No. 12-41015

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM E. CHANCE, JR.,
Plaintiff-Appellant

v.

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

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

Brief of Christian Legal Society as *Amicus Curiae* in Support of Plaintiff-Appellant William E. Chance, Jr., and Reversal of the District Court

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CERTIFICATE OF INTERESTED PERSONS

William E. Chance, Jr. v. Texas Department of Criminal Justice, No. 12-41015

Counsel of record certifies the following persons and entities as described in Fifth Circuit Rule 28.2.1 have an interest in this case. These representations are made for the judges of this Court to evaluate possible disqualification or recusal.

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Amici Curiae:	Pan-American Indian Association; Reverend White Bear Barnard; Huy; Native American Council of Tribes; Elizabeth S. Grobsmith; Christian Legal Society
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Appellees:	Texas Department of Criminal Justice, Brad Livingston, Cynthia Lowery, Bill Pierce, Edgar Baker, John Rupert, and Todd Foxworth
Counsel for Appellees:	Texas Attorney General (Celamaine Cunniff)

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Executed this 29th day of January 2013.

s/ James A. Sonne
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STATEMENT OF *AMICUS CURIAE* REGARDING THE NEED FOR THIS BRIEF AND CONSENT OF ALL PARTIES TO ITS FILING

Amicus curiae Christian Legal Society ("CLS") is familiar with the current briefing in this matter but believes additional argument is necessary. Though concurring in Appellant's legal analysis, CLS's discussion of the issues does not duplicate that briefing. Rather, CLS draws on its unique knowledge of, and broad experience with, the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA").

All parties have consented to the filing of this brief.

STATEMENT OF *AMICUS CURIAE* INDEPENDENCE

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

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae CLS respectfully submits this brief to assist the Court in addressing the central legal question raised in this case: whether the Texas Department of Criminal Justice can show as a matter of law that it accommodated Appellant William E. Chance, Jr.'s religious beliefs in accordance with RLUIPA.

CLS is a nonprofit association of attorneys, paralegals, law students, and other professionals dedicated to the defense of religious freedom, provision of legal aid to the needy, and integration of the Christian faith with the study and practice of law. Through its Center for Law and Religious Freedom, CLS advocates for the protection of religious belief and practice in state and federal courts throughout the nation. Since 1980, CLS has worked on hundreds of cases, legislative initiatives, and publications in defense of religious freedom.

After the Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), CLS played a leading role in a coalition formed to draft and support new legislation in defense of religious freedom. *See Religious Liberty Protection Act: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 225-313 (1999) (statement of Steven T. McFarland, Director, Center for Law and Religious Freedom, CLS). That effort led to congressional passage of RLUIPA, which is the central law at issue in this case. Since RLUIPA was enacted, CLS has consistently participated in the defense

of RLUIPA as a source of protection for religious freedom, including before the Supreme Court in *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

The Court's decision in this case, which involves a Texas prison's refusal to accommodate Native American religious practices central to the beliefs of plaintiff Chance and other inmates, will have significant implications for the scope of the protections guaranteed to fundamental religious liberties by RLUIPA. The Court's determination will affect the ability of prison inmates and other institutionalized persons in Texas and throughout the Fifth Circuit to practice their religion without unnecessary burdens imposed by the state.

INTRODUCTION

At the turn of this century, Congress passed by unanimous consent, and President Clinton signed with great enthusiasm, the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA" or the "Act"). In adopting RLUIPA, the federal government did not merely restate the founding value of religious liberty in America generally but made a pointed effort to stress the unique importance of that liberty for the millions incarcerated in her prisons—regardless of the presumed justice that brought about their confinement. The Christian Legal Society ("CLS"), a prominent supporter of RLUIPA at its passage, submits this brief because it is deeply concerned that the rights codified by RLUIPA for all prisoners, no matter their particular religious faith or practice, will be diminished if the district court's order is allowed to stand.

RLUIPA prohibits any prison policy that substantially burdens an inmate's religious exercise unless the prison can demonstrate *both* that the policy is supported by a compelling state interest *and* that the policy is the least restrictive means of achieving that interest. In demonstrating whether a burdensome policy is in fact the least restrictive means of achieving a compelling state interest, the prison must, among other things, show that it previously considered and rejected all reasonable alternatives. In assessing whether a prison considered and rejected such alternatives, courts across the country have required an inquiry into the past

practices of the defendant prison as well as consideration of the practices of other prisons. Not so the district court here.

Rather, in granting summary judgment to the Texas Department of Criminal Justice ("TDCJ"), and endorsing as a matter of law its Michael Unit prison's prohibition of certain Native American religious practices for all inmates (and not just plaintiff), the district court ignored critical, and uncontroverted, evidence that defeats TDCJ's motion. Specifically, the court failed to consider that (1) the prison previously accommodated the religious practices it now prohibits; and (2) prisons elsewhere presently allow identical or substantially similar religious practices. The district court's failure to recognize that such evidence at least creates a factual dispute not only violates the spirit and letter of RLUIPA, it conflicts with the approach taken by other courts in evaluating whether substantial burdens on a prisoner's chosen religious observance constitute the least restrictive means of addressing whatever the prison's concerns might be, compelling or otherwise.

Defenders of the prison might try to claim that safety, cost, or efficiency are compelling state interests. But Congress made it clear when it passed RLUIPA—and required courts to make an exacting inquiry—that even if these institutional interests were demonstrated to be important in the abstract, context is critical whenever a prisoner's religious liberty is implicated. Context is all the more important at the summary judgment stage, where, as here, the question is not

whether the state should win but whether it must win. It will not open the floodgates to require that the factual disputes created by evidence of past and collateral practices be resolved at trial; indeed, consistent with summary judgment practice, this Court has held that such factual disputes regarding whether a prison's practice is truly the least restrictive means are appropriately resolved at trial. *See Moussazadeh v. Tex. Dep't of Crim. Justice*, ___ F.3d ___, 2012 WL 6635226, at *12 (5th Cir. Dec. 21, 2012). Only through such analysis can courts truly ensure appropriate prison administration without a concomitant loss of religious liberty—exactly what RLUIPA proponents, such as CLS, had in mind.

By refusing to consider past and collateral practice, the district court ignored the broader context and abdicated the exacting scrutiny required by RLUIPA, to the detriment of prisoners of all faiths. Its decision must be reversed.

ARGUMENT

I. FEDERAL LAW REQUIRES PRISONS TO MEET A UNIQUE AND HEAVY BURDEN TO JUSTIFY POLICIES THAT WOULD INHIBIT THE RELIGIOUS PRACTICES OF INMATES.

A. RLUIPA provides special protection for the religious practices of prisoners, not only for their benefit but for society as a whole.

Unlike free persons, prison inmates rely entirely upon the state to provide for their religious needs. As the Supreme Court has recognized, in its prisons "the government exerts a degree of control unparalleled in civilian society." *Cutter v. Wilkinson*, 544 U.S. 709, 720-21 (2005). This comprehensive control is, of course, generally understandable given the circumstances from which most imprisonment arises, and the safety, cost, and administrative concerns invariably attending involuntary confinement on a group basis. But such broad control also has the unfortunate potential to be "severely disabling" to religious exercise and the value of religious liberty otherwise prevailing outside prison walls. *Id*. at 721.

Concern for abuse of religious liberty in the prison context was a driving force behind RLUIPA. Congressional hearings held before the Act's passage, for example, found prisons often unreasonably denied inmates the ability to practice their religion—even where such practice would not have undermined prison safety or discipline. *See* 146 Cong. Rec. S6688 (daily ed. July 13, 2000) (statement of Sen. Edward Kennedy). Indeed, the Act's sponsors observed, prisons were notorious for imposing arbitrary or frivolous rules on religious practice "in

egregious and unnecessary ways." 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sens. Orrin Hatch and Edward Kennedy).

RLUIPA's requirement that any policy that substantially burdens religious exercise must not only arise from a compelling interest but must be the "least restrictive means" of serving that interest was designed to ensure that prison regulations would interfere with the religious exercise of inmates only when absolutely necessary. 42 U.S.C. § 2000cc-1(a). The "least restrictive means" test is derived from identical language in RLUIPA's somewhat better known predecessor, the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b)(2) ("RFRA"), which was, in turn, a direct response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990).

In *Smith*, the Supreme Court refused to recognize—at least in the context of government regulation of only outward physical acts, *see Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 132 U.S. 694, 706-07 (2012)—a constitutional right to religious exemptions from governmental policies that are otherwise neutral toward religion and generally applicable. *Smith*, 494 U.S. at 878-80; *see also* Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 Harv. J.L. & Pub. Pol'y 821, 854-58 (2012) (discussing how *Hosanna-Tabor* limits *Smith*). Although RFRA was later deemed inapplicable to the states, *see City of Boerne v. Flores*, 521 U.S. 507 (1997)—alas, a winding tale—its embrace

of exceptions to general rules absent compelling circumstances was picked up by RLUIPA and applied with unique force to prisons.[1]

Though RLUIPA has an undeniably far-reaching effect in favor of prisoner rights, it attracted broad, bipartisan support at its passage. It passed both houses of Congress with unanimous consent, *see* 146 Cong. Rec. H7192 (daily ed. July 27, 2000); 146 Cong. Rec. S7779 (daily ed. July 27, 2000), and with support from the Department of Justice as well as diverse private organizations, including CLS and the American Civil Liberties Union, *see* 146 Cong. Rec. S6688 (daily ed. July 13, 2000); 146 Cong. Rec. S7776 (daily ed. July 27, 2000). In his signing statement, President Clinton stated: "Religious liberty is a constitutional value of the highest order, and the Framers of the Constitution included protection for the free exercise of religion in the very first Amendment. This Act recognizes the importance the free exercise of religion plays in our democratic society." Presidential Statement on Signing the Religious Land Use and Institutionalized Persons Act of 2000, 36 Weekly Comp. Pres. Doc. 2168, 2168 (Sept. 22, 2000).

Religious freedom is good not only for inmates, but also for the prisons where they live and the society they will likely reenter. Although providing

[1] Interestingly, the least-restrictive-means requirement imposed by RFRA "was not [even] used in the pre-*Smith* jurisprudence RFRA purported to codify." *City of Boerne*, 521 U.S. at 535. Inclusion of this requirement suggests congressional intent to provide even broader protection for religious liberty than under the pre-*Smith*, strict scrutiny cases. The least restrictive means test adopted by extension in RLUIPA, therefore, is arguably a more difficult standard than even ordinary strict scrutiny. *See* Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. Rev. 1137, 1182-83 (2009).

religious accommodations may often seem more a curse than a blessing for prison administrators, such accommodations have collateral benefits. Inmates are more likely to trust a prison that meets their religious needs rather than viewing it as an enemy, making administration at least a little easier. In addition, religious practice is an invariably peaceful way for inmates not only to seek meaning in their daily lot, but also to engage in moral reflection supportive of rehabilitation. (*See* R. 169-70 (recognizing that religious practice reduces recidivism); 171-72 (promotes reintegration into society); 859-60 at 29:12-30:10 (promotes rehabilitation).)

Society stands to benefit generally from a prison population exposed to the basic teachings common to most religions. Moreover, the way society chooses to treat its inmates may be quite telling about its own state of affairs. As Dostoyevsky famously observed, "[t]he degree of civilization in a society is revealed by entering its prisons." Fyodor Dostoyevsky, *The House of the Dead* 76 (C. Garnett trans., 1957). Honoring the religious liberty of "the least of these" among us, *Matthew* 25:37-40, bears witness to its importance as an enduring right for all.

B. In determining whether a policy that would inhibit the religious practices of prisoners satisfies RLUIPA, prisons must satisfy a fact-intensive inquiry; generic appeals to cost or safety will not do.

Under RLUIPA, "[n]o government shall impose a substantial burden on the religious exercise of [an inmate] . . . 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.C. § 2000cc-1(a). Thus, if an inmate can show a prison policy substantially burdens his religious exercise, the burden shifts to the prison to prove its policy not only furthers a compelling interest but also that it is the least restrictive means of achieving it. *Id*. As the Supreme Court has emphasized, "[r]equiring a State to demonstrate . . . that it has adopted the least restrictive means of achieving [a compelling] interest is *the most demanding test known to constitutional law*." *City of Boerne*, 521 U.S. at 534 (emphasis added).

The test required under RLUIPA is as exacting as constitutional strict scrutiny, and Congress intended this. In a statement on the Senate floor, chief sponsor Senator Kennedy noted that RLUIPA "applies the strict scrutiny standard" to prisoner claims. 146 Cong. Rec. S6689 (daily ed. July 13, 2000) (statement of Sen. Edward Kennedy). This Court and others have interpreted the Act accordingly. In *A.A. ex rel. Betenbaugh v. Needville Independent School District*, 611 F.3d 248, 270 (5th Cir. 2010), this Court stated that RLUIPA gives courts power to review denials of prisoner accommodation requests only "under strict scrutiny," and courts in other circuits agree. *See Couch v. Jabe*, 679 F.3d 197, 203 (4th Cir. 2012); *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 996 (7th Cir.

2006); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 661 (10th Cir. 2006).

The least restrictive means test, in particular, "demands a fact-intensive inquiry." *Moussazadeh v. Tex. Dep't of Crim. Justice*, ___ F.3d ___, 2012 WL 6635226, at *12 (5th Cir. Dec. 21, 2012). In making this inquiry courts must look to the specific facts, in context, when evaluating an inmate's religious liberty claim. Mere conclusory statements that a policy is the least restrictive means of furthering a compelling state interest simply do not suffice. *Warsoldier v. Woodford*, 418 F.3d 989, 998-99 (9th Cir. 2005). Rather, RLUIPA requires a specific and exhaustive analysis.

In short, Congress enacted RLUIPA to offer a broad and unique measure of protection for the religious exercise of inmates entirely dependent on government for such exercise and in direct response to documented unnecessary infringements of those rights. The Act guarantees the basic dignity of those in prison while also benefitting society as whole. Given the unique circumstances of incarceration, Congress understandably installed a difficult evidentiary barrier to unnecessary violations of free exercise of religion.

II. IN DETERMINING WHETHER A RELIGIOUSLY BURDENSOME PRISON POLICY IS TRULY THE "LEAST RESTRICTIVE MEANS" OF ACHIEVING A COMPELLING INTEREST, COURTS CANNOT IGNORE THE PRISON'S PAST APPROACH OR THAT OF OTHER PRISONS TO THE RELIGIOUS PRACTICE AT ISSUE.

A. A prison's past treatment of a religious practice is highly relevant in assessing the validity of its current treatment of that practice.

Comparative analysis between a past accommodation of a religious practice and the current challenged practice of non-accommodation provides a valuable tool to courts in determining whether RLUIPA's "least restrictive means" standard has been met. Indeed, "the phrase 'least restrictive means' is, by definition, a relative term." *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007). Here, plaintiff introduced evidence of past accommodation by the prison for the religious practices the prison has now curtailed, as well as evidence concerning the absence of problems during the years in which such accommodation occurred. But the district court nonetheless accepted the prison's new restrictive policies even though the prison failed to explain why the prior policies did not sufficiently further its putative compelling interest. It is difficult to fathom how a practice can be the *least* restrictive means—particularly as a matter of law—in light of evidence that a less restrictive option has in fact been used in the past.

Courts in other circuits have repeatedly recognized that past success of an accommodation is indeed compelling evidence that a new refusal to make such an accommodation cannot meet RLUIPA's "least restrictive means" test—particularly

on summary judgment. The Third Circuit, for example, reversed a grant of summary judgment on these grounds in *Williams v. Secretary, Pennsylvania Department of Corrections*, 450 F. App'x 191 (3d Cir. 2001). In *Williams*, a Muslim inmate was fired from his job in the prison kitchen for praying there, even though the prison had previously offered inmates the opportunity for similar prayer activity in a prayer room. In reversing summary judgment, the Third Circuit held that a reasonable fact finder could find that a designated prayer room in the kitchen would have been a less restrictive means than a ban on kitchen prayer, because the prison had made a related accommodation in the past. *See id*. at 195-96.

Likewise, the First Circuit reversed a grant of summary judgment to a prison on an inmate's RLUIPA challenge to a policy that banned his religious preaching based on concerns that such preaching posed a safety risk. *Spratt v. R.I. Dep't of Corr*., 482 F.3d 33, 38-42 (1st Cir. 2007). The First Circuit held the prison had not carried its burden to show its all-or-nothing policy was the least restrictive means, in part because of the absence of safety problems for seven years. *See id*.

District courts have likewise allowed RLUIPA claims to survive summary judgment based on a prison's prior practice. A district court in Nevada, for example, denied summary judgment on an inmate's challenge to a total ban on wearing a religious symbol, in part because of the prison's failure to demonstrate its previous accommodation of allowing the symbol to be worn was not the least

restrictive means. *Stoner v. Stogner*, 2007 WL 4510202, at *6 (D. Nev. Dec. 17, 2007). And a district court in Pennsylvania denied summary judgment on a prisoner's challenge to a requirement that he prepare pork as part of his kitchen job where the prison previously allowed him to do alternative work to avoid contact with pork. *Williams v. Bitner*, 359 F. Supp. 2d 370, 377 (M.D. Pa. 2005), *aff'd*, 455 F.3d 186 (3d Cir. 2006); *see also Weir v. Nix*, 890 F. Supp. 769, 778 (S.D. Iowa 1995), *judgment aff'd, appeal dismissed in part*, 114 F.3d 817 (8th Cir. 1997) (allowing RFRA claim arising from a prohibition on immersion baptism where the prison previously maintained a pool for such baptisms).

Plaintiff Chance introduced evidence in the district court that the prison had accommodated the pipe-smoking ritual it now restricts for at least ten years without any safety or security problems. (R. 838-40.) Similarly, and contrary to its current practice, the prison had allowed Chance to smudge indoors for eleven years without incident. (R. 843-44.) But the district court nevertheless accepted the prison's medical explanation for the pipe-smoking ban without exploring or requiring the prison to explain how anything had changed. (*See* Appellant's Br. 15.) And the court accepted the prison's fire-alarm justification for the indoor smudging ban, even though there was no evidence the fire alarm had previously been set off. (*See id*. 17.) The district court's failure to consider the prison's prior practices requires the reversal of summary judgment.

In sum, contrary to RLUIPA's plain statutory text and the prevailing rule in other courts, the district court erred in accepting the prison's explanations for its new policies without considering evidence that prior, less restrictive policies were successful. At the summary judgment stage, consideration of such evidence concerning a prison's prior practices is essential because it creates a factual dispute as to whether a challenged policy is indeed the *least* restrictive alternative—a dispute appropriately resolved at trial.

B. Approaches by other prisons to a religious practice are also relevant in assessing the validity of the treatment of that practice by the prison at issue.

In addition to failing to examine the Michael Unit's past practice, the district court failed to consider evidence presented by plaintiff that other prisons also had less-restrictive policies that worked. In so doing, the court ignored the well-tested and helpful experience of other prisons demonstrating that, contrary to the defendant prison's claim here, policies more permissive of Native American religious practices do not undermine security or result in excessive costs.

To ensure that a prison has adopted the least restrictive means of achieving a compelling interest, courts must engage in comparative analysis of policies in other prisons when presented with such evidence. Different prisons often face similar accommodation-of-religion challenges, and they likely have much to learn from one another about which policies best balance the rights of inmates against cost

and security needs. By requiring examination of policies implemented elsewhere, courts ensure that prisons adopt not simply workable solutions, but solutions that have proven to be least restrictive of religious freedom.

Only last month this Court reversed summary judgment in favor of a prison that had required a Jewish inmate to pay for his own kosher meals. *Moussazadeh*, 2012 WL 6635226, at *12. In so ruling, the Court observed in strongly-worded dicta that had the prison adopted an outright ban on kosher meals—as opposed to providing them, but at a cost—the ability of prisons elsewhere to provide such meals would defeat any argument that such a ban would be the "least-restrictive means" of cutting costs. *Id*. In other words, given that other prisons in the same system have been able to offer kosher meals free of charge, the outright refusal to do so cannot be the least restrictive alternative in a similarly situated prison.

In *Warsoldier v. Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005), the Ninth Circuit was more direct. There, the court held that "the failure of a defendant [prison] to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means." *Id*. Applying this rule, the court reversed the district court's denial of an inmate's request for a preliminary injunction that would have exempted him from a prison hair-grooming policy. *Id*. at 991. Notably, the court observed that other prisons, including the

Federal Bureau of Prisons, had no hair requirement or provided exemptions. *Id*. at 999. The defendant prison lost because it could not explain "why these prison systems [were] able to meet their indistinguishable interests without infringing on their inmates' right to freely exercise their religious beliefs." *Id*. at 1000.

Courts elsewhere also routinely engage in comparative analysis of policies in other prisons when determining whether a challenged prison policy is the least restrictive means of achieving a compelling state interest. In *Washington v. Klem*, 497 F.3d 272, 284-85 (3d Cir. 2007), for example, the Third Circuit held that a prison failed to show it adopted the least restrictive means by imposing a limit on the number of religious books a prisoner could possess, in part because it did not explain why an inmate could not be allowed to keep more than ten such books in his cell even though other prisons where the inmate was previously held had allowed him to do so without any problem. The Southern District of Indiana has similarly examined other prison policies in at least two cases. *E.g*., *Lindh v. Warden*, 2013 WL 139699, at *15 (S.D. Ind. Jan. 11, 2013) (finding a prison failed to justify a ban on congregate prayer because it did not consider how such prayer is treated in other prisons); *Hummel v. Donahue*, 2008 WL 2518268, at *8 (S.D. Ind. June 19, 2008) (rejecting as unlawful a prison's refusal to allow group worship by inmates where other prisons allowed the practice).

Requiring prisons to look to policies implemented in other prisons before concluding that a given policy is the least restrictive alternative encourages learning across prison systems. The Ninth Circuit is quick to admit that it "[has] found comparisons between institutions analytically useful when considering whether the government is employing the least restrictive means." *Warsoldier*, 418 F.3d at 1000. Moreover, prison administrators would likely also find such analytical comparisons helpful to them in devising policies that satisfy the state's interests while avoiding imposition of undue burdens on prison inmates' religious exercise. Where other prisons have implemented more efficient policies, prisons should seek to become aware of and emulate these alternatives. Where other prisons' policies have failed, prisons will benefit from knowing what to avoid.

At the trial level, plaintiff introduced evidence of less restrictive alternatives adopted in other prisons, but the district court ignored this evidence in making its summary-judgment ruling. The declaration of James Aiken, an expert in correctional administration, was submitted as Exhibit L to Chance's Response to Defendants' Motion for Summary Judgment and stated that at least four other correctional agencies—in Arizona, Colorado, Montana, and New Mexico—have allowed smudging or prayer pipe services (two of the Native American religious practices at issue in this case) without any resulting safety or security problems. (R. 952-53.) Further, case law provides ample evidence of less restrictive alternatives

adopted by other prison systems. (*See* Appellant's Br. 35-36; Br. of Amici Pan-American Indian Association, et al. 18-27.)

As this Court observed in *Moussazadeh*, "[i]f a less restrictive alternative is available, RLUIPA commands that TDCJ adopt it." *Moussazadeh*, 2012 WL 6635226, at *12. The district court's refusal to consider evidence of such alternatives allowed TDCJ to escape its obligations in this case. Summary judgment must be reversed.

CONCLUSION

For the foregoing reasons, CLS requests that the Court reverse the decision of the district court and remand this matter for further proceedings.

Dated: January 29, 2013

s/ James A. Sonne

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CERTIFICATE OF COMPLIANCE

I hereby certify that the following statements are true:

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2. This brief 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), in that it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font.

Executed this 29th day of January 2013.

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I hereby certify that on the date indicated below, I filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will automatically send notification of such filing to the following counsel of record, each of whom has consented to service in such manner:

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