



HUY

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Pronounced "hoyt," Huy means "see you again/we never say goodbye" in the Coast Salish language.

August 15, 2017

Committee on the Elimination of Racial Discrimination
Human Rights Treaties Division
Office of the United Nations High Commissioner for Human Rights
Palais Wilson – 52, rue des Pâquis
CH-1201 Geneva (Switzerland)

Submitted via cerd@ohchr.org

Dear CERD Secretariat:

Attached please find Huy's August 2, 2017 submission to the United States, calling for it to address the protection of Indigenous prisoners' religious freedoms in its November 20, 2017 State Party report. Huy is a tribally controlled non-profit corporation formed to provide economic, educational, rehabilitative, and religious support for Indigenous prisoners in the United States. Huy, pronounced "Hoyt" in the Coast Salish Indian Lushootseed language, means "see you again/we never say goodbye."

Indigenous prisoners continue to be subject to a pattern of state and local prisons restricting their religious liberties in violation of domestic and international law. Huy submits this letter to notify CERD that organizations in the United States are actively seeking to work with the U.S. State Department to ensure compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The United States has not engaged in extensive consultation with civil society or Indigenous governments regarding its State Party report. Huy nonetheless continues to engage the United States to seek protection of Indigenous prisoners' rights under ICERD.

Thank you for taking note of our submission to the United States, which has been transmitted to U.S. Secretary of State Rex Tillerson, whose office has acknowledged receipt of our letter. We appreciate your role in encouraging treaty implementation and timely compliance with the treaty reporting process.

Sincerely,

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info@huycares.org

Board of Advisors:

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Brian Cladoosby, Swinomish
Francis Cullooyah, Kalispel
Gabe Galanda, Round Valley

Claudia Kauffman, Nez Perce
Winona Stevens, Ho Chunk
Eklon Vail, Past Department of Corrections Secretary



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Pronounced "hoyt," Huy means "see you again/we never say goodbye" in the Coast Salish language.

August 2, 2017

Rex Tillerson
Secretary of State
Harry S. Truman Building
2201 C Street NW
Washington, DC 20520

Submitted via e-mail to CERD@state.gov

Re: Huy Calls on the United States to Address Protection of Indigenous Prisoners Religious Freedoms in Report to CERD

Dear Secretary Tillerson:

Huy respectfully submits these comments regarding the United States' compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) for the United States to consider as it prepares its November 20, 2017, State Party report to the Committee on the Elimination of Racial Discrimination (CERD). Huy is a tribally controlled non-profit corporation formed to provide economic, educational, rehabilitative, and religious support for American Indian, Alaska Native, and Native Hawaiian prisoners in the Pacific Northwest and throughout the United States. Huy, pronounced "Hoyt" in the Coast Salish Indian Lushootseed language, means "see you again/we never say goodbye."¹ Huy submits these comments on behalf of incarcerated Indigenous persons, particularly those in state and local facilities, whose religious freedoms continue to be curtailed in violation of domestic and international law.

Indigenous prisoners in the United States have been, and still are, subject to an ongoing and pervasive pattern of state and local prisons illegally restricting their freedoms to possess religious items, participate in religious ceremonies, and otherwise engage in traditional religious practices. These illegal restrictions violate ICERD Articles 2, 5, and 6, and they are inconsistent with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) Articles 2, 12, 18 and 19. Further, these restrictions have been imposed in the absence of meaningful consultation with Indigenous peoples.

The United States has been on notice of this failure to protect Indigenous prisoners' religious freedoms since at least mid-2013 when it received an inquiry about these violations from the United Nations Special Rapporteur on the Rights of Indigenous Peoples together with the Special Rapporteur on Freedom of Religion or Belief.² To our knowledge, the United States has yet to respond to this inquiry despite calls from Indigenous leaders in the United States.³ We urge the United States to address these serious violations of ICERD in its State Party report and to take immediate action to protect the religious freedoms of Indigenous prisoners.

Board of Advisors:

Frances Charles, Lower Elwha Klallam
Brian Cladoosby, Swinomish
Francis Cullooyah, Kallispel
Gabe Galanda, Round Valley

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Winona Stevens, Ho-Chunk
Eldon Vail, Post Department of Corrections Secretary

The Importance of Indigenous Prisoners' Religious Freedoms

Indigenous peoples continue to suffer from one of the highest incarceration rates of any racial or ethnic group in the country,⁴ and therefore they form a significant and important subsection of the United States' Indigenous population. These Indigenous prisoners depend upon their freedom to engage in traditional religious practices for their rehabilitation, survival, and ability to maintain their identity as Indigenous peoples. Put differently, "for some Native American prisoners, walking the red road in the white man's iron house is the path to salvation, the way of beauty, and the only road to rehabilitation and survival."⁵ Indigenous governments and their citizens generally share the penological goals of repressing criminal activity⁶ and, to that end, facilitating imprisoned Indigenous citizens' engagement in what Standing Rock Sioux Indian theologian Vine Deloria Jr. called "spiritual problem solving." Rather than posing threats to prison security or administrative needs, religious practice in prisons furthers rehabilitation, reduces recidivism, and has previously been successfully accommodated.⁷ Indigenous prisoners' religious freedom is also essential to the cultural survival of their larger communities. As Pawnee lawyer and human rights scholar Walter Echo-Hawk stated, incarcerated Indigenous peoples "represent important human and cultural resources, irreplaceable to their Tribes and families. When they are released, it is important to the cultural survival of Indian tribes and Native communities that returning offenders be contributing, culturally viable members."⁸

Continuing Failure to Protect Indigenous Prisoners Religious Freedoms

Protection for Indigenous prisoners' religious freedoms is enshrined in domestic law, through the policies articulated in the American Indian Religious Freedom Act of 1978 (AIRFA), 42 U.S.C. § 1996, and the protections articulated in the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.* Nevertheless, courts often fail to make these guarantees effective.

As detailed in our attached 2014 report to CERD, in recent years states throughout the country have curtailed the ability of Indigenous prisoners to possess religious items, participate in religious ceremonies, and otherwise engage in traditional practices. These changes have occurred absent meaningful consultation with Indigenous peoples. Since our 2014 report, the United States has not taken corrective action to address these illegal restrictions of Indigenous prisoners' rights.

Although violations of Indigenous prisoners' religious freedoms are widespread, examples from California, Alabama, Idaho and Wyoming are illustrative of the larger pattern.

- **California.** In 2013, the California Department of Corrections and Rehabilitation (CDCR) finalized regulations prohibiting previously allowed sacred items such as pipes and pipe bags, hand drums and rattles, and other items. The regulations were adopted despite receiving 55 comments (out of a total of 168 comments) protesting the restrictions on Indigenous prisoners' religious freedoms and the failure of CDCR to consult with Indigenous peoples. CDCR finalized the regulations over the strenuous objections of Indigenous governments and human rights and civil liberties organizations. Four years later, Indigenous prisoners are being forced to rely on lengthy, and often costly, litigation in an attempt to restore their religious freedoms, including access to tobacco to make prayer ties⁹ and other essential religious items.¹⁰ Huy has also received reports of CDCR curtailing sweat lodge access, and litigation has proceeded over this issue as well.¹¹ Unlike other states, California's rather transparent policy towards

Indigenous prisoner religious freedom reform is: “we’ll see you in court.” An attitudinal shift in California and within CDCR is needed.

- **Alabama.** Along with nine other states, Indigenous prisoners in Alabama are prohibited from seeking a religiously based exemption from prison policies banning long hair.¹² Other states have successfully accommodated religious exemptions to hair length restrictions. In 2015, the U.S. Supreme Court held in *Holt v. Hobbs* that such a restriction in Arkansas violated a Muslim prisoner's rights.¹³ The Supreme Court then vacated and remanded to the Eleventh Circuit Court of Appeals the case of *Knight v. Thompson*, challenging Alabama's failure to provide an Indigenous prisoner with a religious exemption from its hair length policy.¹⁴ Huy, the National Congress of American Indians, and the Native American Rights Fund had filed an amicus brief in the case urging Supreme Court review.¹⁵ Despite the Supreme Court's instructions to the Eleventh Circuit to reconsider the case in light of *Holt v. Hobbs*, the Eleventh Circuit denied rehearing and simply reissued its prior opinion.¹⁶ The Eleventh Circuit's refusal to reconsider *Knight v. Thompson* exemplifies the failure of the United States judiciary to protect Indigenous prisoners' religious freedoms. Alabama prison officials are also currently in litigation over the confiscation and destruction of Indigenous religious items.¹⁷ Alabama, too, requires an attitudinal change in order for Indigenous prisoner religious freedoms to be honored.
- **Idaho.** An Indigenous transgender inmate, Jessika Stover had her access to an Idaho prison sweat lodge denied based on her gender.¹⁸ This happened despite the fact that Ms. Stover offered a less restrictive alternative of using the prison sweat lodge after the male inmates while under the supervision of a prison chaplain. Relying upon *Holt v. Hobbs*, the U.S. District Court, here in *Stover v. Corrections Corp. of America* stated that “[i]f a less restrictive means is available for the Government to achieve its goals, the Government must use it.” The fact that Ms. Stover had to petition a federal court in order to gain access to a sweat lodge that all male Indigenous prisoners are allowed to, despite first offering a less restrictive alternative to prison officials—*i.e.*, that she use the lodge after the male inmates did and while under prison supervision—is disconcerting in light of the Supreme Court’s decision in *Holt v. Hobbs*.
- **Wyoming.** An Indigenous prisoner, Andrew Yellowbear had his access to the prison sweat lodge denied by prison officials in Wyoming despite the Supreme Court’s decision in *Holt v. Hobbs*.¹⁹ It was only through lengthy litigation that Andrew Yellowbear was able to have his case vacated and remanded by the Tenth Circuit Court of Appeals back to the District Court by future U.S. Supreme Court Justice Neil Gorsuch, who found Mr. Yellowbear’s request for some access to the prison’s sweat lodge to, on its face, be more reasonable than Wyoming’s decision to deny him all access. Mr. Yellowbear offered several less restrictive alternatives for Wyoming to consider ranging from only using the sweat lodge on weekends to holding sweat lodge ceremonies early in the morning before the general prison population occupies the prison yard. However, Wyoming has gone out of its way to not accommodate the requests for access to a sacred space like a sweat lodge by prisoners like Mr. Yellowbear who find themselves held in protective custody through no fault of their own. While Mr. Yellowbear was fortunate enough to have a sympathetic jurist in Judge Gorsuch, other Indigenous prisoners may not be so lucky in the future and so relying upon the courts to protect the religious rights of Indigenous prisoners on a case-by-case basis is not an effective solution to the denial of religious rights of Indigenous prisoners in Wyoming.

These examples are consistent with the experience of many Indigenous persons incarcerated in state and local facilities throughout the country who are facing increased barriers to accessing sacred items, participating in religious ceremonies, and engaging in other religious and cultural traditions and practices.²⁰

In stark contrast, in Washington State, Huy successfully partnered with the Washington Department of Corrections to provide increased security and the supplies needed for Indigenous prisoners to hold important ceremonies.²¹ This partnership demonstrates the potential for meaningful consultation and collaboration with Indigenous peoples to support the shared penological goals of state and Indigenous governments. Although the Washington Department of Corrections is currently considering changes to its policies that govern the introduction and use of sacred items like medicines and beads in state prisons, which changes appear to unduly interfere with Indigenous prisoners' religious freedoms, the agency is at least consulting with Indigenous peoples regarding those changes.

Duty under ICERD to Protect Indigenous Prisoners Religious Freedoms

ICERD Article 2(a) obligates each State Party to ensure that all public authorities and institutions, both national and local, do not engage in racial discrimination. Article 2(c) further mandates that each State Party take effective measures to review and amend, rescind, or nullify any laws and regulations that create or perpetuate racial discrimination. The treaty defines racial discrimination in Article 1 to include "any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." Additionally, Article 6 requires State Parties to guarantee "effective protection and remedies" for any act of racial discrimination.

With regard to religious freedom, Article 5 provides that "[i]n compliance with the fundamental obligations laid down in Article 2 . . . State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee . . . the enjoyment of [enumerated] rights," including "[t]he right to freedom of thought, conscience and religion." CERD General Recommendation 31 interprets ICERD to protect Indigenous prisoners' religious freedoms and calls for each State Party to make the necessary changes to prison regimes to take into account cultural and religious practices.²²

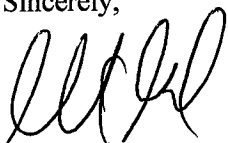
Additionally, UNDRIP Article 12 enshrines Indigenous peoples' rights to "manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies" and to the "use and control of their ceremonial objects." Article 31 affirms "the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expression." These rights must be protected under conditions of equality that are articulated in UNDRIP Article 2. Further, Articles 18 and 19 articulate Indigenous peoples' rights to consultation and States' obligations to obtain their free, prior and informed consent prior to adopting or implementing measures that may affect them. Although UNDRIP is not itself legally binding, the United States endorsed it in 2010 and its provisions enshrine well-established principles of human rights law. UNDRIP, therefore, is critical to interpreting the United States' obligations to eliminate racial discrimination under ICERD.

Conclusion

Huy urges the State Department to address the violation of Indigenous prisoners' religious freedoms in its State Party report to CERD and to take immediate action to ensure the United States is fully complying with its obligations under ICERD to protect Indigenous prisoners' religious freedoms.

Thank you kindly for considering these comments. Please do not hesitate to contact us if we can provide any further information.

Sincerely,



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cc: Scott Busby, Deputy Assistant Secretary, Bureau of Democracy, Human Rights, and Labor

Attachment:

Huy, et al., Report to U.N. Committee on the Elimination of Racial Discrimination (July 25, 2014).

¹ For more information, please see <http://huycares.org/>.

² UN Special Rapporteur on the Rights of Indigenous Peoples, Communication to the United States, AL G/SO 214 (56-23) Indigenous (2001-8) USA 7/2013 (Jun. 5, 2013), [http://unsr.jamesanaya.org/docs/cases/2014a/public - AL_USA_05.06.13_\(7.2013\).pdf](http://unsr.jamesanaya.org/docs/cases/2014a/public_-_AL_USA_05.06.13_(7.2013).pdf); UN Special Rapporteur on the Rights of Indigenous Peoples, Report on Observations to Communications Sent and Replies Received, A/HRC/27/52/Add.5 at 43-44 (noting lack of a US response), <http://unsr.jamesanaya.org/docs/cases/2014-communications-a-hrc-27-52-add4.pdf>.

³ See, e.g., Huy, "NCAI President Presses Sec. State Kerry Re: UN American Indigenous Prisoners' Rights Inquiry," (April 20, 2014), <http://huycares.org/blog/ncai-president-presses-sec-state-kerry-re-un-american-indigenous-prisonersrights-inquiry/>.

⁴ According to the most recent Bureau of Justice Statistics report, for instance, Indigenous peoples are incarcerated at 38% the national rate. Lawrence A. Greenfeld and Steven K. Smith, "American Indians and Crime," U.S. Department of Justice (1999), <http://bjs.gov/content/pub/pdf/aic.pdf>.

⁵ Suzanne J. Crawford & Dennis F. Kelley, *American Indian Religious Traditions: An Encyclopedia* 774 (2005).

⁶ National Congress of American Indians Res. Nos. REN-13-005 and REN-13-041, Ensuring the Protection of American Indigenous Prisoners' Inherent Rights to Practice Traditional Indian Religion (June 24 – 27, 2013) available at http://www.ncai.org/resolutions/REN-13-005_and_041_rec_and_reso.pdf.

⁷ See, e.g., Harvard Pluralism Project, *Sweatlodges in American Prisons* (2005), <http://www.pluralism.org/reports/view/103>; Melvina T. Sumter, *Religiousness and Post-Release Community adjustment Graduate Research Fellowship – Final Report* (2000), <https://www.ncjrs.gov/pdffiles1/nij/grants/184508.pdf>; Byron R. Johnson, et al, "Religious Programs, Institutional

Adjustment, and Recidivism among Former Inmates in Prison Fellowship Programs," 14 Justice Quarterly 1 (1997), <http://www.leaderu.com/humanities/johnson.html>.

⁸ Walter Echo-Hawk, "American Indian Religious Freedom," 19.4 Cultural Survival Quarterly, <http://www.culturalsurvival.org/ourpublications/csqa/article/native-worship-american-prisons>.

⁹ See *In re Rhoades*, 10 Cal.App.5th 896 (Cal. Ct. App. 2017) (involving June 2014 policy change banning tobacco unless mixed with other herbs).

¹⁰ See, e.g., *Bausman v. CDCR*, No. 1:14-cv-00900 (E.D. Cal. May 4, 2016); *Villapando v. Beard*, No. 1:14-cv-00823 (E.D. Cal. 2015).

¹¹ See, e.g., *Navarro v. Herndon*, No. 2:09-cv-1878 (E.D. Cal. Mar. 25, 2016).

¹² The other states include Florida, Georgia, Idaho, Indiana, Louisiana, Mississippi, South Carolina, Texas, and Virginia. Native American Rights Fund, *Legal Protections for Spiritual Practices in Prison* (Mar. 2016), http://www.narf.org/nill/documents/2016_protections_prisoners.pdf.

¹³ 135 S.Ct. 853 (2015).

¹⁴ 135 S.Ct. 1173 (2015).

¹⁵ Available at http://sct.narf.org/documents/knightvthompson/amicus_brief_of_ncai_and_huy.pdf.

¹⁶ 796 F.3d 1289 (11th Cir. 2015), *cert. denied* 136 S.Ct. 1824 (2016).

¹⁷ See *Presley v. Scott*, 679 Fed.Appx. 910 (11th Cir. 2017).

¹⁸ *Stover v. Corrections Corp. of America*, No. 1:12-cv-00393-EJL, 2015 WL 874288 (D.ID. Feb. 27, 2015).

¹⁹ *Yellowbear v. Lambert*, 741 F. 3d 48, (10th Cir. 2014).

²⁰ Our 2014 report to CERD, which is attached, provides examples from California, Texas, Montana, South Dakota, Indiana, Wyoming, Hawai'i, Missouri, and Washington. We would be happy to provide additional and update information.

²¹ Norah West and Gabriel Galanda, "'See You Again/We Never Say Goodbye': Tribal nonprofit, prisons partnership meets religious needs of Native inmates," Department of Corrections Washington State, <http://www.doc.wa.gov/news/stories/2013/072913huyannouncement.asp>.

²² CERD, General Recommendation XXXI, A/60/18 at 98-108.



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July 25, 2014

VIA PRIORITY EXPRESS INTERNATIONAL & EMAIL

CERD Secretariat
8-14 Avenue de la Paix
CH 1211 Geneva 10
Switzerland
cerd@ohchr.org

In Relation to the United States' Combined 7th, 8th and 9th Periodic Reports
Report to U.N. Committee on the Elimination of Racial Discrimination
Re: American Indigenous Prisoners' Religious Rights

Your Excellency:

Enclosed please find twenty (20) copies of a joint submission that we, with Huy, are honored to also submit on behalf of the National Congress of American Indians, Round Valley Indian Tribes, Sherwood Valley Band of Pomo Indians, Passamaquoddy Criminal Justice and Healing Commission, Native Hawaiian Legal Corporation, Native American Rights Fund, National Native American Bar Association, Indigenous Peoples Law and Policy Program at the University of Arizona James E. Rogers College of Law, Indigenous Law and Policy Center at the Michigan State University College of Law, Center for Indian Law and Policy at the Seattle University School of Law, American Civil Liberties Union, and American Civil Liberties Union of Washington.

This report concerns the United States' ongoing violations of indigenous prisoners' religious freedoms and the United States' failure to fully implement the International Convention on the Elimination of All Forms of Racial Discrimination, among various other international human and indigenous rights norms, on state and local levels.

Thank you kindly for allowing us to submit this report. We hope this information will be useful to the Committee and the United States. Please do not hesitate to contact us for any additional information that the Committee might request.

Sincerely,

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Winona Stevens, Ho Chunk
Ekton Vail, Past Department of Corrections Secretary

**JOINT SUBMISSION TO THE U.N. COMMITTEE ON THE
ELIMINATION OF RACIAL DISCRIMINATION**

**CONCERNING RELIGIOUS FREEDOMS OF INDIGENOUS
PERSONS DEPRIVED OF THEIR LIBERTY IN THE UNITED
STATES OF AMERICA**

**IN RELATION TO THE UNITED STATES' COMBINED 7TH,
8TH, AND 9TH PERIODIC REPORTS**

85th Session, 11 August – 29 August 2014

Submitted July 25, 2014

Contact:

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This report is jointly submitted by the following organizations:

Huy is a tribally controlled non-governmental organization formed to provide economic, educational, rehabilitative, and religious support for American Indian, Alaska Native, and Native Hawaiian prisoners in the Pacific Northwest and throughout the United States. Huy, pronounced “Hoyt” in the Coast Salish Indian Lushootseed language, means: “See you again/we never say goodbye.” For more information, see <http://huycares.org/>.

The National Congress of American Indians (“NCAI”) was founded in 1944 and that is the oldest, largest, and most representative American Indian and Alaska Native organization serving the broad interests of tribal governments and communities. NCAI serves as a forum for unified policy development among tribal governments in order to: (1) protect and advance tribal governance and treaty rights; (2) promote the economic development and health and welfare in Indian and Alaska Native communities; and (3) educate the public toward a better understanding of Indian and Alaska Native tribes. For more information, see <http://www.ncai.org/about-ncai>.

The Round Valley Indian Tribes (“RVIT” or “Tribe”) are a sovereign nation of six confederated tribes composed of the Yuki, Wailacki, Concow, Little Lake Pomo, Nomlaki, and Pit River peoples. RVIT is federally recognized and located on the Round Valley Indian Reservation in northern California. RVIT is committed to promoting the welfare and protecting the rights of its members; protecting its natural resources, preserving and protecting its cultural heritage; promoting honor, dignity, and respect among the Tribe; acquiring lands for the benefit of the Tribe and its members; and exercising the inherent sovereign rights and powers of an Indian Tribe. For more information, see <http://www.rvit.org/>.

The Sherwood Valley Band of Pomo Indians (“SVBP”) is a sovereign nation of Northern Pomo and Coast Yuki speaking peoples. SVBP is federally recognized and is located in northern Mendocino County, California. SVBP seeks to promote the health and welfare of future generations by protecting the land-air-water-sacred landscapes and the honor and dignity of its tribal members in perpetuity. For more information, see <http://www.sherwoodvalleytribe.com/>.

The Penobscot Nation is part of the Wabanaki Confederacy that encompasses Northern New England and the Canadian Maritimes. The Penobscot (Penahwabskek) are the Indigenous peoples of the Eastern Woodlands in the State of Maine. The Penobscot Nation is a sovereign nation and a federally recognized tribe in the United States. For more information, see <http://www.penobscotnation.org/>.

The Passamaquoddy Criminal Justice and Healing Commission is an organ of the Passamaquoddy Tribe at Sepayik. The Passamaquoddy Tribe is part of the Wabanaki Confederacy that encompasses Northern New England and the Canadian Maritimes. The Passamaquoddy Tribe at Sepayik is located along Passamaquoddy Bay in Eastern Maine. They are one of the Indigenous peoples of the Eastern Woodlands in the State of Maine. The Passamaquoddy Tribe is a sovereign nation and a federally recognized tribe in the United States. For more information, see <http://www.wabanaki.com/>.

The Native Hawaiian Legal Corporation (“NHLC”) has operated as a 501(c)(3) non-profit, public interest law firm since 1974. NHLC seeks, through legal and other advocacy, to perpetuate the rights, customs and practices that strengthen Native Hawaiian identity and culture. NHLC has provided legal services to Native Hawaiian men incarcerated in privately run prisons throughout the continental United States. For more information, see <http://www.nhlchi.org/>.

The Native American Rights Fund (“NARF”) was founded in 1970 and is the oldest and largest nonprofit law firm dedicated to asserting and defending the rights of Indian tribes, organizations, and individuals nationwide. NARF’s practice is concentrated in five key areas: the preservation of tribal existence; the protection of tribal natural resources; the promotion of Native American human rights; the accountability of governments to Native Americans; and the development of Indian law and educating the public about Indian rights, laws, and issues. For more information, see <http://www.narf.org/>.

The National Native American Bar Association (“NNABA”), founded in 1973, serves as the national association for Native American attorneys, judges, law professors and law students. NNABA works to promote issues important to the Native American community and to improve professional opportunities for Native American lawyers. NNABA strives to be a leader on social, cultural, political, and legal issues affecting American Indians, Alaska Natives, and Native Hawaiians. For more information, see <http://www.nativeamericanbar.org/>.

The Indigenous Peoples Law and Policy Program at the University of Arizona James E. Rogers College of Law (“IPLP”) is an academic center and advocacy organization that offers legal assistance to indigenous peoples and their communities. IPLP is composed of distinguished faculty, a committed and experienced staff, an international team of legal practitioners, and a diverse pool of JD and graduate law students who are being trained to practice indigenous peoples’ law under the leading experts in the field. For more information, see <http://www.law.arizona.edu/depts/iplp/>.

The Indigenous Law and Policy Center at the Michigan State University College of Law is an academic center that is committed to the education of Native law students and the training of lawyers prepared to work on behalf of indigenous peoples and tribes throughout the United States, whether for tribal governments, private law firms or non-profit organizations. For more information, see <http://www.law.msu.edu/indigenous/>.

The Center for Indian Law and Policy at the Seattle University School of Law is an academic center committed to providing an emphasis on Indian law in the curriculum, research and programs at the School of Law to benefit students and practitioners through innovative classes and course offerings, practical experience, interaction with tribal representatives and CLE programs. The Center provides fellowships and intern and extern opportunities for students to gain practical experience and to assist in meeting the legal needs of tribes. The Center for Indian Law and Policy does not, through its co-sponsorship of this report or otherwise, represent the official views of Seattle University. For more information, see <http://www.law.seattleu.edu/centers-and-institutes/center-for-indian-law-and-policy>

The American Civil Liberties Union (“ACLU”) is a nonprofit membership organization that was founded in 1920 and has since been devoted to defending and preserving the individual rights and liberties that the Constitution and laws of the United States guarantee everyone within the United States (or subject to U.S. jurisdiction or control). For more information, see <http://www.aclu.org/>.

The American Civil Liberties Union of Washington is a nonprofit membership organization devoted to defending the individual freedoms of the Bill of Rights for all residents of Washington state and extending freedoms to groups that have historically been denied their rights. For more information, see <http://www.aclu-wa.org/>.

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I. Introduction and Summary

1. This report is submitted on behalf of indigenous persons who are incarcerated in the United States, particularly in state prisons and local jails. This report responds to the United States' seventh, eighth, and ninth combined periodic reports to the Committee on the Elimination of Racial Discrimination ("CERD").¹ Indigenous prisoners' freedoms to possess religious items, to participate in religious ceremonies, and to otherwise engage in traditional religious practices are subject to an increasingly pervasive pattern of illegal restriction throughout the United States. This pattern exemplifies the United States' failure to fully comply with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") and to ensure ICERD's implementation at state and local levels.

2. In CERD's 2008 Concluding Observations regarding the United States, the Committee "welcome[ed] the acknowledgement by the delegation that the State party is bound to apply the Convention throughout its territory and to ensure its effective application at all levels – federal, state, and local – regardless of the federal structure of its government."² The Committee, however, expressed concern over the implementation of the Convention, stating that "[t]he Committee recommends that the State party establish appropriate mechanisms to ensure a coordinated approach towards the implementation of the Convention at the federal, state and local levels."³ The increasingly pervasive pattern of restrictions on indigenous prisoners' religious rights demonstrates the United States' failure to implement ICERD at state and local levels. This report highlights examples of this pattern from the states of California, Texas, Montana, South Dakota, Indiana, Wyoming, Hawai'i, Missouri, and Washington.

3. The Committee's 2008 Concluding Observations also "reiterate[d] its concern with regard to the persistent racial disparities in the criminal justice system ... including the disproportionate number of persons belonging to racial, ethnic and national minorities in the prison population."⁴ As this report explains, indigenous peoples have the highest incarceration rate of any racial or ethnic group in the United States. Incarcerated indigenous peoples depend upon their freedom to engage in traditional religious practices for their rehabilitation and survival. However, state correctional agencies and officers are creating various new restrictions on the free exercise of indigenous prisoners' religion, in violation of state, federal, and international law. Given the extremely high incarceration rate among indigenous peoples, these new restrictions have a particularly detrimental effect on indigenous communities. Additionally, many of the new restrictions discriminate against indigenous peoples, placing significantly higher burdens on indigenous religious practice than on the religious practices of other groups.

4. CERD also highlighted the importance of indigenous religious practice and the need for consultation with indigenous peoples.⁵ Despite the severe impact that new regulations are having on indigenous communities and indigenous peoples' religious practice, these regulations have been created and implemented by states without meaningful indigenous consultation. These new,

¹ United States of America, Periodic Report to the United Nations Committee on the Elimination of Racial Discrimination (June 12, 2013), http://www.state.gov/j/drl/rls/cerd_report/210605.htm [hereinafter US Periodic Report].

² CERD, Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, CERD/C/USA/CO/6 at para. 13 (February 2008).

³ *Id.*

⁴ *Id.* at para. 20.

⁵ *Id.* at para. 29.

severe restrictions on indigenous peoples' religious freedoms, and their adoption in the absence of meaningful consultation, are also inconsistent with the provisions of the United Nations Declaration on the Rights of Indigenous Peoples ("UN Declaration"). CERD specifically stated, even prior to the United States' 2010 endorsement of the UN Declaration, that "the Committee . . . recommends that the declaration be used as a guide to interpret the State party's obligations under the Convention relating to indigenous peoples."⁶

5. The United States' periodic report recognizes the importance of indigenous religious freedom, pointing to domestic law purportedly designed to protect indigenous religious practice.⁷ The United States has, however, failed to make guarantees of religious freedom effective, permitting state and local prisons to dramatically curtail indigenous prisoners' religious rights. The United States' failure to protect the religious freedoms of indigenous prisoners' violates ICERD Articles 2 and 5 as well as the United States' obligations under the UN Declaration and other international and domestic law. We respectfully request that the Committee recommend that the United States: immediately halt all violations of indigenous prisoners' rights to the free exercise of religion; instruct its Attorney General to undertake a comprehensive investigation into state policies infringing upon indigenous prisoners' freedom of religion; and to engage indigenous communities in meaningful consultation to explore how federal, state, and indigenous governments may jointly develop and advance shared penological goals regarding incarcerated indigenous persons.

II. The United States' International Obligations

A. The International Convention on the Elimination of All Forms of Racial Discrimination

6. Article 1 of the ICERD states that "the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

7. Article 2(a) obligates "[e]ach State Party . . . to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation." Further, Article 2(c) states that "[e]ach State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."

8. With respect to the context of religious freedoms, ICERD Article 5 states that "[i]n compliance with the fundamental obligations laid down in article 2 . . . States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee . . . the enjoyment of [enumerated] rights," including "[t]he right to freedom of thought, conscience and religion."

⁶ *Id.*

⁷ US Periodic Report, *supra* note 1, at 169.

9. CERD has interpreted the Convention to protect indigenous prisoners' religious freedoms in General Recommendation 31, which addresses "the prevention of racial discrimination in the administration and functioning of the criminal justice system."⁸ The preamble to General Recommendation 31 highlights several particular groups of persons, including indigenous peoples. It then articulates that "States parties should pursue national strategies ... [t]o make the necessary changes to the prison regime for prisoners belonging to the groups referred to in the ... preamble, so as to take into account their cultural and religious practices" within the context of the administration and functioning of the criminal justice system.⁹ General Recommendation 31 further calls on States parties to "[g]uarantee such persons the enjoyment of all the rights to which prisoners are entitled under the relevant international norms, in particular rights specially adapted to their situation [including] the right to respect for their religious and cultural practices."¹⁰

B. The International Covenant on Civil and Political Rights

10. The fundamental nature of the human right to religious freedom is exemplified by its prominence in the International Covenant on Civil and Political Rights (ICCPR). ICCPR Article 18(1) states that "[e]veryone shall have the right to freedom of thought, conscience and religion," including the "freedom, either individually or in community with others and in public or private, to manifest his religion or belief."

11. Article 18(3) further provides that "[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to public safety, order, health, or morals or the fundamental rights and freedoms of others." The Human Rights Committee, in General Comment 22, clarified that "[p]ersons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the restraint."¹¹ Additionally, ICCPR Article 10 states that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

12. The rights of indigenous peoples to maintain their religious and cultural practices is protected by ICCPR Article 27, which provides that persons belonging to "ethnic, religious, or linguistic minorities . . . shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

C. The UN Declaration on the Rights of Indigenous Peoples

13. The UN Declaration on the Rights of Indigenous Peoples, endorsed by the United States in 2010, affirms in Article 12 that "[i]ndigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; [and] the right to the use and control of their ceremonial objects." Additionally, Article 31 affirms "the right to

⁸ CERD, General Recommendation XXXI, A/60/18, pp. 98-108.

⁹ *Id.* at para. 5(f).

¹⁰ *Id.* at para. 38(a).

¹¹ Human Rights Committee, General Comment No. 22: Article 18 (Freedom of Thought, Conscience, or Religion), UCCPR/C/21/Rev.1/Add.4 at para. 8 (July 30, 1993), <http://www.refworld.org/docid/453883fb22.html>.

maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.”

14. Indigenous peoples maintain the right to the free exercise of their religion and cultural practices under conditions of equality. Article 2 of the Declaration states that indigenous peoples “have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.”

15. The Declaration also enshrines the right of indigenous peoples to be consulted regarding administrative measures affecting them. Article 18 articulates indigenous peoples’ “right to participate in decision-making in matters that would affect their rights, through representatives chosen by themselves in accordance with their own procedures,” and Article 19 provides that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

16. The United States has an obligation, in implementing its domestic and international legal obligations, to promote the full application of the Declaration. Article 42 of the Declaration states that “[t]he United Nations . . . and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.”

17. Additionally, the UN Special Rapporteur on the rights of indigenous peoples has called attention to the need to make the Declaration effective at state and local levels. In his report on the United States, the Special Rapporteur recognized that “[a]lthough competency over indigenous affairs rests at the federal level, the states of the United States exercise authority that in various ways affects the rights of indigenous peoples.”¹² The Special Rapporteur recommended that “[r]elevant state authorities should become aware of the rights of indigenous peoples affirmed in the Declaration . . . and develop state policies to promote the goals of the Declaration and to ensure that the decisions of state authorities are consistent with it.”¹³

III. Failure to Protect the Religious Freedoms of Indigenous Prisoners

A. The Importance of Religious Exercise to Indigenous Prisoners

18. Indigenous peoples in the United States have the highest incarceration rate of any racial or ethnic group.¹⁴ A 1999 Bureau of Justice Statistics report stated that indigenous peoples are incarcerated at 38 percent the national rate.¹⁵ As of 2011, 29,700 indigenous peoples were incarcerated in the United States.¹⁶ These indigenous prisoners depend upon their freedom to engage in traditional religious practices for their rehabilitation as well as their ability to maintain

¹² S. James Anaya, The situation of indigenous peoples in the United States of America, A/HRC/21/47/Add.1, para. 106, 30 August 2012.

¹³ *Id.*

¹⁴ Margaret Severson and Christine Wilson Duclos, “American Indian Suicides in Jail: Can Risk Screening Be Culturally Sensitive?” U.S. Department of Justice (2005), <https://www.ncjrs.gov/pdffiles1/nij/207326.pdf>.

¹⁵ Lawrence A. Greenfeld and Steven K. Smith, “American Indians and Crime,” U.S. Department of Justice (1999), <http://bjs.gov/content/pub/pdf/aic.pdf>.

¹⁶ Todd D. Minton, “Jails in Indian Country, 2011,” U.S. Department of Justice (2012), <http://bjs.gov/content/pub/pdf/jic11.pdf>.

their identity as indigenous peoples. Put differently, “for some Native American prison inmates, walking the red road in the white man’s iron house is the path to salvation, the way of beauty, and the only road to rehabilitation and survival.”¹⁷

19. Traditional religious practices that further indigenous peoples’ rehabilitation include, without limitation, the practice of sweatlodge, talking circle, blessing way, Change of Seasons, pipe, drumming and pow wow ceremonies, and the related use of sacred traditional items such as beadwork, pipes, feathers, hides, bones and teeth, prayer fans, hand-drums and sticks, rattles and medicine bags, and sacred traditional medicines including sage, sweet grass, cedar, copal, bitter root, osha root, kinnikinnick, and tobacco. These traditional religious practices facilitate indigenous peoples’ spiritual rehabilitation, or what indigenous theologian and scholar Vine Deloria, Jr. called “spiritual problem solving.”

20. Indigenous communities and governments in the United States generally share with federal and state governments the penological goal of repressing criminal activity and facilitating rehabilitation in order to prevent habitual criminal offense. The ability of incarcerated indigenous persons to maintain a connection with indigenous religion and culture is critical to furthering this shared goal.

21. Rather than posing threats to prison security or administrative needs, religious practice in prisons furthers rehabilitation and reduces recidivism.¹⁸ Indigenous peoples’ access to religious items and ceremonies has previously been and can be accommodated without undermining prison security needs, instead greatly contributing to indigenous prisoners’ rehabilitation.¹⁹

22. Additionally, increasing restrictions on indigenous prisoners’ religious freedoms pose a direct threat to the cultural survival of indigenous communities in the United States. Given the large and growing incarcerated indigenous population, the inability of indigenous prisoners to freely practice their religion has a potentially severe impact not only on the prisoners themselves but also on the broader, often tribal, communities to which they return.

23. As Pawnee lawyer and indigenous human rights scholar Walter Echo-Hawk has stated, incarcerated indigenous peoples “represent important human and cultural resources, irreplaceable to their Tribes and families. When they are released, it is important to the cultural survival of Indian tribes and Native communities that returning offenders be contributing, culturally viable members.”²⁰ Indigenous communities in the United States have already been severely impacted by a history of colonization and policies designed to disrupt the continuity of indigenous spiritual and religious traditions.²¹ The ability of indigenous communities to maintain their religious practices has been, and remains, critical to their survival.

¹⁷ Suzanne J. Crawford & Dennis F. Kelley, *American Indian Religious Traditions: An Encyclopedia* 774 (2005).

¹⁸ See e.g., Melvina T. Sumter, Religiousness and Post-Release Community Adjustment Graduate Research Fellowship – Final Report (2000), <https://www.ncjrs.gov/pdffiles1/nij/grants/184508.pdf>; Byron R. Johnson, et al, “Religious Programs, Institutional Adjustment, and Recidivism among Former Inmates in Prison Fellowship Programs,” 14 *Justice Quarterly* 1 (1997), <http://www.leaderu.com/humanities/johnson.html>.

¹⁹ See, e.g., Harvard Pluralism Project, *Sweatlodges in American Prisons* (2005), <http://www.pluralism.org/reports/view/103>.

²⁰ Walter Echo-Hawk, “American Indian Religious Freedom,” 19.4 *Cultural Survival Quarterly*, <http://www.culturalsurvival.org/ourpublications/csq/article/native-worship-american-prisons>.

²¹ Such policies included the outright ban of certain indigenous religious practices as well as policies of forced assimilation, such as removal of indigenous children from their families and into boarding schools where they were unable to speak their language or participate in religious and cultural practices.

B. Increasing Restrictions on Indigenous Prisoners' Religious Freedoms

24. In recent years, states throughout the United States have issued new regulations curtailing the ability of indigenous prisoners to possess religious items, participate in religious ceremonies, and otherwise engage in traditional practices. Further, changes in regulations continue absent meaningful consultation with indigenous peoples.

25. **California.** On February 21, 2013, the California Department of Corrections and Rehabilitation (CDCR) issued "emergency" regulations significantly limiting prisoners' religious property.²² Effective immediately, prisoners no longer had access to sacred medicines such as kinnikinnick, copal, and osha root; cloth for prayer ties; beads and beading materials; sacred pipes and pipe bags; and numerous other traditional items. The process for getting religious items approved was also made significantly more burdensome. At the same time, CDCR began reducing prisoner access to sweatlodge ceremonies. In response to widespread criticism, CDCR made minor revisions to the regulations, leaving intact the prohibition on previously allowed sacred items such as pipes and pipe bags, hand drums and rattles, and the sacred herb kinnikinnick. On December 9, 2013, CDCR made these emergency regulations permanent despite receiving a total of 162 written comments on the regulations and their revisions, including 55 comments specifically protesting the illegality of the restrictions on indigenous peoples' religious freedoms and the failure of the CDCR to consult with indigenous peoples or include a single indigenous person in the process of designing the new regulations.²³ The CDCR's permanent adoption of these unduly restrictive and illegal regulations in disregard for the outpouring of concern by indigenous inmates, other indigenous persons, tribal governments, and human rights and civil liberties organizations exemplifies the institutional failure to address clear violations of indigenous prisoners' human rights at state and local levels.

26. **Texas.** In 2013, prison authorities changed regulations for an indigenous prisoners' unit, significantly restricting ceremonial participation. Indigenous prisoners are no longer allowed to participate directly in pipe ceremonies, smudge indoors, keep locks of hair from deceased relatives, or perform important ceremonies such as the Wiping Away the Tears ceremony.²⁴ Texas prison guards are also known to engage in overt racism toward indigenous prisoners. The media reports that on January 27, 2013, prison guards searched an indigenous prisoner's cell, handling his medicine bag. When the prisoner stated that the guards were not supposed to touch his sacred items, a guard said "I don't give a shit," and that "being an Indian didn't make him special."²⁵ The state of Texas's treatment of indigenous prisoners was the subject of an appeal to the Fifth Circuit Court of Appeals in the case *Chance v. Texas Department of Criminal Justice*, in which Huy and other indigenous prisoners' religious rights advocates and organizations have appeared as amici curiae or "friends of the court." The Fifth Circuit largely ruled against the

²² State of California Office of Administrative Law, Notice of Approval of Emergency Regulatory Action, http://www.oal.ca.gov/res/docs/pdf/emergency_postings/2013-0206-01EON_App.pdf.

²³ See California Department of Corrections and Rehabilitation, NCR 13-01 Final Statement of Reasons, http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/NCDR/2013NCR/13-01/Final%20Statement%20of%20Reasons.pdf.

²⁴ Appellant's Opening Brief, *Chance v. Texas Department of Criminal Justice*, No. 12-41015 (January 14, 2013), <http://turtletalk.files.wordpress.com/2013/01/chance-opening-brief-filed.pdf>.

²⁵ Brian Daffron, "Inmate's Religious Rights Allegedly Violated Within Texas Prison System," *Indian Country Today* (March 8, 2013), <http://indiancountrytodaymedianetwork.com/2013/03/08/inmates-religious-rights-allegedly-violated-within-texas-prison-system-148058>.

indigenous plaintiff, finding that prison authorities had not violated the law by failing to accommodate his participation in important religious ceremonies.²⁶

27. **Montana.** Indigenous peoples in Montana comprise 7 percent of the total population but over 16 percent of incarcerated men and 35 percent of incarcerated women.²⁷ Indigenous prisoners in Montana are currently challenging en masse strip searches conducted prior to sweatlodge ceremonies as well as confiscation or prohibition of smudge tobacco, antlers, herbs, and other sacred materials.²⁸ The state of Montana issued an investigatory report in 2009 confirming almost all of the prisoners' allegations as well as describing the derogatory treatment of indigenous prisoners by guards.²⁹

28. **South Dakota.** Indigenous peoples comprise 27 percent of the South Dakota prison population, the highest proportion of any state in the country.³⁰ On October 19, 2009, the Department of Corrections extended a ban on tobacco to include indigenous religious uses. Indigenous prisoners were no longer allowed to use tobacco in sweatlodge ceremonies, pipe ceremonies, or for prayer ties and flags. When a federal district court held that the ban violated federal law, prison authorities were still unable to agree with prisoners on an accommodation, forcing the court to issue a remedial order.³¹ South Dakota has appealed the case to the Eighth Circuit Court of Appeals.

29. **Indiana.** In April 2014, the American Civil Liberties Union of Indiana filed a class action lawsuit on behalf of Daniel Littlepage and others stating that the Miami Correctional Facility of the Indiana Department of Corrections had banned the weekly worship of approximately 40 indigenous prisoners since June 2013.³² Previously allowed services, such as sacred circle services and smudging ceremonies were not allowed because the prison stated it did not have approved outside volunteers to lead the group.³³ The commission responsible for recommending such volunteers had not met since 2007.³⁴ After the federal suit was filed, the prison reached an agreement with the plaintiffs to resume religious services and to seek a long-term facilitator to

²⁶ *Chance v. Texas Department of Criminal Justice*, 730 F.2d 404 (5th Cir. 2013), <http://turtletalk.files.wordpress.com/2013/10/chance-v-tdcj-decision.pdf>.

²⁷ Lisa Desjardins and Emma Lacey-Bordeaux, "Problems of liberty and justice on the plains," CNN, December 13, 2012, <http://www.cnn.com/2012/08/10/us/embed-america-tribal-justice>.

²⁸ *Knows His Gun v. Montana*, 866 F.Supp.2d 1235 (D. Mont. 2012), http://www.narf.org/nill/bulletins/dct/documents/knows_his_gun.html.

²⁹ Montana Department of Corrections Investigation Team, "Investigation into Complaints from Native American Inmates at the Crossroads Correctional Center, Shelby, Montana," May 14, 2009, Part 1: <http://www.aclumontana.org/images/stories/documents/montanaprisonproject/crossroadsdocinvestigation1.pdf>, Part 2: <http://www.aclumontana.org/images/stories/documents/montanaprisonproject/crossroadsdocinvestigation2.pdf>.

³⁰ *Native Am. Council of Tribes v. Weber*, No. Civ. 09-4182, 2012 WL 4119652 (D.S.D. Sept. 19, 2012), <http://turtletalk.files.wordpress.com/2013/01/dct-remedial-order.pdf>.

³¹ *Id.*; Remedial Order, *Native Am. Council of Tribes v. Weber*, Civ. 09-4182-KES (D. S.D. 2013), <http://turtletalk.files.wordpress.com/2013/01/dct-remedial-order.pdf>.

³² See Carson Gerber, "Native American Inmate Sues Miami Correctional Facility," Kokomo Tribune (April 23, 2014), <http://www.kokomotribune.com/local/x2117345875/Native-American-inmate-sues-Miami-Correctional-Facility>.

³³ *Id.*

³⁴ Associated Press, "Native American sues Indiana Prison Over Religion," The Washington Times (April 21, 2014), <http://wishtv.com/2014/04/21/native-american-sues-indiana-prison-over-religion/>.

assist the indigenous prisoners.³⁵ This situation demonstrates the pattern of increasing restrictions on indigenous religious practice and the need to challenge the elimination of indigenous ceremonies.

30. **Wyoming.** In January 2014, the Tenth Circuit Court of Appeals ruled in *Yellowbear v. Lampert* that a federal district court improperly dismissed a case in which an indigenous prisoner challenged a decision to completely bar him from sweatlodge ceremonies due to the cost of transporting him from a special unit where he was held for his own safety.³⁶ The Tenth Circuit found this complete ban on participation was a cognizable claim under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”). Filed in 2011, the merits of the case will finally be heard by a court. This case not only demonstrates the pervasiveness of restrictions by state and local departments of corrections but also attests to the impossibility of rectifying the current pattern of human rights abuses on a case-by-case basis given the widespread nature of the violations and the failure of the United States to guarantee timely and effective remedies.

31. **Hawai‘i.** On January 20, 2014, Huy, along with the Native American Rights Fund, filed a brief as *amicus curiae*, or “friend of the court,” in the case of *Davis v. Abercrombie* in federal district court in the State of Hawai‘i.³⁷ Hawai‘i has, since 1995, engaged in the controversial practice of sending prisoners to facilities on the mainland United States, with over half being held in private prisons such as those operated by the Corrections Corporation of America (“CCA”).³⁸ In 2012, two Hawaiian prisoners were killed in separate incidents at CCA facilities in Arizona, illustrating larger concerns with CCA’s failure to protect the basic human rights of indigenous prisoners.³⁹ In *Davis*, Native Hawaiian prisoners in CCA facilities in Arizona, thus far, have been deprived of access to a Pohaku O Kane, a sacred space for prayer, refuge, and atonement that utilizes a stone altar.⁴⁰ Despite prisons throughout the country successfully accommodating various forms of group worship, including indigenous sweatlodges that utilize fire and stones and that are permitted at the very facilities at issue, CCA claims that unsubstantiated safety concerns support a complete ban on the Native Hawaiian stone altar necessary for associated religious ceremonies. Far from posing threats to prison security or administrative needs, religious practice in prisons furthers rehabilitation and reduces

³⁵ Associated Press, “Indiana Prison Resuming Native American Services,” Post-Tribune (April 30, 2013), <http://posttrib.suntimes.com/news/27152119-418/indiana-prison-resuming-native-american-services.html#.U8SHK41dXv0>.

³⁶ *Yellowbear v. Lampert*, No. 12-8048 (10th Cir. 2014) <http://www.ca10.uscourts.gov/opinions/12/12-8048.pdf>.

³⁷ For background, see Order Denying Defendants’ Motion to Transfer Venue, *Davis v. Abercrombie*, No. 11-00144, http://www.gpo.gov/fdsys/pkg/USCOURTS-hid-1_11-cv-00144/pdf/USCOURTS-hid-1_11-cv-00144-0.pdf; see also Amicus Curiae Brief in Support of Plaintiffs’ Opposition to Summary Judgment, <http://turtletalk.wordpress.com/2014/04/02/federal-court-rules-against-native-hawaiians-prisoners-in-religious-freedom-case/>.

³⁸ See Department of Sociology University of Hawaii at Manoa and Department of the Attorney General State of Hawaii, *Hawaii’s Imprisonment Policy and the Performance of Parolees Who Were Incarcerated In-State and on the Mainland* (2011), <http://ag.hawaii.gov/cpja/files/2013/01/AH-UH-Mainland-Prison-Study-2011.pdf>.

³⁹ See ACLU, *Family of a Second Hawaii Prisoner Murdered in Mainland Prison Files Suit Against State of Hawaii and Corrections Corporation of America*, <https://www.aclu.org/node/34901>.

⁴⁰ *Davis v. Abercrombie*, No. 11-00144, Order on Summary Judgment, <http://turtletalk.wordpress.com/2014/04/02/federal-court-rules-against-native-hawaiians-prisoners-in-religious-freedom-case/>.

recidivism.⁴¹ Held nearly 3,000 miles from their families and their indigenous homelands, the importance of religious freedom for Native Hawaiian prisoners takes on heightened importance and is critical to their rehabilitation and survival.

32. **Missouri.** On November 18, 2013, Huy received a letter of allegation from an indigenous prisoner incarcerated by the Missouri Department of Corrections, contending that indigenous prisoners have not been allowed access to sweatlodge ceremonies since 2000. After an indigenous prisoner's *pro se* claims pursuant to the First Amendment of the U.S. Constitution and RLUIPA were originally dismissed by a federal district court, the Eighth Circuit Court of Appeals reversed the dismissal and remanded the matter to the district court, only to have the prisoner's case again dismissed by the trial court on summary judgment.⁴² This case, too, illustrates the impossibility of remedying the current pattern of human rights abuses against indigenous prisoners in the United States, on a case-by-case basis.

33. **Washington.** In 2010, the Washington Department of Corrections prohibited almost all indigenous prisoners' religious practices, banned tobacco, reclassified sacred medicines such as sage and sweet grass as non-religious, prohibited foods for traditional meals such as frybread and buffalo, disallowed children from attending summer prison pow wows, and altered regulations so that certain religious items could no longer be securely stored. After ten tribes petitioned the governor, the Department of Corrections reversed course, consulting with tribal leaders about reforms and reaching an accommodation to restore indigenous prisoners' religious rights.⁴³ Events in Washington demonstrate both the larger pattern of rising state restrictions on indigenous prisoners' rights as well as the importance of consultation with indigenous peoples concerning administrative measures that affect them. That state-tribal consultation and reform is what gave rise to Huy. The Washington Department of Corrections and Huy recently entered a memorandum of understanding to formalize and commemorate their relationship. This partnership is the first of its kind and has allowed Huy to donate nearly \$100,000 to the Department of Corrections to provide the increased security and supplies needed for indigenous prisoners to hold important ceremonies.⁴⁴ Indeed, Washington now stands as a potential model for meaningful state-indigenous peoples consultation and collaboration with respect to state corrections policy regarding Native American prisoners' religious property and ceremony vis-à-vis the shared penological goals of state and indigenous governments in the United States.

C. Failure to Comply with International Obligations

34. Although protections for indigenous prisoners' religious freedoms have been formally enshrined in domestic law, these measures have proved insufficient to deter state agencies from imposing significant burdens on indigenous prisoners' exercise of religion without consultation

⁴¹ See, e.g., Melvina T. Sumter, *Religiousness and Post-Release Community Adjustment: Graduate Research Fellowship – Final Report* (2000), <https://www.ncjrs.gov/pdffiles1/nij/grants/184508.pdf>; Harvard Pluralism Project, *Sweatlodges in American Prisons* (2005), <http://www.pluralism.org/reports/view/103>.

⁴² See *Pounders v. Kempker*, No. 03-254 (8th Cir. 2013) (unpublished), <http://media.ca8.uscourts.gov/opndir/03/10/032054U.pdf>.

⁴³ Gabriel S. Galanda, "Native American Prisoners Obtain Religious Freedom," King County Bar Association Bar Bulletin (July 2012), <https://www.kcba.org/newsevents/barbulletin/BView.aspx?Month=07&Year=2012&AID=article1.htm>.

⁴⁴ Norah West and Gabriel Galanda, "'See You Again/We Never Say Goodbye': Tribal nonprofit, prisons partnership meets religious needs of Native inmates," Department of Corrections Washington State, <http://www.doc.wa.gov/news/stories/2013/072913huyannouncement.asp>.

with indigenous peoples. The First Amendment to the United States' Constitution establishes the right to the free exercise of religion, and the Fourteenth Amendment articulates that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." State constitutions, likewise, protect religious exercise under conditions of equality.⁴⁵

35. The United States' policy, as articulated in the American Indian Religious Freedom Act of 1978 (AIRFA), is to "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions" of indigenous communities.⁴⁶ With respect to prisoners, the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), prohibits prison authorities from substantially burdening an inmate's religious exercise unless in furtherance of a compelling governmental interest and accomplished by the least restrictive means.⁴⁷ As the United States Supreme Court has recognized, prisoners "do not forfeit all constitutional protections by reason of their conviction and confinement in prison."⁴⁸

36. Despite domestic laws, U.S. courts have failed in numerous instances to provide effective remedies to indigenous peoples whose exercise of religion has been restricted. In *Lyng v. Northwest Cemetery*, the U.S. Supreme Court held that AIRFA "had no teeth in it," barring claims from being brought under the statute.⁴⁹ And in applying RLUIPA, courts in numerous instances have failed to protect indigenous prisoners' rights, finding that restrictions either did not constitute substantial burdens or that the state had both a compelling interest and had employed the least restrictive means.⁵⁰

37. Further, the length and cost of litigation in the U.S. judicial system means that courts are often not effective means of ensuring that state correctional agencies and officers do not violate indigenous prisoners' rights to the free exercise of religion under conditions of equality. Case-by-case litigation has been insufficient, as demonstrated by the examples from the five states above, to halt the pattern of increasing state restrictions on indigenous prisoners' religious freedoms.

IV. Nationwide Indigenous Mobilization

38. In response to the United States' increasing and illegal restrictions on indigenous prisoners' rights to freely practice their religion, indigenous organizations throughout the country have mobilized in an effort to support and protect the incarcerated members of their communities.

39. On April 10, 2013, the National Native American Bar Association ("NNABA") passed Resolution # 2013-3, entitled "Supporting the Free Exercise of Indigenous Religion by American

⁴⁵ See, e.g., California Constitution Article 1 § 4, Texas Constitution Article 1 § 6.

⁴⁶ 42 U.S.C. § 1996.

⁴⁷ 42 U.S.C. § 2000cc *et seq.*

⁴⁸ *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

⁴⁹ 485 U.S. 439 (1988).

⁵⁰ See, e.g., *Fowler v. Crawford*, 534 F.3d 931 (8th Cir. 2008) (allowing Missouri prison to deny sweat lodge access for security reasons despite other facilities' use of sweat lodges); *Haight v. Thompson*, 2013 WL 1092969 (W.D. Ky. 2013) (holding prisoners failed to state a claim based on denial of sweat lodge ceremonies and pow wow foods); *Hyde v. Fisher*, 203 P.3d 712 (Idaho Ct. App. 2009) (holding indigenous prisoners could be denied sweat lodge ceremonies due in part to possibility of violence if Indigenous prisoners were given special treatment).

Indian, Alaska Native and Native Hawaiian Prisoners in Domestic Detention Facilities.”⁵¹ NNABA is a national association of indigenous attorneys, judges, law professors, and law students.⁵² The NNABA resolution stated that “notwithstanding ... international, federal, state, and American indigenous government laws and norms, the inherent rights of incarcerated American Indigenous Peoples’ freedom to believe, express and exercise the traditional religions, in various traditional indigenous religious manners, are too frequently violated by federal, state and local government actors in the United States.”⁵³

40. NNABA’s concerns were echoed by resolutions by the Affiliated Tribes of Northwest Indians (“ATNI”)⁵⁴ and the National Congress of American Indians (“NCAI”).⁵⁵ Both organizations passed resolutions entitled “Ensuring the Protection of American Indigenous Prisoners’ Inherent Rights to Practice Traditional Indian Religions.” ATNI represents 57 tribes in the northwestern United States and is recognized as the strongest regional indigenous organization in the country.⁵⁶ NCAI, established in 1944, is the oldest and largest national organization of indigenous tribal governments.⁵⁷

41. The NNABA, ATNI, and NCAI resolutions each denounced the increasing illegal restrictions on the religious freedoms of incarcerated indigenous peoples in violation of both domestic and international law. Further, each resolution called upon the United States and its subdivisions to:

- a. Take all reasonable steps to commend, support, and facilitate incarcerated American Indigenous Peoples’ inherent rights to believe, express, and exercise traditional indigenous religion,
- b. Denounce or cease any unduly inappropriate or illegal federal, state, or local government restriction upon incarcerated American Indigenous Peoples’ inherent rights to believe, express, and exercise traditional indigenous religion, and
- c. Explore how federal, state, and American indigenous governments can jointly develop and advance shared penological goals in regard to incarcerated American Indigenous Peoples.⁵⁸

42. The NNABA, ATNI, and NCAI resolutions also each called for action by the UN Special Rapporteur on the Rights of Indigenous Peoples. On April 19, 2013, Huy submitted a formal Letter of Allegation to the UN Special Rapporteur on the Rights of Indigenous Peoples, “requesting an investigation into the pervasive pattern in the United States of increasing

⁵¹ National Native American Bar Association, Resolution # 2013-3 (April 10, 2013), http://www.nativeamericanbar.org/wp-content/uploads/2012/04/NNABA-Resolution-2013-3_fully-exe.pdf.

⁵² For more information, see <http://www.nativeamericanbar.org/>.

⁵³ NNABA Resolution # 2013-3, supra note 51.

⁵⁴ Affiliated Tribes of Northwest Indians, Resolution # 13-63 (May 13-16, 2013), <http://www.atnitrines.org/sites/default/files/res-13-63-1.pdf>.

⁵⁵ National Congress of American Indians, Resolution # REN-13-005 (June 24-27, 2013), http://www.ncai.org/attachments/Resolution_eHEbGbYvhEkkepreLriGHQGnKTfydkHUPHLXdoUvjsPTUUIWILbe_REN-13-005%20final.pdf.

⁵⁶ For more information, see <http://www.atnitrines.org/>.

⁵⁷ For more information, see <http://www.ncai.org/>.

⁵⁸ Each resolution contained substantially the same language. See NNABA Resolution # 2013-3, supra note 51; ANTI Resolution # 13-63, supra note 54; and NCAI Resolution # REN-13-005, supra note 55.

restrictions on the religious freedoms of indigenous persons who have been deprived of their liberty, particularly by American state corrections agencies and officers.”⁵⁹ The Letter requested that the Special Rapporteur “encourage the United States and its agents . . . to respect American indigenous prisoners’ human rights, to refrain from violating those rights, to correct any current or impending violations, and to engage in meaningful consultation with American indigenous peoples concerning prison administrative regulations, which affect a significant proportion of the country’s American indigenous population.”⁶⁰ The Quinault Indian Nation, Round Valley Indian Tribes, and NNABA each sent letters to the Special Rapporteur in support of the Letter of Allegation and requesting the Special Rapporteur’s intervention.

43. On June 5, 2013, the UN Special Rapporteur on the Rights of Indigenous Peoples and the UN Special Rapporteur on Freedom of Religion or Belief, wrote to the United States of America regarding indigenous prisoners’ religious freedoms.⁶¹ The two Special Rapporteurs stated that they “would like to bring to the attention of [the United States] allegations received concerning the increased number of state-level regulations that restrict the religious freedoms of Native American prisoners, including their participation in religious ceremonies and possession of religious items.” Their communication highlighted the disproportionate rate at which indigenous persons are incarcerated, the importance of religious practice to indigenous prisoners, and, by way of example, regulations in the states of California, Texas, South Dakota, Montana, and Washington. The Special Rapporteurs requested that the United States provide information regarding (1) existing measures to protect indigenous religious freedoms in state and local prisons; (2) existing measures to protect indigenous practices and religious items in the development of institutional policies and regulations; and (3) existing regulations at federal and state levels requiring consultation with indigenous peoples regarding possible restrictions on their religious practices in correctional facilities.

44. Following the United States’ failure to respond to the communication from the Special Rapporteurs, the UN Special Rapporteur on the Rights of Indigenous Peoples published this communication in his February 2014 report to the Human Rights Council.⁶² To date, the United States has failed to respond to this communication despite calls from indigenous leaders, such as NCAI President Brian Cladoosby.⁶³

45. On September 3, 2013, Huy, ATNI, NCAI, NNABA and the Round Valley Indian Tribes, Indigenous Peoples Law and Policy Program of the University of Arizona, Native American Rights Fund, Center for Indian Law and Policy at the Seattle University School of Law, American Civil Liberties Union of Washington, and the American Civil Liberties Union of

⁵⁹ Huy, Letter of Allegation regarding increasing illegal restrictions on indigenous prisoners’ religious freedoms in the United States of America (April 19, 2013), http://turtletalk.files.wordpress.com/2013/04/unsr-letter-of-allegation_indigenous-prisoners-religious-freedom.pdf.

⁶⁰ *Id.*

⁶¹ UN Special Rapporteur on the Rights of Indigenous Peoples, Communication to the United States, AL G/SO 214 (56-23) Indigenous (2001-8) USA 7/2013 (Jun. 5, 2013), [http://unsr.jamesanaya.org/docs/cases/2014a/public_-_AL_USA_05.06.13_\(7.2013\).pdf](http://unsr.jamesanaya.org/docs/cases/2014a/public_-_AL_USA_05.06.13_(7.2013).pdf)

⁶² Human Rights Council, Twenty-fifth Session, Communications report of Special Procedures, A/HRC/25/74 (February 24, 2014), <http://unsr.jamesanaya.org/docs/cases/2014a/2014-joint-communications-a-hrc-25-74-eng.pdf>.

⁶³ Huy, “NCAI President Presses Sec. State Kerry Re: UN American Indigenous Prisoners’ Rights Inquiry,” (April 20, 2014), <http://huycares.org/blog/ncai-president-presses-sec-state-kerry-re-un-american-indigenous-prisoners-rights-inquiry/>.

Southern California submitted a stakeholder report to the UN Human Rights Committee detailing the United States' violations of Articles 2, 10, 18, 26, and 27 of the ICCPR.⁶⁴

46. These recent actions demonstrate that there has been nationwide mobilization of indigenous coalitions around the issue of indigenous prisoners' rights to freely exercise their religion. The concerns expressed by these tribes and coalitions attest to the serious effect illegal restrictions are having on indigenous populations in the United States. Additionally, the mobilization of these prominent indigenous organizations indicates the recognition that, given the pervasiveness of the rising restrictions on indigenous prisoners and the impossibility of countering each instance of illegal action by state departments of corrections, indigenous peoples must come together to seek comprehensive solutions on the national and international levels to the problem of increasing violations of indigenous prisoners' human rights. It is in this spirit that we request the Committee's support in recommending that United States fully implement ICERD at local levels to fulfill its human rights obligations to incarcerated indigenous peoples.

V. Conclusion and Recommendations

47. As the situation of indigenous prisoners' religious freedoms illustrates, the United States is failing to fulfill its obligation to comply with ICERD. The United States incarcerates indigenous peoples at a disproportionate rate and has failed to prevent or effectively remedy violations of incarcerated indigenous persons' religious freedoms. Further, the United States has failed to ensure that state correctional agencies and officers engage in meaningful consultation with indigenous peoples prior to implementing administrative measures that affect them.

48. Although the United States has enshrined principles of religious freedom and equality in federal and state law, these protections have proved insufficient to stop state correctional agencies and officers from engaging in a pattern of increasing illegal restrictions on indigenous prisoners' ability to possess religious items, engage in religious ceremonies, and otherwise engage in traditional religious practices.

49. Because the United States' failure to protect the religious freedoms of incarcerated indigenous peoples violates ICERD Articles 2 and 5, we respectfully request that the Human Rights Committee urge the United States to:

- a. Immediately halt violations of indigenous prisoners' rights to freely exercise their religion;
- b. Instruct its Attorney General to undertake a comprehensive investigation of state laws and policies regarding indigenous exercise of religion;
- c. Engage indigenous communities in meaningful consultation to explore how federal, state, and indigenous governments may jointly develop and advance shared penological goals regarding incarcerated indigenous persons; and
- d. Provide any other recommendations the Committee considers appropriate.

⁶⁴ Joint Submission to the U.N. Human Rights Committee (September 3, 2013), <http://www.nativeamericanbar.org/wp-content/uploads/2012/04/Joint-Submission-Indigenous-Prisoners-Religious-Freedoms-in-the-United-States-Report-to-the-Human-Rights-Committee-109th-Session.pdf>.