

**No. 21-16068**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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ERNEST JORD GUARDADO,  
*Plaintiff-Appellant,*

v.

STATE OF NEVADA, et al.,  
*Defendants-Appellees.*

On Appeal from the United States District Court  
for the District of Nevada  
No. 2:18-cv-00198-GMN-VCF  
Hon. Gloria M. Navarro

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**APPELLANT'S OPENING BRIEF**

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## INTRODUCTION

This appeal concerns the constitutionality of an undisputed racial restriction on religious exercise in prison. Specifically, the appeal challenges the district court’s refusal to extend its finding on summary judgment that a state prison violated federal statutory law in thwarting an inmate’s sincere need to participate in communal Native American worship because he lacked documentation proving Native American race.

Because both the statutory and constitutional claims require strict scrutiny of this racial classification, the district court should have granted judgment to the inmate on all claims, with distinct remedies to follow. Moreover, to the extent a standard more deferential to the prison applies, Defendants cannot justify their actions in any event.

On summary judgment, the district court rightly found that Defendants Nevada Department of Corrections and its officials (collectively “NDOC”) violated the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) by barring Plaintiff Ernest Guardado from participating in rituals central to his Native American faith—including sweat-lodge and pipe ceremonies—based on his lack of tribal membership or similar certification of Native American race.

In its order, the court found that Guardado’s exclusion triggered strict scrutiny under RLUIPA by substantially burdening his sincere religious exercise in conditioning that exercise on Native American lineage. What’s more, the court found that NDOC could not satisfy strict scrutiny because: (1) the stated reasons for its policy—limited staff for larger gatherings, the risk of violent divisions between Native American and other inmates, and the misuse of eagle feathers—were unsupported; and (2) the only alternative NDOC proffered—access to the rituals of other earth-based faith groups—would not alleviate the burden on Guardado’s Native American religious practice, much less his role as a nominated elder in that community of practitioners in his prison.

Unfortunately, the district court erred by abandoning this logic for Guardado’s claims under the First and Fourteenth Amendments. The court instead found that the race-based burden on Guardado’s religion need only meet the more deferential test for evaluating the constitutionality of prison regulations articulated by the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 89 (1987); namely, the regulation must be “reasonably related to legitimate penological interests.” And under this standard, the district court found that the RLUIPA-violating

limitation on access to Native American rituals was nonetheless constitutional because it credited NDOC's assertions that: (1) Guardado could practice his faith alone in his cell with materials on the history and practices of Native religion; and (2) NDOC had an interest in avoiding possession of eagle feathers by non-Native Americans.

But as the Supreme Court held in *Johnson v. California*, 543 U.S. 499, 509 (2005), the *Turner* standard does not apply in the “immediately suspect” context of “racial classifications.” When it comes to race, the Court in *Johnson* insisted, strict scrutiny remains the rule both inside and outside the prison context. Accordingly, the district court erred in failing to apply strict scrutiny to Guardado's constitutional claims over what that court found was a case of “intentional[ ] discrimination against Plaintiff on the basis of race.” 1-ER-19. And because the district court already determined that this discrimination did not pass strict scrutiny under RLUIPA as a matter of law, this Court should reverse and likewise remand for entry of judgment for Guardado on his constitutional claims—or at least remand for trial under *Johnson*.

Alternatively, to the extent the *Turner* standard applies, this Court should reverse and remand for trial on that standard. Under *Turner*, the

challenged prison regulation must be evaluated using four factors: (1) the rationality of the connection between the regulation and a valid government interest; (2) the presence of other ways the inmate can exercise his rights; (3) the impact on staff, resources, and other inmates; and (4) whether the prison's actions are exaggerated in light of the alternatives. In its analysis, not only did the district court fail to address at all the third and fourth factors, there was ample evidence to prevent summary judgment for the prison based on the first two factors.

This Court should reverse and remand for entry of judgment for Guardado, or at least trial on the merits, on his constitutional claims.

### **JURISDICTIONAL STATEMENT**

Guardado filed his lawsuit under RLUIPA and the First and Fourteenth Amendments to the United States Constitution (via 42 U.S.C. § 1983). Accordingly, the district court had jurisdiction over the case under 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1343(a)(3) (federal civil rights); and 42 U.S.C. § 2000cc-2 (RLUIPA).

Furthermore, this Court has jurisdiction over this appeal from a final judgment under 28 U.S.C. § 1291. Guardado filed a notice of appeal during the pendency of his timely motion for reconsideration of a final

judgment under Rule 60 of the Federal Rules of Civil Procedure and Rule 4(a)(4) of the Federal Rules of Appellate Procedure. 1-ER-2–22; 2-ER-35–129; 3-ER-443. On this Court’s order, Guardado then filed a timely notice of his intent to prosecute this appeal after the motion for reconsideration was resolved. 1-ER-31–32; 1-ER-23–30; 2-ER-34.

### **STATEMENT OF ADDENDUM**

The full text of the relevant constitutional provisions, statutory provisions, and rules is set forth in the addendum attached to this brief. *See* 9th Cir. R. 28-2.7.

### **ISSUES PRESENTED**

1. Whether the district court erred in granting summary judgment to NDOC on Guardado’s First and Fourteenth Amendment claims by failing to apply strict scrutiny to its restriction of his religious exercise on the basis of race, and should have instead granted summary judgment to Guardado.

2. Whether, in the alternative, the district court erred in granting summary judgment to NDOC on Guardado’s First and Fourteenth Amendment claims under the *Turner* standard.

## STATEMENT OF THE CASE

**A. Nevada inmate Ernest Guardado is a longstanding believer in Native American religious practices, and is honored as a leader in that faith by fellow inmates.**

Ernest Jord Guardado is a prisoner in the custody of the Nevada Department of Corrections. 3-ER-341.<sup>1</sup> He is also a devout believer in Native American religious practice. 3-ER-345.

To exercise his religion, Guardado must participate in the following four practices:

- *Sweat Ceremony*. 3-ER-423. This ceremony is a communal practice that takes place in an outdoor sweat lodge, “a house of prayer and meditation . . . for those who share [the] Native American religious tradition.” *Yellowbear v. Lampert*, 741 F.3d 48, 52 (10th Cir. 2014). Guardado has explained the ritual is a “cornerstone” of his faith. 3-ER-423; *see also* 3-ER-336 (calling it a “powerful ceremony that helps participants to learn, grow, heal, and be cleansed”).
- *Sacred Pipe Ritual*. 3-ER-423. This ritual is described as the “only” way for Native American believers to offer prayers to the Spirits. *Chance v. Tex. Dep’t of Crim. Just.*, 730 F.3d 404, 408 (5th Cir. 2013). “During the ceremony, the Sacred Pipe is passed around the group, with each participant smoking the pipe and offering his personal prayers as he exhales the smoke.” *Id.*
- *Smudging*. 3-ER-423. Smudging is a purification ritual performed prior to other forms of worship. 3-ER-386. It is “an elemental component of the Native American faith.” *Chance*, 730 F.3d at 409.

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<sup>1</sup> As the district court observed, “[i]n light of [Guardado]’s [then-]status as a pro se litigant, the Court has liberally construed his filings, holding them to standards less stringent than formal pleadings drafted by attorneys.” 1-ER-2.

Smudging “involves burning a small amount of herbs and then fanning the resulting smoke over the individual, any sacred object to be used, and the ceremonial site.” *Id.*

- *Prayer and Drum Circle*. 3-ER-423. According to the Federal Bureau of Prisons, Native prayers are offered in a circle and often accompanied by drums. Fed. Bureau of Prisons, Dep't of Just., *Inmate Religious Beliefs and Practices: Native American* 12-14 (Mar. 27, 2002). Such prayer is a group, not an individual, practice. *See also id.* at 16-18 (bibliography on Native American religion).

Notably, NDOC recognizes that these Native American practices require use of outdoor grounds and group participation. *See* NDOC Administrative Regulation (“AR”) 810.2 at 5; *see also* 2-ER-59 (“Earth-based Groups”). Guardado explained to the district court that NDOC forbids him from burning herbs, smudging, smoking the sacred pipe, or performing the sacred sweat in his cell. 2-ER-248. Moreover, the only Native American worship practice listed as a personal practice in NDOC’s policies is “smudging during sweat-lodge ceremonies”—ceremonies that are inherently communal and practiced outdoors. AR 810.2 at 5.

Throughout the years, Guardado has “played a significant part in the Native American group” at his prison. 2-ER-163. In fact, the group nominated Guardado as one of three group elders, a responsibility that he accepted. *Id.* Guardado has also performed a “Hunkapi” ceremony

with another Native inmate, creating a sacred bond that is “stronger than blood relatives.” *Id.*

**B. In 2017, Nevada prison officials forbid Guardado from practicing Native American forms of worship because he cannot prove membership in that race.**

AR 810.3 provides that, to be eligible to participate in Native American sweat-lodge and pipe ceremonies, an inmate must meet one of the following four criteria:

- a. Show proof of being enrolled in a federally recognized tribe.
- b. Demonstrate credible association with tribal living via written documentation from a recognized tribe.
- c. Demonstrate credible association with tribal living via written documentation from a tribe recognized by the United States Government as having existed prior to 1887 (Dawes Act enacted) but not necessarily registered with the federal government.
- d. Successfully obtain written verification of Native American ethnicity from the Nevada Indian Commission (“NIC”).

2-ER-65–66. As the district court described them, these criteria “discriminate against [an inmate] on the basis of his race.” 1-ER-19.

Guardado is of Mexican-American descent and is unable to provide documentation of Native American heritage. 3-ER-345. He was able to access the Native American sweat-lodge grounds for a time by registering as a Wiccan. 2-ER-28. The worship schedule then allowed Guardado to

practice with other Native American practitioners in that capacity. *See* 2-ER-163.

In 2017, however, NDOC began strictly enforcing AR 810.3 § 9 at Guardado's prison—only those inmates meeting its requirements could participate in Native American communal worship. *Id.*; *see also* 2-ER-140. Defendants thus prohibited Guardado from accessing the Native grounds and faith rituals. 3-ER-345. Frustrated, Guardado spoke to Defendant Chaplain Julio Calderin, asserting that AR 810.3 and associated procedures violated his constitutional rights. 3-ER-428.

**C. The prison rejects Guardado's internal grievances.**

Guardado informally complained to NDOC about his lack of access to the Native American grounds and the denial of his religious exercise. 1-ER-3. After three months with no answer, he began the formal grievance process. *Id.* In response to Guardado's initial grievance, NDOC explained that the requirement of proving Native American descent was imposed by the Nevada Indian Commission ("NIC"). *Id.* Guardado immediately responded by filing a first level grievance, pointing out that

the NIC had no authority over NDOC.<sup>2</sup> *Id.* NDOC replied by quoting AR 810.3. 1-ER-3. Upon Guardado’s filing of a second level grievance, NDOC told Guardado he needed to contact a “religious review team.” 1-ER-4. And although Guardado then presented to that team his claim that AR 810.3 contained an unconstitutional exclusion, it never responded. *Id.*

Guardado also tried on at least two occasions to change his faith registration to Native American. 1-ER-5. However, NDOC denied these requests, first saying he had “no proof of being Native American” and then saying he had “no tribal papers.” *Id.* Meanwhile, there is evidence that NDOC authorized several inmates at Guardado’s prison—including those who could not provide documentation of Native American race—to participate in communal Native ceremonies, contrary to the stated policy of AR 810.3. *See* 2-ER-166–71; 2-ER-120–25 (showing that certain inmates authorized to participate in Native American religious

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<sup>2</sup> The NIC, moreover, explained it does not have the statutory authority to determine Native American ethnicity. 3-ER-301. Since 2009, the NIC has also expressed concerns about AR 810.3 and in 2018 asked NDOC to remove it from the regulation, but NDOC refused because of “pending litigation.” *Id.*; *see also* 3-ER-327; 2-ER-172–73.

ceremonies are not categorized under the “American Indian” race); 2-ER-127 (list of inmates authorized for group worship as of August 6, 2019).

**D. Guardado sues and secures a preliminary injunction.**

On February 2, 2018, Guardado filed this suit, alleging that NDOC’s race-based condition on Native American practice violates the First Amendment’s Free Exercise Clause, Fourteenth Amendment’s Equal Protection Clause, and RLUIPA. 3-ER-432–38.

Guardado also filed a motion for preliminary injunction. 3-ER-420–31. The court thereafter granted an injunction temporarily ordering NDOC to allow Guardado access to the Native spiritual grounds and participation in “Native American religious ceremonies with Native American practitioners.” 3-ER-418. In doing so, the district court emphasized that Guardado “would be greatly harmed if he is not able to exercise his chosen religion.” 3-ER-417.

**E. The district court grants summary judgment to each side on different claims: to Guardado on the RLUIPA claim on strict-scrutiny grounds, and to the prison on the constitutional claims under the *Turner* standard.**

On cross-motions for summary judgment, the district court found as a global matter that there is no genuine dispute of material fact as to the sincerity of Guardado’s faith and rejected as “misguided” NDOC’s

view that “one’s race is directly tied to the sincerity of one’s religious beliefs.” 1-ER-11. The court also found that NDOC imposed a substantial burden on Guardado’s religion by conditioning its exercise on proof of Native American lineage—something Guardado could not provide. *Id.*

Turning to the RLUIPA defense, the lower court found that NDOC could not justify the burden on Guardado’s religious exercise because AR 810.3 is not the “least restrictive means” of furthering a “compelling governmental interest.” 1-ER-12–16. NDOC claimed that allowing non-Native American inmates to practice with Native inmates would overwhelm prison staff and increase the risk of inmate violence. *Id.* It also intimated that non-Native American access would lead to the misuse of eagle feathers. 1-ER-15. The district court dismissed the staffing assertion as “speculation” because it assumes, without any evidence, that all inmates would be willing to forego their own sincerely held religious beliefs to partake in Native American ceremonies. 1-ER-13. In rejecting the risk-of-violence and eagle-feathers assertions, the court concluded NDOC could not identify “even one actual instance” of inmate violence or demonstrate that ensuring lawful possession of eagle feathers furthers

safety or security interests. 1-ER-14, 16. The court also noted that Guardado did not include a request to possess an eagle feather. 1-ER-16.

Additionally, the district court found that NDOC failed to show it considered and rejected less restrictive measures and instead relied on “broad generic assertions.” 1-ER-15. The court found, moreover, that providing Guardado the option to participate in a non-Native American sweat-lodge ceremony is not a less restrictive alternative because he is still “restricted from exercising his chosen religion.” 1-ER-16.

The district court then went on to grant summary judgment in favor of NDOC on Guardado’s First and Fourteenth Amendment claims. The court found that NDOC “intentionally discriminated against [Guardado] on the basis of his race” and “violated [his] right to equal protection of the law.” 1-ER-17. Nonetheless, the court used the more permissive *Turner* standard to conclude that AR 810.3 passes constitutional muster. 1-ER-17–20. It found that prohibiting non-Native inmates from participating in ceremonies where eagle feathers may be used is reasonably related to NDOC’s interest in preventing their unlawful possession. 1-ER-18. The court also adopted NDOC’s assertion that Guardado can practice individually in his cell with “materials on the history and practices of

Native American religion” as an alternative to outdoor communal practice. *Id.* The district court did not discuss two of the four *Turner* factors—system impacts or alternatives for the prison to meet its goals.

This appeal follows.

### **SUMMARY OF THE ARGUMENT**

The district court committed reversible error in entering summary judgment against Guardado on his constitutional claims. Most notably, the court applied the more deferential *Turner* standard to NDOC’s exclusion of Guardado from practicing his faith when, under *Johnson*, it should have applied strict scrutiny based on the racial grounds for that exclusion. From there, because the lower court rightly found that the NDOC policy fails strict scrutiny under RLUIPA, this Court should remand for judgment in Guardado’s favor under *Johnson*; or, at a minimum, it should remand to allow the district court to apply *Johnson* in the first instance.

Alternatively, to the extent *Turner* applies, this Court should reverse and remand for trial because the lower court failed to apply *Turner*’s required elements, and evidence on those elements is at least disputed.

As the district court found, in applying AR 810.3 NDOC “intentionally discriminated against [Guardado] on the basis of race” in excluding him from Native American worship. 1-ER-19. Under *Johnson*, therefore, NDOC must satisfy strict scrutiny to defeat Guardado’s constitutional challenge since racial classifications—even in prison—are “immediately suspect.” 543 U.S. at 509. But because the district court instead applied the more deferential *Turner* standard—i.e., the prison’s actions must be “reasonably related to legitimate penological interests”—it committed reversible error. 482 U.S. at 89.

What’s more, and as the district court found in the RLUIPA context, NDOC’s supposed compelling interests—staffing, safety, and the misuse of eagle feathers—are neither supported by evidence nor justify Guardado’s exclusion from group worship as a means least restrictive of religious exercise. Thus, no more proceedings should be needed for Guardado to prevail. Of course, if there is any doubt, the district court should at least analyze Guardado’s claims under *Johnson* in the first instance.

In the alternative, to the extent *Turner* applies, this Court should reverse and remand because the district court has so far addressed only

two of that test's four factors, and there is at least disputed evidence on each factor as well. In applying *Turner* in a single paragraph, the district court said that (1) AR 810.3 serves a legitimate penological interest in limiting illegal possession of eagle feathers; and (2) Guardado has the option to practice in his cell by obtaining materials on his faith.

The court, however, did not address the remaining *Turner* factors of whether (3) AR 810.3 can be justified by the impact on staff, resources, and other inmates; or (4) NDOC could meet its supposed concerns in other ways. As this Court has held, even where a prison has a legitimate interest, “[t]he other three *Turner* factors must also be evaluated before a court can decide whether the prison regulation or policy is permissible.” *Hrdlicka v. Reniff*, 631 F.3d 1044, 1051 (9th Cir. 2011).

Moreover, the evidence undercuts a finding for NDOC on each of the four *Turner* factors. As to the first of the two factors the district court addressed, the court's singular concern about illegal possession of eagle feathers in Native American ceremonies is unsupported by the evidence; indeed, Guardado nowhere seeks access to feathers in these rituals and can participate without them. Regarding the second factor—alternative means of religious practice—not only is the district court's suggestion

that Guardado could practice in his cell unsupported by any evidence that his beliefs include solitary exercise, it is undisputed that the group rituals Guardado has been denied are both integral to his Native American faith and part of NDOC's understanding of that faith.

Lastly, as to the third and fourth *Turner* factors, although the district court nowhere addresses the third factor of external impacts on staff, resources, and other inmates, its rejection under RLUIPA of similar concerns—officer overload, violence by or among inmates, desecration of the site—discounts such a finding under *Turner*. Similarly, although the district court also ignored the fourth and final factor—alternatives for the prison to meet its goals—other state prison systems, and even NDOC itself in the past, have taken approaches that do not bar non-Native Americans from joining Native worship.

### **STANDARD OF REVIEW**

This Court reviews de novo a district court's grant of summary judgment. *2-Bar Ranch Ltd. P'ship v. U. S. Forest Serv.*, 996 F.3d 984, 990 (9th Cir. 2021). Accordingly, this Court determines if the district court correctly applied the substantive law and, viewing the evidence in the light most favorable to the nonmoving party, whether there are

genuine issues of material fact. *Soc. Techs. LLC v. Apple Inc.*, 4 F.4th 811, 816 (9th Cir. 2021).

In conducting this review on cross-motions for summary judgment, moreover, this Court may affirm, reverse and remand for trial, or reverse and direct the district court to grant the other side's motion. *Herrera v. Command Sec. Corp.*, 837 F.3d 979, 985 (9th Cir. 2016). A grant of "summary judgment requires the absence of any genuine issue of material fact." *Shakur v. Schriro*, 514 F.3d 878, 885 (9th Cir. 2008). Summary judgment is not proper if material factual issues exist for trial. *See Simo v. Union of Needletrades*, 322 F.3d 602, 610 (9th Cir. 2003).

In assessing whether summary judgment should be ordered, however, neither "[c]onclusory, self-serving affidavit[s], lacking detailed facts and any supporting evidence" nor "declarations not based on personal knowledge" raise a genuine issue of material fact. *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1063 (9th Cir. 2012) (internal quotation marks omitted).

## ARGUMENT

### I. THIS COURT SHOULD REVERSE AND REMAND FOR JUDGMENT IN GUARDADO'S FAVOR ON HIS CONSTITUTIONAL CLAIMS UNDER *JOHNSON*.

#### A. According to *Johnson*, constitutional challenges to racial classifications in prison trigger strict scrutiny.

As a general matter, courts evaluate constitutional challenges to prison regulations or policies under the “reasonableness” test set forth in *Turner v. Safley*, 482 U.S. at 89; namely, whether the prison regulation or policy at issue is “reasonably related to legitimate penological interests.” *O’Lone v. Est. of Shabazz*, 482 U.S. 342, 349 (1987).

In *Johnson v. California*, however, the Supreme Court made clear that a different rule applies to race. In that case, the Court held, strict scrutiny is the proper standard because racial classifications are “immediately suspect.” 543 U.S. at 509; *see also Harrington v. Scribner*, 785 F.3d 1299, 1305 (9th Cir. 2015) (“In *Johnson*, the Supreme Court was unequivocal that strict scrutiny is the proper standard of review for an equal protection challenge to a race-based prison policy.”). To justify a racial classification, therefore, a prison must prove its policy “is narrowly tailored to serve a compelling state interest.” *Johnson*, 543 U.S. at 509.

Indeed, the Court in *Johnson* further stressed: “We have never applied *Turner* to racial classifications,” citing three core rationales. 543 U.S. at 510. First, the Court observed, the *Turner* test is “too lenient a standard to ferret out invidious uses of race,” especially in the prison context where “the government’s power is at its apex” and a “searching judicial review” of racial classifications is therefore necessary. *Id.* at 511, 513. Second, the Court warned, racial classifications threaten to incite racial hostility in prison—even if, in *Johnson*, the prison’s claimed justification for discrimination was racial violence. *Id.* at 507. Third, the Court observed that granting prisons an exemption from the rule that strict scrutiny applies to racial classifications would undercut “unceasing efforts to eradicate racial prejudice from our criminal justice system.” *Id.* at 512 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987)).

Thus, the government must prove, even for seemingly “benign” racial classifications, that it is pursuing a goal important enough to warrant such a highly suspect tool. *Johnson*, 543 U.S. at 505-06. And the burden of satisfying strict scrutiny is indeed a heavy one, as “racial classifications are simply too pernicious to permit any but the most exact

connection between justification and classification.” *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (internal quotation marks omitted).

**B. Because NDOC’s application of AR 810.3 discriminates against inmate religious practice on the basis of race, the district court erred in applying *Turner* rather than *Johnson*.**

In its summary-judgment order, the district court rightly found that NDOC’s application of AR 810.3 “intentionally discriminated against [Guardado] on the basis of his race” and thus “violated [his] right to equal protection of the law.” 1-ER-19. According to *Johnson*, therefore, the court should then have applied strict scrutiny rather than the “reasonableness” test in *Turner*. It unfortunately failed to do so.

As the district court put it, “the language in AR 810.3 draws an explicit racial distinction” by conditioning access to Native American sweat-lodge ceremonies on the ability of inmates to “provide evidence of their Native American heritage.” 1-ER-19. What’s more, the lower court added, “there is no factual dispute that [Guardado]’s requests were denied more than once based on his lack of ‘tribal papers.’” *Id.*; see also *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982) (treating district court finding of intention to discriminate on the basis of race as “a pure question of fact”). In other words, Guardado and any other non-

Native American inmate with a sincere religious need to access Native worship is refused, while similarly situated Native Americans are accepted. The differential treatment of similarly situated individuals on racial grounds is a quintessential violation of equal protection. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985).

In an unpublished decision, the Nevada Supreme Court likewise recently treated the regulation here as a form of race discrimination. *Kille v. Calderin*, No. 72358, 2019 WL 2089533, at \*2 (Nev. May 10, 2019). Other courts facing similar requirements have agreed. *See Morrison v. Garraghty*, 239 F.3d 648, 652, 657-58 (4th Cir. 2001) (treating the conditioning of an inmate's use of Native American spiritual items on tribal membership or association as race discrimination); *accord Mitchell v. Angelone*, 82 F. Supp. 2d 485, 491 (E.D. Va. 1999).<sup>3</sup>

Given the district court's finding that NDOC's application of AR 810.3 was a form of intentional race discrimination and the Supreme

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<sup>3</sup> Although *Mitchell* and *Morrison* applied *Turner*, they predate *Johnson* and the courts there nonetheless rejected the restrictions on religious exercise under that more permissive standard. *See Mitchell*, 82 F. Supp. 2d at 491-93; *Morrison*, 239 F.3d at 66-62. In the unpublished decision of *Kille*, the Nevada Supreme Court did not mention *Johnson* but likewise condemned AR 810.3 under *Turner*. *Kille*, 2019 WL 2089533, at \*2.

Court's insistence in *Johnson* that race discrimination can be justified only if it satisfies strict scrutiny, the district court should have applied this heightened standard. It committed reversible error, however, by applying the "reasonableness" test from *Turner* instead.

**C. As the district court has already found in its RLUIPA analysis, NDOC's race-based restriction on inmate religious exercise cannot survive strict scrutiny.**

**1. AR 810.3 does not further compelling governmental interests.**

To survive constitutional strict scrutiny, Defendants must prove that racial classifications are narrowly tailored measures that "further compelling governmental interests."<sup>4</sup> *Johnson*, 543 U.S. at 505. While courts have recognized prison security and safety as compelling interests, *see id.* at 512, 514, that alone is not enough: "[O]fficials' security concerns must be "grounded on more than mere speculation, exaggerated fears, or post-hoc rationalizations" to ensure prison policies actually further these interests. *Fowler v. Crawford*, 534 F.3d 931, 939 (8th Cir. 2008) (internal quotation marks omitted) (conducting this analysis in analogous

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<sup>4</sup> RLUIPA uses nearly identical language in defining the compelling-interest prong of the strict-scrutiny inquiry: It requires that a burden on religious exercise be the least restrictive means of "furthering [a] compelling governmental interest." 42 U.S.C. § 2000cc(1)(a).

RLUIPA inquiry). As the district court found, what NDOC offered is not enough.

NDOC posits that AR 810.3 furthers its compelling interest in health, safety, and security in two ways. 2-ER-197. First, citing the number of inmates at Guardado's prison, NDOC explains that it would not be able to supervise all inmates who wish to take part in Native American ceremonies. *Id.* Second, NDOC contends that AR 810.3 prevents potential violence between Native and non-Native inmates. 2-ER-197–98.

These assertions are not supported by the record. There is no evidence that an overwhelming number of inmates would be willing to forego their own sincerely held religious beliefs to partake in Native ceremonies should that option be open to them. Moreover, Defendant Snyder's assertions about inmate violence are unsupported by any actual incidents at Guardado's prison or other institutions. 2-ER-238–40.

In granting Guardado summary judgment on his RLUIPA claim, the district court rightly refused to recognize these proffered interests as compelling justifications for the racial restriction. 1-ER-14 (“Put simply, Defendants fail to identify even one actual instance of sweat lodge

destruction or inmate violence in support of a ‘compelling interest.’”). The court further noted that Defendant Snyder’s assertions were based on inadmissible hearsay. *Id.* Lastly, it dismissed as mere “speculation” NDOC’s contention that staff would become overwhelmed if non-Native inmates were allowed to partake in Native ceremonies. 1-ER-13.

Moreover, nowhere in its analysis does the district court say—nor has NDOC asserted—that preventing unlawful eagle feather possession is a “compelling interest” advanced by the racial restriction on access to Native American grounds. To the contrary, another provision of AR 810.3 already regulates eagle feathers and NDOC has put forth no evidence to show that this provision is inadequate. *See* 2-ER-65.

**2. Even if NDOC’s interests were compelling, AR 810.3 is not narrowly tailored.**

To demonstrate narrow tailoring, NDOC must show that “reasonable men and women could not differ regarding the necessity of a racial classification” and that the classification is “the least restrictive alternative.” *Richardson v. Runnels*, 594 F.3d 666, 671 (9th Cir. 2010) (reversing summary judgment in favor of prison on equal protection claim because it failed to present evidence that all inmates of a certain race posed a security risk). This Court, moreover, gives no deference to

penological interests when assessing whether a racial prison policy is narrowly tailored. *Harrington*, 785 F.3d at 1307-08.

The restriction in AR 810.3 is not narrowly tailored for four reasons described in more detail below: (1) the district court already found that the policy is not the “least restrictive means” of furthering NDOC’s goals under RLUIPA; (2) there is no evidence that allowing sincere non-Native American inmates access to Native ceremonies would increase violence or division; (3) any concern about illegally possessing eagle feathers is misplaced; and (4) there is nothing particular about Native American religious practice that requires the racial exclusion here.

First, in its RLUIPA analysis, the district court already found that the policy is not the least restrictive means of furthering Defendants’ goals. 1-ER-16. Because the narrow tailoring analysis for constitutional claims is also a “least restrictive” inquiry, it follows that AR 810.3 fails narrow tailoring as well. *See, e.g., Hernandez v. Cate*, 918 F. Supp. 2d 987, 1008 (C.D. Cal. 2013); *Bernal v. Fainter*, 467 U.S. 216, 219 (1984) (holding that a law discriminating on the basis of alienage must be “the least restrictive means available” to withstand strict scrutiny).

Second, NDOC cannot show that granting non-Native American practitioners access to sweat lodges would be more dangerous than granting such access to Native practitioners. *See Mitchell*, 82 F. Supp. 2d at 491 (using this rationale to hold that a race-based religious property policy violated the Equal Protection Clause); *Morrison*, 239 F.3d at 660-61 (same). In fact, the record is to the contrary: There have “never been any issues” with Guardado or other non-Native Americans participating in Native ceremonies. 1-ER-10. Worse yet, the mere presence of a racial classification threatens to “stigmatize individuals” and “incite racial hostility.” *Johnson*, 543 U.S. at 507.

Third, the discriminatory nature of AR 810.3 is not narrowly tailored to advancing NDOC’s purported interest of preventing non-Native American inmates from illegally possessing eagle feathers. Narrow tailoring “require[s] serious, good faith consideration of workable race-neutral alternatives.” *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *accord Richardson*, 594 F.3d at 671. As the district court correctly pointed out in its RLUIPA analysis, the record “does not show that Defendants have actually considered and rejected the efficacy of less restrictive measures.” 1-ER-15. Moreover, AR 810.3 is overinclusive since Guardado

does not require possession of eagle feathers in these ceremonies—nor, as the district court noted, does he seek to possess them here. 1-ER-16; 3-ER-370; *see City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 506 (1989) (holding program fails narrow tailoring due to overinclusiveness).

Fourth, AR 810.3 singles out Native American religion for inferior treatment on racial grounds and NDOC cannot justify why. No other religious group is required to provide documentation of race to practice their sincerely held religious beliefs. 3-ER-437. Yet NDOC does not show that prisoners of Native American religion are “more inclined than prisoners of other religions” to use faith practice in nefarious ways. *See Ben-Levi v. Brown*, 577 U.S. 1169, 1177 (2016) (Alito, J., dissenting from denial of cert.). While Native American faith practice might involve unique components such as tobacco, NDOC fails to provide evidence that this accommodation has been misused more so than other types of permitted religious items (e.g., firewood for Earth-based religious practice). *See* 2-ER-84.

Given AR 810.3’s impermissible racial classification, this Court should reverse and remand for entry of judgment in favor of Guardado under *Johnson*.

**II. ALTERNATIVELY, THIS COURT SHOULD REVERSE AND REMAND FOR TRIAL TO THE EXTENT *TURNER* APPLIES.**

**A. Under *Turner*, a prison policy that burdens an inmate’s constitutional rights must satisfy a four-part test.**

Absent the requirement of applying strict scrutiny under *Johnson* to a racial classification, a prison policy that otherwise burdens an inmate’s constitutional rights must be “reasonably related to legitimate penological interests” according to the four-factor test in *Turner*. *Shakur*, 514 F.3d at 884 (quoting *Turner*, 482 U.S. at 89).

These four factors are: (1) whether there is “a valid, rational connection between the prison regulation and the legitimate government interest put forward to justify it”; (2) “whether there are alternative means of exercising the right that remain open to prison inmates”; (3) “the impact accommodation of the asserted right will have on guards and other inmates, and on the allocation of prison resources generally”; and (4) whether the prison has “obvious, easy alternatives,” which “may be evidence that the regulation is not reasonable, but is an ‘exaggerated response’ to prison concerns.” *Turner*, 482 U.S. at 89-90.

Notably, to rule in favor of a prison regulation’s constitutionality on summary judgment under *Turner*, this Court has held that a “cursory”

analysis will not do. *Shakur*, 514 F.3d at 885. Rather, to summarily find for a prison a court must weigh all four *Turner* factors. *Id.* (“Given that summary judgment requires the absence of any genuine issue of material fact, . . . we must engage in a full *Turner* analysis[.]”); *see also Hrdlicka*, 631 F.3d at 1051 (holding that a court must apply all four factors to reject a constitutional challenge to a prison policy on summary judgment).

**B. The district court committed reversible error in failing to apply the full *Turner* analysis.**

In granting summary judgment to NDOC on Guardado’s constitutional claims, the district court made only two findings—and in a single paragraph. *See* 1-ER-18 (findings on First Amendment), 1-ER-19 (incorporating First Amendment findings for Fourteenth Amendment). Specifically, the court found: (1) “Plaintiff can practice individually in his cell because he can obtain materials on the history and practices of Native American religion;” and (2) “Disallowing non-Native American inmates from participating in Native American religious ceremonies where eagle feathers are used is reasonably related to” a “legitimate interest in preventing non-Native American inmates from possessing eagle feathers in violation of the law.” 1-ER-18.

Beyond the disputed nature of these two findings, which we detail below, the district court’s “ cursory ” *Turner* analysis demands reversal. *Shakur*, 514 F.3d at 885. Indeed, the court’s engagement with, at most, only the first two *Turner* factors—alternatives available to the inmate to exercise his faith (factor #2) and a supposed interest in avoiding illegal possession of eagle feathers (factor #1)—is itself reversible error.

As this Court held in *Hrdlicka*, even where a regulation meets the first factor of being “rationally related to a legitimate penological objective, . . . [t]he other three *Turner* factors must be evaluated before a court can decide whether the prison regulation or policy is permissible.” 631 F.3d at 1051. Indeed, this Court reversed summary judgment in *Shakur* based on the lower court’s failure to address the very same “third and fourth *Turner* factors” that the district court here failed to address—“impact of the accommodation” (factor #3) and “availability of ready alternatives” (factor #4). 514 F.3d at 888.

**C. Under a full application of *Turner*, the record either fails to support or is disputed when it comes to the constitutionality of NDOC’s actions.**

**1. The record cannot support a finding as a matter of law that AR 810.3 is rationally related to a legitimate penological interest.**

In articulating the sort of “valid penological objectives” that support the constitutionality of a prison regulation under the first *Turner* factor, the Supreme Court has stressed three: rehabilitation, deterring crime, and security. *O’Lone*, 482 U.S. at 348. Even then, though, these objectives cannot be evaluated in the abstract but must be tied to the regulation. As the Court held in *Turner*, if the logical connection between the regulation and its stated objectives is “so remote as to render the policy arbitrary or irrational,” then it “cannot be sustained.” 482 U.S. at 89-90.

Here, NDOC’s supposed justifications for excluding non-Native Americans from Native worship—deterring illegal eagle feather possession and prison safety—are neither supported nor rationally connected to the exclusion. Consequently, and as the district court found when rejecting a similar restriction on Native American religious practice in *Combs v. Corrections Corp. of America*, NDOC’s policy “offends the fundamental constitutional right to practice [the] religion of one’s choice.” 977 F. Supp. 799, 802 (W.D. La. 1997).

*Eagle feathers.* Regarding the supposed prevention of the illegal possession of eagle feathers, there are at least three reasons why the district court erred in finding as a matter of law that there was a rational relationship between that concern and the exclusion of sincere non-Native American practitioners from Native spiritual grounds.

First, as Guardado declared and NDOC never disputed, access to Native American worship need not implicate possession of eagle feathers. 3-ER-370; 1-ER-16. Second, even if AR 810.3 could be justified by avoiding illegal eagle feather possession, the fact that NDOC allowed non-Native Americans to worship in Native ceremonies over the years without any evidence of an eagle feather incident vitiates that concern. *See* 2-ER-120–29; 2-ER-144–50. Third, the sole record reference to eagle feathers in support of NDOC’s motion is in Snyder’s declaration. But Snyder mentions eagle feathers only by stating that other earth-based religious adherents cannot “possess” them as a reason for separating their sweat-lodge ceremonies. 2-ER-238; *see also* AR 810.2. Nor does he ever say how a non-Native American would “possess” an eagle feather in a Native ceremony in any event. *See* 2-ER-238; *see also Turner*, 482 U.S. at 97-98 (rejecting speculative concerns to justify prison rule); *Reed v.*

*Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988) (rejecting conjecture in *Turner* analysis).

*Security*. Any argument that barring non-Native American access to Native worship would be justified by institutional safety is similarly deficient or, at a minimum, disputed.

In his declaration, Defendant Williams says that “having non Native Americans participate in Native American ceremonies *could* result in a significant likelihood of physical injury.” 2-ER-117 (emphasis added). He provides nothing to support this conjecture. *See Reed*, 842 F.2d at 963. Similarly, Snyder asserts that allowing “non-Native inmates to attend and participate in Native American ceremony [sic] would give rise to serious safety and security concerns,” but he gives no specifics and was found to be repeating inadmissible hearsay. 2-ER-238; 1-ER-13–14. Finally, Defendant Nash asserts that AR 810.3 is needed to keep protective-segregation and general-population inmates separate. 2-ER-245. But the district court discredited Nash’s declaration as containing only “broad generic assertions.” 1-ER-15.

It is no wonder, then, that in its RLUIPA finding—a finding NDOC has not appealed from—the district court determined that NDOC

presented only “speculation” and “inadmissible hearsay” to support an assertion that AR 810.3 is backed by a security interest. 1-ER-13–14. As the district court found, NDOC provides “no further detail” as to the effect on staff supervision of inmates and “fail[s] to provide any evidence” on inmate violence or site desecration that would result from allowing such worship. 1-ER-13.

In sum, NDOC cannot cite institutional security to support its application of AR 810.3 under the first *Turner* factor. *See Reed*, 842 F.2d at 963 (speculation and “piling conjecture upon conjecture” are insufficient for *Turner* analysis); *see also Tobin v. Fed. Exp. Corp.*, 775 F.3d 448, 452 (1st Cir. 2014) (“Speculation about mere possibilities, without more, is not enough to stave off summary judgment.”). This Court should therefore reverse on this factor alone. *See Hrdlicka*, 631 F.3d at 1051 (holding that “[t]he first *Turner* factor is a *sine qua non*: ‘[I]f the prison fails to show that the regulation is rationally related to a legitimate penological objective, we do not consider the other factors.’” (quoting *Ashker v. Cal. Dep’t of Corr.*, 350 F.3d 917, 922 (9th Cir. 2003))).

**2. The record cannot support a finding as a matter of law that Guardado can otherwise adequately practice his Native American faith in his cell.**

The Supreme Court explained a prison regulation may be valid “[w]here ‘other avenues’ remain available” to exercise the constitutional right the regulation burdens. *Turner*, 482 U.S. at 90 (internal citations omitted). In the First Amendment context, if a prison permits inmates to participate in other ceremonies of their religion, the second *Turner* factor is satisfied. *O’Lone*, 482 U.S. at 352; *Thornburgh v. Abbott*, 490 U.S. 401, 418 (1989). Conversely, the absence of “alternative means of exercising the right” shows the regulation is invalid. *Turner*, 482 U.S. at 90.

Applying *O’Lone*, this Court has explained that the “relevant inquiry” for the second *Turner* factor is whether an inmate has “retained the ability to participate in other significant rituals and ceremonies of their faith” such that the inmate has not “been denied all means of religious expression.” *Ward v. Walsh*, 1 F.3d 873, 877 (9th Cir. 1993), *cert. denied*, 510 U.S. 1192 (1994). In *Ward*, this Court expressly rejected private prayer in one’s cell as an alternative means of religious free exercise for a Nevada inmate without access to religious services or communal prayer. *Id.* at 878. As this Court put it, if “the opportunity to

engage in private prayer” was enough, the second *Turner* factor “would have no meaning at all because an inmate would always be able to pray privately.” *Id.* The Court in *Ward* concluded that the inmate’s “religious practice ha[d] been so dramatically curtailed in prison,” such that the second *Turner* factor weighed in his favor. *Id.*

For his part, Guardado has explained he must have access to the Native spiritual grounds and group worship to practice his religion. 3-ER-336 (“Plaintiff’s religious beliefs requires [sic] him to perform his sacred sweat once a week” in the Native sweat lodge); 2-ER-275 (“[P]laintiff requires smudging, burning of herbs, smoking the sacred pipe, tobacco ties and drum circle to sing, . . . [which] cannot be done in [his] cell.”); *see also* 3-ER-373–74 (Guardado characterizing his requested practices as “everything that there is”). Guardado declared that “[t]he very nature of plaintiff’s religion is that it is a group practice.” 2-ER-43 (responding to assertion he could practice individually in his cell); *see also* 3-ER-395 (stating “the sacred ceremonies are a group practice”).

NDOC’s own regulations likewise recognize that Native American religious practices are inherently communal. AR 810.2 includes a “Faith Group Overview Chart” detailing every recognized religious group and

its worship practices. *See* AR 810.2 at 5-18. In NDOC’s description of the “American Indian/Native American” Faith Group, the regulation lists sweat-lodge ceremonies, talking circles, pipe ceremonies, and weekly group meetings as group practices; the sole personal practice listed is “[s]mudging *during* sweat-lodge ceremonies.” *Id.* at 5 (“Worship Practices Personal/Group”) (emphasis added). In other words, NDOC itself recognizes no Native religious practice that Guardado could perform individually in his cell. This contrasts with other faiths, for whom page after page of NDOC’s chart lists individual practices, such as “[i]ndividuals study and pray in private.”<sup>5</sup>

Moreover, Guardado has noted that he “is not permitted to burn sage or other herbs to smudge in his cell, let alone smoke the sacred pipe or perform sacred sweat.” 2-ER-248; *accord* 2-ER-36; *see also* 3-ER-395

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<sup>5</sup> NDOC’s recognition of individual practice for other faiths includes: “devotions, prayers, studies” (Asatru); “daily prayer” (Baha’i, Mormons, Sikh); “chanting” (Buddhism, Yoga, Sikh); “[i]ndividuals study and pray in private” (Christian, Hindu, Jehovah’s Witnesses, Moorish Science, Rastafarians, Roman Catholic, Seventh-day Adventist); “personal worship ritual” (Druid, Thelema, Wicca); “[p]ray 5 times daily for 10 min.” (Islam); “[p]ray three times a day in private” (Judaism); and “meditation” (Yoga, Sikh). AR 810.2 at 6-18. Additionally, NDOC defines the Native American Faith Group under “Earth-based Groups,” which “historically and traditionally meet outdoors for worship.” *See* 2-ER-59.

(Guardado stating that “[f]orcing [him] to become a solitary practitioner” would violate NDOC’s own policy, which shows that “Native Americans do not have a solitary circle”); 2-ER-65–66 (noting that sweat-lodge and pipe ceremonies occur only in the outdoor “sweat lodge area”). As a district court observed in rejecting a similar assertion by NDOC in defense of AR 810.3, to say an inmate “can practice Native American religion in his cell’ is anathema to the freedom of religion.” *Pasaye v. Dzurenda*, 375 F. Supp. 3d. 1159, 1170 (D. Nev. 2019).

In its summary-judgment papers, NDOC offered nothing more than a bald assertion—unsupported by any citations—to claim Guardado had an alternative means of practicing his religion. 2-ER-266 (claiming Guardado could practice Native American religion in his cell and obtain materials on its history and practices); 2-ER-196–97 (same); 2-ER-239 (Defendant Snyder making similar assertion with no supporting evidence).

Ultimately, the record belies the district court’s conclusion that Guardado can “practice individually in his cell because he can obtain materials on the history and practices of Native American religion” as an alternative means. 1-ER-18. Under this Court’s precedent in *Ward*, AR

810.3 fails the second *Turner* factor because it “dramatically curtails” Guardado’s religious practice by completely depriving him of sweat-lodge and pipe ceremonies, smudging, and prayer and drum circle rituals. 1 F.3d at 878.

**3. The record cannot support a finding as a matter of law that AR 810.3 is justified by a concern for the effects on staff and other inmates.**

The third factor of a *Turner* analysis concerns the impacts of accommodating the asserted constitutional right; specifically, whether there will be a “ripple effect” on fellow inmates, prison staff, and resources. *Turner*, 482 U.S. at 90. The extent of an administrative disruption to accommodate the constitutional right matters—courts “cannot simply accept” prison officials’ assertions “that the disruption would be significant.” *Ward*, 1 F.3d at 878-79.

The record here cannot support a finding that accommodating Guardado’s religious exercise would significantly impact the prison’s population, staff, or resources. NDOC claimed that “[p]ermitting non-Native American inmates to participate in Native American ceremonies would give rise to serious health, safety, and security concerns that would impose substantial burden on the operation of NDOC.” 1-ER-12. NDOC

officials suggested that AR 810.3 was needed to avoid “jeopardiz[ing] the safety and security of inmates and employees,” and that the regulation prevents violence between Native and non-Native inmates. 2-ER-245, 2-ER-238.

But, as the district court determined in its RLUIPA finding—a finding NDOC has not appealed from—NDOC presented no admissible evidence to substantiate claims that its staff would become overwhelmed; that many more inmates would suddenly decide to claim Native American religion; and that NDOC employees and inmates would face new risks to their safety and security. 1-ER-12–14. Thus, NDOC failed to demonstrate any “ripple effect” that would result from accommodating Guardado’s Native practice as required by the third *Turner* factor.

**4. The record cannot support a finding as a matter of law that no alternative is available to the prison to meet its penological interests.**

The *Turner* Court explained, “if an inmate claimant can point to an alternative that fully accommodates the prisoner’s rights at *de minimis* cost to valid penological interests,” the prison cannot justify its actions under the fourth factor. *Turner*, 482 U.S. at 90-91. The Supreme Court later emphasized in *Thornburgh* the importance of “prison officials

[being] able to demonstrate that they have rejected a less restrictive alternative because of reasonably founded fears that it will lead to greater harm.” 490 U.S. at 419. As this Court put it, “[t]he existence of reasonable alternatives” can be sufficient on its own in a *Turner* analysis to “decisively tip[] the balance in favor of [an inmate]’s free exercise right.” *Ashelman v. Wawrzaszek*, 111 F.3d 674, 678 (9th Cir. 1997)

Although the district court nowhere addressed the fourth *Turner* factor, it made clear in its RLUIPA finding that NDOC did not consider a less restrictive alternative. 1-ER-15–16. Specifically, it found NDOC’s evidence “does not show that Defendants have actually considered and rejected the efficacy of less restrictive measures.” 1-ER-15.

Furthermore, the record indicates that NDOC in fact practices an alternative policy in sporadically allowing non-Native Americans into the Native faith group and its religious ceremonies without incident. 2-ER-120–29; 2-ER-144–50. This suggests NDOC ignores the *de jure* regulation that it used against Guardado and operates, in parallel, a more lenient *de facto* alternative policy at its discretion.

Moreover, other state prisons implement alternative regulations that address Native American worship without resorting to a racial

classification. One option used is to allow those with a sincere religious belief to practice Native religion. *See* N.M. CORR. DEP'T, NATIVE AMERICAN COUNSELING ACT, NO. CD-101100, POLICIES 4-4520 § D, and PROCEDURES 4-4520 § H(2)(d) (2018).<sup>6</sup> This approach accords with the use of sincerity as a touchstone for protection of religious exercise in prison and a workable standard in that context. *See Holt v. Hobbs*, 574 U.S. 352, 369 (2015). Indeed, the district court rejected NDOC's assumption "that all inmates would be willing to forego their own sincerely held religious beliefs and practices in order to partake in Native American ceremonies." 1-ER-13.

Another alternative used is to open Native American religious practice subject to appropriate safeguards. *See* MONTANA STATE PRISON, NATIVE AMERICAN RELIGIOUS PROGRAMMING GUIDELINES 2 (2012), Exhibit 2 to *Governor's Office of Indian Affairs Update, Before Montana State Tribal Relations Comm.* (Nov. 11, 2019) (providing that any inmate may designate Native religion, "regardless of race or ethnic background," and Native spiritual practices are open to all, subject to appropriate behavior, security, and safety concerns); IDAHO DEP'T OF CORR., STD. OPERATING

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<sup>6</sup> <https://perma.cc/QF9C-MEG9> (New Mexico).

PROC. RELIGIOUS ACTIVITIES, CONTROL NO. 403.02.01.001 § 14 (2019) (“[S]weat lodge ceremonies are open to all IDOC inmates who wish to practice the Native American religion.”).<sup>7</sup>

In sum, NDOC cannot prevail on the final *Turner* factor regarding alternative prison practices.

### CONCLUSION

The court in *Mauwee v. Donat*, No. 3:06-cv-00122, 2009 WL 3062787, at \*7 (D. Nev. Sept. 18, 2009), put it well in describing as “commonsense” the right of non-Native access to Native religious practice: “If the right to free exercise did not include this aspect (the right to choose one’s faith) it would be the opposite of freedom—it would be bondage to the religion of one’s upbringing or ethnic heritage.” *Id.*

Accordingly, and for all the reasons described above, this Court should reverse the district court’s grant of summary judgment to NDOC on Guardado’s constitutional claims. It should then remand for entry of judgment in Guardado’s favor, with distinct remedies to follow, or in the alternative, remand for trial on the merits.

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<sup>7</sup> <https://perma.cc/79S9-HDJB> (Montana); <https://perma.cc/YX3U-J8X8> (Idaho).

Date: March 8, 2023

Respectfully submitted,

STANFORD LAW SCHOOL  
RELIGIOUS LIBERTY CLINIC

By: /s/ James A. Sonne

*Attorneys for Appellant*  
Ernest Jord Guardado

## **ADDENDUM**

**U.S. CONST., AMEND. I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**U.S. CONST., AMEND. XIV § 1**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT**

**§ 2000cc-1. Protection of religious exercise  
of institutionalized persons**

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that 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. CODE § 1983 - CIVIL ACTION FOR DEPRIVATION OF RIGHTS**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**STATEMENT OF RELATED CASES  
PURSUANT TO CIRCUIT RULE 28-2.6**

The undersigned attorney states the following: I am unaware of any related cases currently pending in this court.

Dated: March 8, 2023

/s/ James A. Sonne

James A. Sonne

*Attorney for Appellant*

Ernest Jord Guardado

## CERTIFICATE OF COMPLIANCE

The foregoing **Appellant's Opening Brief** complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains no more than 13,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief contains a total of 8,583 words. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), and was prepared in 14-point Century Schoolbook, a proportionally spaced typeface, using Microsoft Word. Finally, the electronic brief was subject to a virus scan and no virus was detected prior to its submission.

Dated: March 8, 2023

/s/ James A. Sonne

James A. Sonne

*Attorney for Appellant*

Ernest Jord Guardado

## CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I electronically filed the foregoing document, **Appellant's Opening Brief**, with the United States Court of Appeals for the Ninth Circuit, using the CM/ECF system. I further certify that all parties, through their counsel of record, are registered as ECF filers and that they will be simultaneously served via Notice of Docketing Activity (NDA).

Dated: March 8, 2023

/s/ James A. Sonne

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