No. 21-16068

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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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INTRODUCTION

The district court committed reversible error on two alternative grounds in granting summary judgment to the Nevada Department of Corrections and its officials (collectively, "NDOC") on Ernest Guardado's constitutional challenge to Administrative Regulation 810.3.

First, the district court erred by analyzing under *Turner v. Safley* AR 810.3's exclusion of Guardado from observing his Native American faith in prison based on his inability to prove Native heritage. Because, as the district court found, this exclusion constituted a form of race discrimination, *Johnson v. California* required the court to have applied strict scrutiny and not the more deferential *Turner* standard. And under strict scrutiny, AR 810.3 fails for reasons similar to those the district court offered in ruling for Guardado on his RLUIPA claim—a ruling that likewise involved heightened review and which NDOC has not appealed.

Second, and in the alternative, the district court erred in upholding AR 810.3 under *Turner*. For starters, it failed to address the four *Turner* factors—an omission this Court has repeatedly condemned in reversing rulings under *Turner* on appeal. Moreover, and as the district court found

in rejecting NDOC's evidentiary showing on the RLUIPA claim, the record fails to establish that the *Turner* factors were met.

In response, NDOC contends that AR 810.3 is not in fact a racial classification, and that even if it is, NDOC has a compelling governmental interest to justify it; namely, preventing inmate violence. Alternatively, NDOC argues the district court did not need to address each *Turner* factor and that the record otherwise supports a finding of constitutionality under *Turner*. Lastly, NDOC argues qualified immunity applies because its officials did not violate Guardado's constitutional rights in violation of clearly established law.

But numerous courts, including the district court here, have found the requirements of AR 810.3 or its analogues in other states to constitute race discrimination. On strict scrutiny, moreover, AR 810.3 fails because, as the district court found in applying similar provisions of RLUIPA, NDOC's violence concerns are unsupported by the record as a compelling interest; nor can NDOC show the policy is narrowly tailored to any such concerns.

Alternatively, the district court did indeed commit reversible error under this Court's precedent by failing outright to address at least two of

the *Turner* factors. Moreover, there is ample evidence on these and the other factors to support a finding of unconstitutionality—thus precluding summary judgment for NDOC in any event.

Finally, qualified immunity does not attach here. After all, NDOC has repeatedly litigated AR 810.3, with an on-point loss at the Nevada Supreme Court that made clear it is an illegal form of race discrimination. Furthermore, a robust consensus of in-circuit and out-of-circuit courts agree. Thus, NDOC's officers have known or should have known for years that their actions violate the constitutional rights of non-Native inmates to practice the Native faith. At a minimum, we ask this Court to rule on the merits in line with established authority.

I. AR 810.3 IS A RACIAL CLASSIFICATION THAT FAILS STRICT SCRUTINY.

A. AR 810.3 triggers strict scrutiny under *Johnson* because it segregates inmates by race.

For constitutional challenges to racial classifications in prison, the Supreme Court rejects the default reasonableness review for other prison rules and instead requires strict scrutiny. *See Johnson v. California*, 543 U.S. 499, 509 (2005) (holding racial classifications in prison are subject to strict scrutiny); *Turner v. Safley*, 482 U.S. 78, 89 (1987) (holding that

the standard for other prison policies is whether they are "reasonably related to legitimate penological interests"). In fact, even where a racial classification benefits a minority group or is meant to protect against violence, its use still requires the "searching judicial inquiry" of strict scrutiny. *Johnson*, 543 U.S. at 505-06 (citation omitted).

Accordingly, the Ninth Circuit applied *Johnson* in evaluating a proposed "race-conscious" prison policy at the intersection of free-exercise and equal-protection rights. *See Walker v. Beard*, 789 F.3d 1125, 1137 (9th Cir. 2015) (holding prison has a compelling interest in refusing to exempt prisoners for religious reasons from a race-neutral policy since a race-conscious policy would be subject to strict scrutiny under *Johnson*).

Racial Classification

AR 810.3 is a racial classification that must meet the exacting strict-scrutiny test because, as in *Johnson*, it segregates prisoners based on race. As the district court found, AR 810.3 "draws an explicit racial distinction" by requiring inmates to provide "evidence of their Native American heritage" to access Native worship. 1-ER-19. Further, the court found that NDOC's application of AR 810.3 "intentionally discriminated

against [Guardado] on the basis of his race" and therefore "violated [his] right to equal protection of the law." 1-ER-19.

Indeed, other courts have found AR 810.3 and similar regulations to be invalid racial classifications. During the pendency of this litigation, in fact, the Nevada Supreme Court condemned AR 810.3 under the Equal Protection Clause as "facially discriminatory because it imposes differential treatment based on ethnicity or ancestry." *Kille v. Calderin*, No. 72358, 2019 WL 2089533, at *2 (Nev. May 10, 2019).

And this understanding is nothing new. More than a decade ago, the Nevada district court in *Mauwee v. Donat* disapproved a policy akin to AR 810.3 as a form of unconstitutional race discrimination. No. 3:06-cv-122, 2009 WL 3062787, at *7 (D. Nev. Sept. 18, 2009) ("The right to free exercise of one's religion clearly includes the right to *choose* one's faith unrestricted by one's bloodline."). There, the court was dealing with the inverse of AR 810.3, where a Native inmate argued allowing non-Native Americans access to Native worship would violate RLUIPA.

Notably, in defending the inverse rule in *Mauwee*, NDOC took the exact opposite of its position here. As the court recounted, NDOC argued "it would actually be a violation of the rights of non-Indian inmates to

refuse them the ability to engage in traditionally Indian ceremonies, just as it would be a violation of one's equal protection and free exercise rights to refuse to allow a non-Jew to participate in Judaic ceremonies or a non-Italian to participate in Catholic ceremonies." *Id.*

Likewise, the Fourth Circuit held in *Morrison v. Garraghty* that requiring inmates to prove they were "bona fide Native Americans" to access Native faith artifacts was an impermissible racial classification. 239 F.3d 648, 652, 657 (4th Cir. 2001). The court held the policy was "facially discriminatory" because of its focus on racial lineage. *Id.* at 658.

NDOC's Arguments

NDOC nonetheless argues AR 810.3 is not a racial classification subject to strict scrutiny, claiming it: (1) follows a Native faith tradition of rejecting believers like Guardado; (2) mimics federal standards that afford special rights to Native Americans in light of the indigenous community's history of persecution; and (3) does not involve racial segregation as in *Johnson*. Answering Br. 7-9. NDOC is wrong on all three counts.

First, NDOC cites no authority that AR 810.3 merely "describes the parameters of a religion created by Native American tribes." Answering

Br. 7. To the contrary, and as the Fourth Circuit observed in rejecting a similar framing, Native Americans "practice a diverse set of beliefs and practices depending on their individual beliefs" and there is no support "for the broad proposition for a sincere belief in Native American theology" that requires racial exclusion. *Morrison*, 239 F.3d at 659.

In fact, the record shows the Nevada Indian Commission declined to be involved with AR 810.3 and asked that a reference citing them as an authority empowered to determine Native identity be removed. 2-ER-141; 3-ER-304; 3-ER-325-32. Similarly, Native inmate and spiritual leader Aguilar provided evidence that "race or the fact that an individual is not Native American does not matter" because "we are all the creators children no matter what nation or race," adding that no "true practitioner of Native American religion would agree [with] or condone [] the NDOC's statements or position on this matter." 2-ER-164.

In arguing that AR 810.3 follows the Native American faith's own exclusion on race, NDOC accuses Guardado of practicing "someone else's religion." Answering Br. 8. Offensiveness to Guardado's sincere faith aside, this statement cuts against NDOC's position by conceding AR 810.3 is in fact a racial exclusion. It also flies in the face of the district

court's admonition that it is a "misguided conclusion [by NDOC] that one's race is directly tied to the sincerity of one's religious beliefs" and the court's finding that Guardado is indeed sincere. 1-ER-11; *see also Mitchell v. Angelone*, 82 F.Supp. 2d 485, 492 (E.D. Va. 1999) (stating that a similar position taken by the prison system in defending the policy overturned in *Morrison* "defies common sense and precedent").

Second, in arguing AR 810.3 mimics federal provisions, NDOC cites 43 C.F.R. § 10.2 and 20 U.S.C. § 7491 as "determining Native American status for participation in the Native American religion." Answering Br. 8. But these provisions have nothing to do with religion; rather, they concern only the provision of secular government services to Native Americans. *See* 43 C.F.R. § 10.2 (defining "Indian tribe" and "person" under the Native American Graves Protection and Repatriation Act); 20 U.S.C. § 7491 (defining "Indian" under the Indian Education Act). If anything, rather than proving something about Native religion, NDOC's invocation of these provisions shows that NDOC itself sees AR 810.3 as a racial classification.

Third, AR 810.3's racial segregation is not distinguishable from *Johnson*. In *Johnson*, the California Department of Corrections housed all new and transferred inmates with only other inmates of their race for up to the first 60 days. 543 U.S. at 502-03. In arguing that *Johnson* is inapplicable, NDOC offers but one purported distinction: that the policy in *Johnson* did not include appeals or exceptions. Answering Br. 9. NDOC, however, nowhere explains how AR 810.3 is not a segregation mandate or what part of the policy constitutes an exception. To the contrary, AR 810.3 segregates inmates by race in forcing them to prove Native heritage to access Native American worship.

B. As the district court found in its RLUIPA ruling, AR 810.3 fails strict scrutiny.

To survive strict scrutiny, a prison must prove its policy is narrowly tailored to achieve a compelling governmental interest. *Johnson,* 543 U.S. at 505. And when it comes to race in prisons, the Ninth Circuit has noted that "[c]ourts generally accept racial segregation in prisons only when motivated by concerns about prisoner safety." *Walker*, 789 F.3d at 1137 (citing *Johnson*). What's more, to justify racial segregation, prison officials must go beyond "simply assert[ing] that it was necessary." *Johnson*, 543 U.S. at 514; *accord Fowler v. Crawford*, 534 F.3d 931, 939

(8th Cir. 2008) ("[S]ecurity concerns must be "grounded on more than mere speculation, exaggerated fears, or post-hoc rationalizations.'") (citations omitted). Indeed, this sort of concrete showing is especially necessary at the summary-judgment stage. *See 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.").

Moreover, the "burden [is] on state actors to demonstrate that their race-based policies are justified." *Harrington v. Scribner*, 785 F.3d 1299, 1307 (9th Cir. 2015) (quoting *Johnson*, 543 U.S. at 506 n.1). In the strict scrutiny context of race, any deference to the prison cannot "excuse the narrow tailoring requirement." *Harrington*, 785 F.3d at 1308. After all, racial policies are "immediately suspect." *Johnson*, 543 U.S. at 509.

In resolving Guardado's RLUIPA claim in his favor, the district court rejected the security interests described in NDOC's declarations. Specifically, the court found as "nothing more than speculation" NDOC's assertions that, absent the racial restriction, a spate of inmates would ask to practice the Native faith, prison operations would be imperiled, or prisoner violence would increase. 1-ER-13. Indeed, the court found, NDOC "fail[ed] to identify even one actual instance of sweat lodge

destruction or inmate violence in support of a 'compelling interest.'" 1-ER-14; *see also Johnson*, 543 U.S. at 514 (requiring more than "simpl[e] assert[ions]" from prison officials for a racial classification to survive strict scrutiny). One of the declarant's assertions, the district court here added, "appear[] to be based on inadmissible hearsay," 1-ER-14, and another declarant has been challenged as being untruthful. 2-ER-155-56; 2-ER-111-14; *see also Howard v. Connett*, No. 2:11-cv-01402, 2017 WL 4682300, at *7-8 (D. Nev. Oct. 17, 2017).

On appeal, NDOC repeats similar safety and security justifications rejected by the district court. Specifically, it argues that AR 810.3 is required to keep general population and protective segregation inmates separate; prevent the desecration of Native religious grounds by non-Native inmates; and avoid violence due to perceptions of favoritism through the risk non-Native Americans would possess eagle feathers in violation of federal law. Answering Br. 12-13. Moreover, NDOC disputes that the district court's RLUIPA findings control, distinguishing that standard from the *Johnson* test and stressing that, in rejecting NDOC's concerns, the district court failed to afford it due deference. *Id*. at 9-12. NDOC is wrong again.

Compelling Interest

To take the last of NDOC's arguments first, the Ninth Circuit has expressly described RLUIPA as a strict-scrutiny standard where free-exercise violations involve racial classifications. *Walker*, 789 F.3d at 1136. Because NDOC's evidence on safety and security was insufficient to make out a compelling interest under RLUIPA—a ruling NDOC has not appealed from—one cannot conclude, much less as a matter of law, that the same evidence shows a compelling interest under *Johnson*.

Next, the record contains no indication of any potential for violence. To the contrary, Guardado and other believers were welcomed members of the Native American community, regardless of their ability to prove Native ancestry. *See* 2-ER-120-29 (lists of Native faith practitioners, which include non-Native inmates); 2-ER-144-50 (non-Native inmate declarations); 2-ER-163-64 (Native inmate declaration describing Guardado's central and sacred role in the community); 3-ER-294-97 (list of Native inmates opposing AR 810.3); 3-ER-399 (declaration from Native inmates welcoming Guardado and other non-Native inmates); *accord Morrison*, 239 F.3d at 661 (finding Native Americans "encourage[d]" non-Native Americans with sincere Native beliefs to join their practice).

Neither Guardado nor anyone else has been in danger at any point. 1-ER-14 (district court finding on no evidence of inmate violence); 3-ER-401-02 (inmate declaration that "no violence of any kind is acceptable on the Native grounds"). Additionally, general-population and protective-segregation inmates have always practiced in separate groups, so there is no risk of violence by overlap between the two; and this is true of all religious groups, not just Native Americans. *See* 3-ER-338, 370-71, 379.

The record likewise cannot support NDOC's assertion of a compelling interest in preventing non-Native Americans from possessing eagle feathers to prevent unrest. Indeed, NDOC provides no evidence in its brief of how or whether such illegal possession might occur, or any instances of racial violence arising from potential improper possession. As the district court found in rejecting the same argument under RLUIPA, NDOC "does not demonstrate that the lawful possession of eagle feathers furthers NDOC's safety and security interests." 1-ER-16.

Narrow Tailoring

Even assuming NDOC has a compelling interest in preventing inmate violence by enforcing its racial exclusion—it does not—AR 810.3 is not narrowly tailored to achieve this end.

In its RLUIPA analysis, the district court recognized that RLUIPA "does not override an institution's safety and security interests." 1-ER-8. But it nonetheless found that AR 810.3 was "by no means a less restrictive measure" to support NDOC's supposed compelling interest in security. 1-ER-16. The Ninth Circuit has considered narrow tailoring for constitutional strict scrutiny and least restrictive means under RLUIPA as the same test when adjudicating race-based prison policies. *See Richardson v. Runnels*, 594 F.3d 666, 671 (9th Cir. 2010) (finding prison racial classification invalid and explaining that under *Johnson*, a prison must show "the racial classification was the least restrictive alternative (*i.e.*, that any race-based policies are narrowly tailored to legitimate prison goals)"). Accordingly, the district court's RLUIPA finding on least restrictive means controls here as well.

NDOC argues it should not have "to prove the previous failure of policy or cite specific examples of past infractions in order to prevent anticipated violence, unrest, or strains on prison resources." Answering Br. 11. But when it comes to race in particular, this Court has warned against using deference to "absolve[] prison officials of their obligation to demonstrate that the race-based action was narrowly tailored."

Harrington, 785 F.3d at 1302; *see also Johnson*, 543 U.S. at 512 (noting that the law in other areas likewise "refuse[s] to defer to state officials' judgments on race" without evidence).

In *Harrington*, this Court struck down a jury instruction in the race-in-prison context that gave "deference to the opinion of prison officials in their adoption . . . of policies . . . to maintain internal security" because the instruction allowed jurors not to "assess[] whether the challenged race-based actions were narrowly tailored." 785 F.3d at 1305, 1307. NDOC's insistence that any deference to prison officials means it need not explain the violent circumstances it is supposedly responding to, nor how AR 810.3 prevents such violence, "pull[s] the rug out from under the narrow tailoring requirement." *Id.* at 1307.

For all the reasons above, AR 810.3 fails the strict scrutiny it is subject to as a racial classification under *Johnson*.

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

A. The district court failed to apply the four-factor *Turner* test.

Outside the race context, the Supreme Court made clear in *Turner* that a prison policy that burdens an inmate's constitutional rights is valid only where a court finds it to be "reasonably related to

legitimate penological interests" based on a four-factor analysis. 482 U.S. at 89-91.

The four factors a court must assess are as follows:

> (1) Whether there is a valid, rational connection between the prison policy and the legitimate interest advanced to justify it.
>
> (2) Whether alternative means remain open to the inmate of exercising the constitutional right at issue.
>
> (3) Whether accommodating the right will impact guards and other inmates, and prison resources generally.
>
> (4) Whether the existence of ready alternatives to address the prison's concerns show the regulation is not reasonable but is an exaggerated response to its concerns.

Id. at 89-90.

Notably, the Ninth Circuit has emphasized that a "cursory" analysis of these factors is insufficient. *Shakur v. Schriro*, 514 F.3d 878, 885 (9th Cir. 2008). In *Shakur*, this Court reversed the lower court's finding under *Turner* because it did not "actually balance the four *Turner* factors" to justify the burden on an inmate's rights. *Id*. Indeed, even where the policy is "rationally related to a legitimate penological objective"—i.e., the first and "*sine qua non*" *Turner* factor—the inquiry continues, and "[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).

Accordingly, the district court committed reversible error by granting summary judgment to NDOC without engaging each of the *Turner* factors. The court made findings on, at most, the first two factors—and in a single paragraph of its 21-page opinion. Namely, the court found only that:

> (1) "Disallowing non-Native American inmates from participating in Native American religious ceremonies where eagle feathers are used is reasonably related to" the legitimate interest of "preventing non-Native American inmates from possessing eagle feathers in violation of the law."
>
> (2) Guardado has "alternative means of practicing Native American religion" where he "can practice individually in his cell because he can obtain materials on the history and practices of Native American religion."

1-ER-18. In other words, the district court made no findings on the third or fourth *Turner* factors: impact on guards, resources, and other inmates; and the existence of ready alternatives to meet NDOC's concerns.

In response, NDOC relies on *Beard v. Banks*, 548 U.S. 521 (2006), to argue that it was enough for the district court to list the four *Turner* factors in its summary of the law preceding its application to the facts and, rather than balance the four factors, analyze the general question of

"whether the policy shows a reasonable relation to a legitimate penological objective." Answering Br. 14. In short, NDOC claims *Beard* "did not mandate an express analysis of each *Turner* factor." *Id*.

But NDOC's singular reliance on *Beard* in support of this argument cites not to the Court's opinion but only to its syllabus. *See* Answering Br. 14 (citing *Beard*, 548 U.S. at 522). Regardless, the opinion in *Beard* shows the opposite of what NDOC claims, because it in fact did engage in an express analysis of each *Turner* factor. *See Beard*, 548 U.S. at 529-33. And although the Court in *Beard* concluded that the first factor outweighed the other three there given the documented and extreme dangers posed by those inmates, it assessed each factor individually—across five full pages, no less. *Id*. Indeed, given the district court's favorable treatment of Guardado's RLUIPA claim, there is especially no excuse for it not to have weighed each *Turner* factor.

To bring things full circle, this four-factor approach is indeed consistent with this Court's condemnation in *Shakur* of the lower court's refusal to balance each of the *Turner* factors in favor of a mere conclusion that the policy is "rationally related to legitimate penological interests," or the requirement in *Hrdlicka* that all four *Turner* factors must be

"evaluated before a court can decide" the validity of the policy in question. *Shakur*, 514 F.3d at 885; *Hrdlicka*, 631 F.3d at 1051. Perhaps unsurprisingly, NDOC nowhere addresses in its brief this holding from *Shakur*; nor does it mention *Hrdlicka* at all.

B. On a full *Turner* analysis, the record fails to support or is at least disputed on the validity of NDOC's actions.

The record also fails to support NDOC's position under any *Turner* factor. NDOC says AR 810.3 satisfies each of the *Turner* factors because of: (1) security concerns and compliance with federal law prohibiting possession of eagle feathers by non-Native Americans; (2) alternative means given Guardado to practice; (3) alleged violence which could overwhelm prison administration; and (4) lack of ready alternatives to meet prison needs. *See* Answering Br. 13-19.

But as detailed in our opening brief, NDOC cannot show as a matter of law that its exclusion of Guardado from Native worship meets the four-factor *Turner* test. First, NDOC's supposed justifications—illegal eagle feather possession and safety—were either unsupported, speculative, or discredited by the district court as an evidentiary matter in its RLUIPA ruling. *See* Opening Br. 33-35; *accord Morrison*, 239 F.3d at 661. Second, the option for Guardado to practice his Native American faith alone in

his cell is meaningless given the faith's communal nature. *See* Opening Br. 38-40; *accord Ward v. Walsh,* 1 F.3d 873, 878 (9th Cir. 1993). Third and fourth, the district court likewise rejected in its RLUIPA ruling NDOC's evidence about the supposed negative effects on others of accommodating Guardado or the lack of an alternative to meet its safety concerns. *See* Opening Br. 40-43; *see also Ward*, 1 F.3d at 879.

In responding to these points in the Answering Brief, NDOC offers scant, if any, record or legal support. Regardless, its arguments fail. We now address each factor in turn.

Rationally Related to Legitimate Interest

To satisfy the first *Turner* factor, there must be a valid, rational connection between the prison's policy and its governmental interest. *See O'Lone v. Est. of Shabazz,* 482 U.S. 342, 348 (1987). Put another way, a finding in the prison's favor on this factor cannot be met where this connection is "so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90.

Here, NDOC asserts two interests: deterring eagle feather possession and prison security. *See* Answering Br. 16-19. But neither

interest can support a finding on this record of a rational connection to the wholesale exclusion of non-Native Americans from Native worship.

Regarding eagle feathers, NDOC argues "Guardado's participation in religious ceremonies with practitioners who lawfully possess eagle feathers increases the risk for unlawful possession and other negative consequences resulting from such possession." Answering Br. 16. But NDOC nowhere explains how this is so; indeed, it cites nothing from the record or the law. This is perhaps unsurprising given that the evidence the district court relied on in its *Turner* analysis is the Snyder declaration, which discussed eagle feathers only to explain why NDOC separated "earth based groups" for a "non-Native American sweat lodge ceremony." 1-ER-18, 2-ER-238; *see also Turner*, 482 U.S. at 97-98 (rejecting speculative concerns to justify prison rule).

To the contrary, the record shows access to Native American worship need not implicate possession of eagle feathers. 3-ER-370; 1-ER-16. Moreover, NDOC has allowed Non-Native Americans to participate in the Native rite without any evidence of an eagle feather incident implicating safety or security. *See* 2-ER-120-29; 2-ER-144-50. And although NDOC says these showings are not dispositive, it offers no

support for that argument. Answering Br. 16; *see also Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988) (rejecting conjecture under *Turner*).

Regarding NDOC's security justification, the prison references "concerns expressed in the declarations of prison officials concerning the separation of protective segregation and general population inmates as well as limiting potential unrest and violence stemming from non-Native American participation [in Native worship]." Answering Br. 17. But NDOC fails to address the flaws in the referenced declarations stressed in our opening brief; namely, that their assertions on safety were generic, speculative, or deemed inadmissible by the district court. *See* Opening Br. 34-35; *see also Reed*, 842 F.2d at 963 (holding speculation and "piling of conjecture upon conjecture" insufficient for *Turner* analysis); *see also Tobin*, 775 F.3d at 452 (condemning speculation at summary judgment stage in particular). And again, general population and protective segregation inmates worship separately. *See supra*, p. 13.

Finally, the district court here rightly found that in AR 810.3, NDOC "intentionally discriminated against [Guardado] on the basis of his race." 1-ER-19. Accordingly, to the extent *Turner* applies, AR 810.3 has no rational connection to safety concerns as a "pernicious[]" race-

based classification. *Morrison*, 239 F.3d at 656, 661 (striking down analogue to AR 810.3 under *Turner*, holding "it is patently impermissible to control the number of dangerous items by instituting a policy which arbitrarily makes race or heritage the threshold requirement").

Alternative Means

In *Turner,* the Supreme Court held that the lack of an "alternative means of exercising the right" points to the regulation being invalid. 482 U.S. at 90. Drilling down on the matter, this Court has held that a prison can prevail on the second *Turner* factor only where the inmate "retained the ability to participate in other significant rituals and ceremonies of their faith." *Ward*, 1 F.3d. at 877-78.

In its brief, NDOC makes two arguments on the matter of worship alternatives. First, it argues Guardado "is not precluded from practicing his religion in his cell or from obtaining materials on the history and practices of the Native American religion." Answering Br. 17. Second, NDOC contends that its group worship policy was "subsequently amended to permit non-Native Americans to perform [separate] sweat lodge ceremonies which is an alternative means for Guardado to engage in group practice." *Id*. 17-18. NDOC is again wrong on both counts.

As we explained in our opening brief, Guardado's Native American faith is an inherently communal religion consisting of (1) smudging; (2) pipe ceremony; (3) sweat lodge; (4) drum circle; and (5) prayer circle. *See* 1-ER-5; 3-ER-373-74. None of these can be practiced alone in one's cell. *See* 1-ER-15; 2-ER-248. As the district court urged in *Pasaye v. Dzurenda*, to say an inmate "can practice Native American religion in his cell is anathema to the freedom of religion." 375 F.Supp. 3d 1159, 1170 (D. Nev. 2019); *see also Ward,* 1 F.3d at 878 (rejecting private prayer as an alternative under *Turner*, observing that if private prayer were enough, the second *Turner* factor "would have no meaning at all because an inmate would always be able to pray privately").

NDOC's argument about the option of participating in a separate non-Native American sweat-lodge ceremony fares no better. To practice another religion does not count as an alternative means of practicing one's own faith; by definition, it could not. *See Ward*, 1 F.3d. at 877 (stressing ability of plaintiffs to practice "*their faith*" when assessing alternatives) (emphasis added); *see O'Lone*, 482 U.S. at 352 (framing alternatives as part of the same faith).

Indeed, in rejecting NDOC's proposal of a non-Native American sweat ceremony as an alternative in the RLUIPA context, the district court found that, "by [that proposal's] very terms, the inmate is still restricted from exercising his chosen religion." 1-ER-16.

External Impacts

When it comes to the third factor—*i.e.*, the wider impact of the accommodation—*Turner* instructs courts to determine whether there will be "ripple effects" on "prison staff, on inmates' liberty, and on . . . prison resources." 482 U.S. at 90, 78. In making this assessment, however, the court should not "simply accept" a prison official's assertions "that the disruption would be significant." *Ward*, 1 F.3d at 878-79.

NDOC makes two arguments on wider impacts. First, it suggests accommodating Guardado would violate "the right of Native Americans to practice their religion as prescribed." Answering Br. 18. Second, NDOC references "security concerns related to keeping protective segregation inmates separate from the general population and the potential harms associated with access to eagle feathers." *Id.* at 18-19. Once again, however, NDOC's arguments fail.

For starters, and as NDOC concedes, the district court's order "did not expressly discuss" the third (or fourth) *Turner* factor. Answering Br. 18. In *Ward*, this Court held that "[i]n the absence of sufficient factual findings regarding the second, third, and fourth factors, it is impossible for us to determine whether the denial of [the accommodation there]" passed constitutional muster. 1 F.3d at 879. So too here.

In any event, NDOC's assertion on the need to protect the practice of Native Americans includes no record or legal support. *See* Answering Br. 18. And regarding wider security concerns, the district court made clear in its RLUIPA finding that there was no admissible evidence to substantiate NDOC's claims about staff becoming overwhelmed or that there would be new safety risks. *See* 1-ER-12-14; *see also supra*, p. 13 (protective-segregation inmates worship separately). Although NDOC responds that the RLUIPA and *Turner* analyses are distinct, this Court cannot affirm on the third *Turner* factor where the district court called the same evidence: "nothing more than speculation," lacking in "further detail" or "further discussion," including no evidence of "any incidents," and "appear[ing] to be based on inadmissible hearsay." 1-ER-13-15.

Prison Alternatives

The fourth and final *Turner* factor instructs that the prison cannot justify its actions where "an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological concerns." 482 U.S. at 91. Indeed, "the existence of reasonable alternatives" can be sufficient in a *Turner* analysis to "decisively tip the balance in favor of [an inmate]'s free exercise right." *Ashelman v. Waswrzaszek,* 111 F.3d 674, 678 (9th Cir. 1997).

In its brief, NDOC makes no argument on the matter of alternatives it could have pursued to satisfy its supposed safety and other interests. Rather, it simply states "the absence of ready alternatives is evidenced by the penological concerns and the burdens of Constitutional compliance as already discussed." Answering Br. 19. But whether the prison has concerns says nothing about the manner of addressing them. As this Court observed in *Ward*, "in the absence of [a] sufficient factual finding" by the district court on the matter—which, once again, we do not have—"it is impossible" for this Court to affirm on the infeasibility of alternatives. 1 F.3d at 879.

In any event, and as outlined in our opening brief, there are in fact ready alternatives that address NDOC's supposed concerns but would not violate Guardado's religious liberty. These could include NDOC's *de facto* alternative policy of allowing non-Native Americans into the Native practice group and religious ceremonies without incident; allowing those with a sincere religious belief to practice Native religion; or opening Native American religion to all, subject to appropriate safeguards. *See* Opening Br. 42-44 (citing inclusive policies in other states).

III. THIS COURT SHOULD NOT AFFIRM ON THE GROUNDS OF QUALIFIED IMMUNITY.

A. NDOC officials knew or should have known they were violating Guardado's established rights.

Qualified immunity shields officials for unconstitutional acts where those acts do not violate clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Conversely, qualified immunity is overcome where an official "knew or reasonably should have known" that the action he took would violate the plaintiff's constitutional rights. *Id.* at 815.

The Supreme Court has held that a government official reasonably should have known an act violates the Constitution where there exists either controlling authority or a robust consensus of persuasive authority. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). In determining

whether a defendant is entitled to qualified immunity, "the focus is on whether the officer had fair notice that her conduct was unlawful." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). Immunity does not protect those "who knowingly violate the law." *White v. Pauly*, 580 U.S. 73, 79 (2017) (citation omitted).

Remarkably, NDOC officials have had direct and actual notice of the unlawfulness of AR 810.3 since at least 2019 when the Nevada Supreme Court determined the regulation violates an inmate's equal-protection rights because on its face it "imposes differential treatment based on ethnicity or ancestry." *Kille*, 2019 WL 2089533, at *2. Despite this ruling from the state's highest court, NDOC officials—including defendant Calderin, who is named in both suits—continued to block Guardado from practicing his faith for another year and a half and continue defending the policy as constitutionally sound to this day. *See* 1-ER-2; *Kille*, 2019 WL 2089533, at *1.

In light of the notice *Kille* provided, the officials here "knowingly violate[d] the law." *White*, 580 U.S. at 79. At the very least, *Kille* requires a remand on the qualified immunity question to determine who knew or should have known AR 810.3 was unconstitutional. *See Price v. Hawaii*,

939 F.2d 702, 707 (9th Cir. 1991) (remanding on qualified immunity where relevant issues had not yet been addressed by the district court).

Perhaps even more extraordinary than its rebuke in *Kille* is NDOC's contrary position fourteen years ago in *Mauwee v. Donat*, where the court disapproved of the racial exclusion embodied in AR 810.3 as violative of the constitutional rights of inmates who cannot prove Native race. *See* 2009 WL 3062787, at *7-8. In fact, the court in *Mauwee* found that those officials deserved qualified immunity for *not* imposing the policy of racial exclusion that these NDOC officials implement today. *Id.*

Moreover, the conclusions in *Kille* and *Mauwee* are part of a robust consensus of courts across the country. *See Morrison*, 239 F.3d at 657 (holding a prison policy conditioning access to Native religious items on proof of Native race violated inmate's equal protection rights); *Brown ex rel. Indigenous Inmates at N.D. State Prison v. Schuetzle*, 368 F.Supp. 2d 1009, 1024 (D. N.D. 2005) (finding the conditioning of Native faith practice on Native race in prison "offend[s] the fundamental constitutional right to practice religion of one's choice—whether Native American or non-Native American"); *Mitchell*, 82 F.Supp. 2d at 492 (rejecting prison policy conditioning access to Native religious items on

Native race as violative of equal protection); *Combs v. Corr. Corp. of Am.*, 977 F.Supp. 799, 803 (W.D. La. 1997) (finding prison policy restricting Native worship to Native inmates violated the First Amendment).

In its brief, NDOC argues qualified immunity attaches because its officials "did not believe that they violated Guardado's constitutional rights by limiting the practice of the Native American religion to those who the tribes recognized." Answering Br. 20. To support this argument, NDOC says: (1) the Native religion was created and practiced by Native Americans; (2) the policy mimics federal standards for determining Native American status; and (3) the constitutional right was not clearly established. *Id.* at 20-21. NDOC is wrong.

First, and again, it is well established that the Native American religion is not only practiced by those who can verify Native ancestry. As the court in *Mitchell* put it, there is a "common sense" understanding that "belief in Native American theology is not absolutely limited to individuals with a certain percentage of Native American blood." 82 F.Supp. 2d at 489; *accord Morrison*, 239 F.3d at 659 (concluding there is no "convincing evidence for the broad proposition [that] a sincere belief in Native American theology" requires racial exclusion).

Second, AR 810.3 is not supported by the federal standards NDOC invokes. Once more, NDOC cites only to federal provisions regarding secular services, which have nothing to do with defining who can practice the Native religion. *See supra*, p. 8.

Finally, as to controlling precedent, the absence of a Ninth Circuit case on the rights of non-Native inmates to practice Native faith traditions in prison is not dispositive for qualified immunity purposes. For a right to be clearly established, a robust consensus of persuasive authority suffices—which exists here. *See supra*, pp. 29-31*; Ashcroft*, 563 U.S. at 732. Furthermore, qualified immunity is defeated if an official had fair notice her conduct was unlawful. *Brosseau*, 543 U.S. at 198.

NDOC nowhere addresses in its brief the multiple cases it has litigated on Native racial exclusion which condemned its officials' illegal conduct. *See, e.g.*, *Kille*, 2019 WL 2089533*; Mauwee*, 2009 WL 3062787. To be sure, if ever there was a case where officials knew or reasonably should have known their actions violated the Constitution, it's this one.

B. This Court should first rule on the merits that denying the right of non-Native inmates to practice Native religion is unconstitutional.

In deciding qualified immunity, courts consider whether there has been a constitutional violation and whether the state of the law was clear such that a reasonable person in the official's position should have known his actions violated the plaintiff's rights. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). And in conducting this analysis, the Supreme Court has noted the value in deciding the merits of a constitutional violation before deciding whether the matter was clearly established. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (acknowledging that a determination on the merits "promotes the development of constitutional precedent").

The Fifth Circuit has flagged the problem that when courts resolve a case on qualified immunity without addressing the constitutional issue, the corpus of constitutional law stagnates. *Sims v. City of Madisonville*, 894 F.3d 632, 638 (5th Cir. 2018) ("This is the fourth time in three years that an appeal has presented the [First Amendment question at issue]. . . . Continuing to resolve the question at the clearly established step means the law will never get established.").

To this point, NDOC officials have evaded accountability under the Constitution and continue to violate the attendant rights of inmates under the guise of ignorance. Despite arguing in *Mauwee* that a policy like AR 810.3 would violate the constitutional rights of its inmates, NDOC adopted just such a policy seven years later. 2-ER-256; 2009 WL 3062787, at *7-8. And after enforcing the racial exclusion, NDOC officials were told in *Kille* that they violated equal protection rights by doing so, yet they haven't stopped. *See* 2019 WL 2089533.

Following *Kille*, NDOC officials—including six of the named defendants in this case—were again sued over the same policy in *Pasaye v. State of Nevada*, this time in federal court. No. 2:17-cv-02574, 2020 WL 2105024, at *1 (D. Nev. May 1, 2020). But rather than reach the merits of the claim, the court there dismissed it on the grounds the law was not yet clearly established. *Id.* at *5-6.

While the court in *Pasaye* acknowledged the wave of authority for the unconstitutionality of racial exclusion from Native religious practice, it failed to contribute to it by not ruling on the merits. *Id.* In so doing, the court exemplified the problem of constitutional stagnation and allowed *identical NDOC officials* to evade liability while persisting in flouting

constitutional rights they knew or reasonably should have known they were violating. They must be held to account. *See* Michael L. Wells, *Civil Recourse, Damages-As-Redress, and Constitutional Torts*, 46 Ga. L. Rev. 1003, 1043 (2012) (when courts "avoid constitutional questions, the effect . . . is to deny deserving plaintiffs the opportunity to obtain any vindication at all, even a mere public declaration that they suffered a constitutional wrong").

* * *

In closing, and in the alternative, recent scholarship on the Reconstruction Congress's passage of Section 1983 suggests the original statutory text explicitly rejected common law immunities, including qualified immunity. *See generally* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201 (2023). Although the current state of qualified immunity law does not reflect this history, it should be enough to deny NDOC officials qualified immunity here were this Court or the Supreme Court to embrace it. *See Rogers v. Jarrett*, 63 F.4th 971, 979-81 (5th Cir. 2023) (Willett, J., concurring) (describing Professor Reinert's scholarship but deferring to the Supreme Court).

CONCLUSION

This Court should reverse the grant of summary judgment to NDOC on the constitutional claims. It should then remand for judgment in Guardado's favor or, in the alternative, remand for trial.

Date: June 8, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing **Appellant's Reply Brief** complies with the type-volume limitation of Cir. R. 32-1, because it contains no more than 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief contains a total of **6,878** 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: June 8, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I electronically filed the foregoing document, **Appellant's Reply 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: June 8, 2023

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