERESTS.

In addition to participating in bimonthly pipe ceremonies, weekly teaching ceremonies, and smudging rituals before every one of those ceremonies, Chance also wishes to hold pipe ceremonies on four "important dates in Native American history." USCA5.368. TDCJ previously recognized those four days, but due to Iron Thunderhorse's lawsuit and the subsequent recommendations of the Native American

contract chaplain and a volunteer, TDCJ instituted a neutral policy because it would be infeasible to designate all the different holy days desired by each Native American adherent. USCA5.693-94; *see also* USCA5.1006 (noting that different Native American faith groups recognize different holy days); USCA5.685 (list of Narragansett holidays); USCA5.688 (list of Navajo Nation holidays).

Providing ceremonies on one faith's holy days but not another's would violate the Establishment Clause, a result RLUIPA does not require. *See Cutter*, 544 U.S. at 726; *Kyler*, 295 F. App'x at 484 (paying for Rastafarian chaplain "would require the [State] to pay expenses for numerous other religious leaders . . . or else be exposed to a charge of religious favoritism" (ellipsis in original) (internal quotation marks omitted)); *Antoine*, 318 F.3d at 923 ("an alternative can't fairly be called 'less restrictive' if it places additional burdens on other believers"); *cf., e.g.*, *Wilkerson*, 2005 WL 5280675, at *4 (finding "compelling interest in avoiding perceived favoritism between religious groups").

Chance claims that TDCJ's policy impermissibly "resolv[es] disputed matters of religious doctrine," Chance Br. 53 n.11, but this accusation is backwards—it is Chance who urges TDCJ to permit

ceremonies on his requested four days instead of on other tribes'. As explained above, due to staffing, cost, and operational concerns, it would not be feasible for TDCJ to permit ceremonies for each holy day for each tribe. This is not a "slippery slope" argument. Rather, TDCJ simply acknowledges that allowing ceremonies on Chance's holy days, but not Thunderhorse's (as an example), would be impermissible, and the only alternative to remedy that problem—allowing ceremonies on all the requested holy days—would be impossible due to resource constraints. Summary judgment was appropriate.

VI. PREVENTING CHANCE FROM KEEPING LOCKS OF HIS DECEASED PARENTS' HAIR IS THE LEAST RESTRICTIVE MEANS OF ADVANCING TDCJ'S COMPELLING INTERESTS IN MAINTAINING SECURITY.

Chance wants to possess locks of his deceased parents' hair. USCA5.369. TDCJ offered evidence demonstrating that allowing inmates to receive hair would jeopardize prison security. For example, inmates may receive items only from approved vendors to ensure nothing dangerous enters the prison. USCA5.588, 613-14, 620. Hair could be dipped in dangerous fluids or chemicals. USCA5.598, 614, 619-20. Moreover, hair is contraband, and TDCJ prohibits inmates receiving items from individuals. USCA5.588, 620 ("Any time we open

the door for individuals to send items in, it breaches the security of our institution . . . ."). Thus permitting Chance a special dispensation would breed resentment and jealousy and make him a target. USCA5.269, 615. "[P]rison security is a compelling state interest, and . . . deference is due to institutional officials' expertise in this area." *Cutter*, 544 U.S. at 725 n.13.

Chance first criticizes the district court for "ignor[ing]" that "Defendants have given shifting explanations for" the refusal to allow Chance to keep the hair, noting that an early communication to Chance cited "health hazard[s]." Chance Br. 54 (quoting USCA5.92). The district court's failure to address this discrepancy can be forgiven because Chance did not argue this in his summary-judgment briefing on this issue. *See* USCA5.821-23; USCA5.1364-65. Accordingly, he forfeited this argument on appeal. *See, e.g.*, *Spotts*, 613 F.3d at 575. In any event, that communication did not disclaim security concerns and should not tie TDCJ's hands. After that communication, Chance filed another grievance where he states that TDCJ officials denied his request "due to health *and security* reasons." USCA5.533 (emphasis added). Therefore, TDCJ properly asserted security concerns.

Chance seeks to undermine these concerns by claiming that another Michael Unit inmate, John Rose, was allowed to keep his deceased daughter's hair with him. Chance Br. 55. The only evidence of this is Chance's own self-serving declaration, *see* USCA5.845, which does not preclude summary judgment. *See Smith v. Sw. Bell Tel. Co.*, 456 F. App'x 489, 492 (5th Cir. 2012) (per curiam) ("[W]e have repeatedly held that self-serving statements, without more, will not defeat a motion for summary judgment, particularly one supported by plentiful contrary evidence."); *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 531 (5th Cir. 2005); *United States v. Lawrence*, 276 F.3d 193, 197 (5th Cir. 2001); *see also Borzych*, 439 F.3d at 391. Furthermore, TDCJ submitted evidence showing that no record exists of Rose possessing hair. *See* USCA5.1207.

Likewise, Chance's "expert testimony that at least one other prison permits the same practice" cannot withstand scrutiny. Chance Br. 55. His expert did state that "many" Nebraska inmates keep hair in medicine bags, but she also acknowledged that she had never looked inside a medicine bundle. USCA5.864. This self-contradictory testimony is insufficient to defeat summary judgment. Moreover, this

was Chance's religious, not security, expert—she did not and could not comment on security implications. As with Chance's other arguments regarding other prisons' policies, the precise safety measures were not submitted. *See supra* Part II.A.2. Even if this testimony is accepted, though, Nebraska's prison system houses only 190 Native American inmates.[16] That stark contrast with TDCJ's Native American religious population casts doubt on whether Nebraska's policies could be implemented at TDCJ. And Chance again failed to bring this evidence to the district court's attention. *See* USCA5.821-23, 1364-65.

Chance further argues that TDCJ's concern about hair being dipped in dangerous fluids is a red herring because inmates may receive mail, which poses the same risk. Chance Br. 56. But mail can be tested in ways that hair cannot—prisons officials cannot touch the hair because it is a sacred item. USCA5.614-15; *cf.* USCA5.557 (Chance's grievance complaining that officer allegedly touched another inmate's Native American religious medallion); USCA5.875 (policy stating that Native American devotional items "may be visually inspected, but for

[16] NEB. DEP'T OF CORRECTIONAL SERVS., 37TH ANNUAL REPORT AND STATISTICAL SUMMARY 65, 69 (2011), *available at* http://www.corrections.state.ne.us/pdf/annualreports/2011%20NDCS%20Annual%20Report.pdf.

religious reasons only the offender should touch them"). As to TDCJ failing to introduce evidence explaining why hair poses a greater risk than other religious items like a tooth, feather, bone, or shell, *see* Chance Br. 56, it is unclear why TDCJ must compare every other item that an inmate may possess. All TDCJ must show is that there is no viable alternative to banning the receipt of human hair. In any event, a single bone or tooth cannot hide contraband. *Cf.* USCA5.597; *Hoevenaar*, 422 F.3d at 367, 371 (crediting testimony that contraband could be hidden in a "kouplock," a "two inch by two inch square section [of hair] at the base of the skull"); *see also* USCA5.269-70. And those other devotional items are purchased from approved vendors. *See* USCA5.877; USCA5.620 (explaining need for vendors). It should go without saying that Chance's parents' hair cannot be procured the same way. Though Eason suggested it might be possible to find a vendor to inspect and test the hair, it is unclear whether that testing is even feasible—testing might destroy the hair, *cf.* USCA5.616 (noting chemical testing), and, like prison officials, a vendor might be forbidden to touch a sacred item. This testing also would impose an additional cost on the prison. *See* USCA5.616-17.

Finally, Chance does not refute TDCJ's argument that allowing him to receive an item from an individual would make him a target for other inmates who also want to receive such items. As Eason explained, having an item even as seemingly inconsequential as a lock of hair poses a problem "[b]ecause other inmates don't have access to that. It is not the small lock of hair. It is that he received something from an individual. . . . When the other offenders can't receive things from individuals . . . [,] that would make him a target, possibly put pressure on him." USCA5.619-20; *see also* USCA5.611, 615 ("[P]rison is all about status, power, and authority. So in an inmate population they are going to assume Offender Chance has that power."); *cf., e.g.*, *Baranowski*, 486 F.3d at 125. Summary judgment was warranted.

CONCLUSION

The Court should affirm the district court's judgment.

Respectfully submitted.

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Counsel also certifies that on March 14, 2013, the foregoing instrument was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov/.

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