No. _____

In The
Supreme Court of the United States

RICHARD R. WATKINSON,

Petitioner,

V.

ALASKA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition involves a prisoner who previously received religious accommodations without incident. But after an administrative reinterpretation of the applicable prison policies, he—but not secular groups—was then denied those previous accommodations. He now faces additional burdens in obtaining the material that he needs for his religious celebrations, burdens that the district court found have precluded him from consistently obtaining the material he needs for his religious celebration.

The Free Exercise Clause should have protected the Petitioner. But the circuits are divided about whether a "substantial burden" is a prerequisite to a prisoner's Free Exercise Claim. The Petitioner had the misfortune to have sued in a Circuit requiring such a showing. Further, the Ninth Circuit below failed to recognize that discrimination against prisoner religious practice ought to receive strict scrutiny, rather than mere reasonableness review, because government neutrality toward religion is not "inconsistent with proper incarceration." *Johnson v. California*, 543 U.S. 499, 510 (2005) (quotation omitted) (applying strict scrutiny rather than reasonableness-review to racial classifications in prisons).

Even if the Free Exercise Clause did not require strict scrutiny, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc-1 et seq., does. But the Ninth Circuit failed to find a substantial burden and thus never reached the strict-scrutiny analysis.

Accordingly, two questions are presented here:

1. Does the Free Exercise Clause permit a prison to deny accommodations to the Petitioner for his religious exercise that it already allows for secular activities, especially where the denial hinders him from obtaining the material necessary for his religious practice?

2. Does RLUIPA permit a prison to deny accommodations to Petitioner for his religious exercise that it already allows for secular activities, especially where the denial hinders him from obtaining the material necessary for his religious practice?

LIST OF PARTIES

Below Respondent Earl Houser's name appeared as "Earl Hauser" but should have read "Earl Houser." Additional respondents are James Duncan and Scott Dial. Keith Rogers and John Conant were parties in the district court but were dismissed.

LIST OF RELATED PROCEEDINGS

Judgment in the District Court:

Watkinson v. State of Alaska et al., No. 3:17-cv-00236-JMK (D. AK). Judgment entered January 26, 2021.

Judgment in the Court of Appeals:

Watkinson v. Alaska Department of Corrections et al., No. 21-35084 (9th Cir.). Judgement entered May 2, 2022.

TABLE OF CONTENTS

TABLE OF CONTENTS OF THE APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Richard R. Watkinson respectfully petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The Ninth Circuit Court of Appeals did not select its opinion for publication. It is reprinted in the Appendix. [A1-A5].

The district court did not select its opinion for publication. It is reprinted in the Appendix. [A6-A36].

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. Judgment entered on January 26, 2021.

The U.S. Court of Appeals for the Ninth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court has jurisdiction to review the judgment of the Ninth Circuit. 28 U.S.C. § 1254(1). Judgment entered on May 2, 2022.

CONSTITUTIONAL AND STATUTORY PROVISIONS

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.

* * *

42 U.S.C. § 2000cc-1:

(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.

(b) Scope of application

This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

STATEMENT OF THE CASE

I. Proceedings in the District Court

Petitioner Richard R. Watkinson is a prisoner of the Alaska Department of Corrections ("DOC"). He filed suit in the U.S. District Court for the District of Alaska because previous religious accommodations were revoked following a reinterpretation of the DOC's existing policies and procedures.

A. The Parties' Stipulations

The parties made numerous trial stipulations, including the following.

Mr. Watkinson is an Asatru adherent and a prisoner of the DOC, which is subject to the RLUIPA. At all relevant times, the DOC has recognized the Asatru faith for congregate worship. Mr. Watkinson's congregation, called the Blodtyrggr Kindred, "accept[s] any inmate who wishes to attend services or other congregant activities…."

By policy, the DOC has authorized a prisoner welfare fund ("PWF") at each facility, funded by a 3% surcharge on commissary items. PWF funds "may be expended for charitable, recreational and educational purposes when approved and authorized in writing by the Superintendent or their designee." By policy, prisoner groups can submit proposals to the Superintendent for PWF funds, "to pay for special events, recreation equipment, special programs and appliances purchased for prisoner use and/or benefit." Neither of the relevant policies "authorizes PWF funds to be used for activities of a particular religious group."

In 2014, the DOC's Goose Creek Correctional Center ("GCCC") began purchasing firewood for sweat lodges with PWF funds. In May 2016, following a successful grievance from Mr. Watkinson, GCCC also allowed Asatru practitioners to obtain firewood through the PWF. In the DOC decision resolving his grievance, a DOC administrator wrote that "if the facility is [later] no longer able to provide firewood through the [PWF, then Mr. Watkinson would be] allowed to request reasonable alternatives to obtain it."

Beginning in or about February 2017, Respondent Dial began to prohibit the Asatru faith group from using PWF-purchased wood, while continuing to allow the sweat lodge to use PWF-purchased firewood.

The PWF did, and still does, purchase firewood for the GCCC sweat lodge.

From 2015-17, Mr. Watkinson and the other members of his Kindred donated money from their offender trust accounts ("OTAs") to the PWF, which the PWF pooled and held for them. Their virtual balance within the PWF was then used to purchase juice and honey, which is used in Asatru religious celebrations. Purchasing juice and honey through the PWF resulted in significant savings for Mr. Watkinson. But in June 2017, Respondent Dial stated that the DOC would no longer allow virtual balance.

B. The Bench Trial

The district court held a bench trial to consider whether to grant Mr. Watkinson the declaratory and injunctive relief that he sought. It ruled against him.

1. Mr. Watkinson's Requested Relief

Mr. Watkinson sought a declaratory judgment:

- That he had been wrongfully denied the "the right to compete for PWF funds to purchase firewood and food/beverage products,"

- That the PWF policies are illegal insofar as they "categorically exclude" religious groups like his Asatru Kindred "from being eligible to obtain PWF funds," and

- That the DOC must permit prisoners like him to "donate funds to reimburse the PWF for purchases that would not otherwise have sufficiently broad appeal to merit PWF purchase without inmate reimbursement, subject to the Superintendent's ability to deny particular requests for religiously neutral reasons."

He also sought an injunction requiring the DOC and its employees: "1. [t]o cease discrimination against religion in general and Asatru in particular with respect to the PWF; and 2. [t]o develop criteria independent of religion for evaluating PWF funding requests within 45 days of the entry of judgment."

2. The District Court's Findings of Fact

The district court accepted that Mr. Watkinson is an adherent of the Asatru faith. [A11-A12 ¶2]. As part of Mr. Watkinson's religious practice, he attends a weekly ceremony, called a blot, which requires firewood. [A12 ¶3]. Additionally, he uses juice and honey for his religious celebration. [A12 ¶3].

"Cultural and non-religious groups are able to submit requests to utilize funds from the PWF, but they are not guaranteed to receive what they request. Religious groups are not able to obtain funding from the PWF." [A12-A13 ¶4 (footnotes omitted)]. Under the DOC's policies, the DOC "'is not responsible for the procurement of any faith group property or equipment.'" [A13 ¶5 (quoting DOC policy 816.01)].

In 2017, Respondent Duncan, the statewide DOC chaplaincy coordinator, determined that Mr. Watkinson and the other Asatru practitioners would no longer be allowed to use PWF firewood. [A11 ¶1, A13-14 ¶7. Respondent Dial announced that change at GCCC. [A14 ¶7].[1]

After the DOC stopped allowing Mr. Watkinson to use PWF firewood and to maintain a virtual balance in the PWF for his juice and honey purchases, "there were times when he was not able to obtain the items because the Asatru faith group did not have the 'financial accommodations' to be able to buy enough, or the families of members were unable to donate items or funds in time for the ceremony." [A14-A15 ¶9]. The district court accepted Mr. Watkinson's unrebutted testimony "that the new interpretation of Alaska's DOC's policy [has] subjected him to increased personal expense, delay, and un-certainty in obtaining firewood, juice, and honey, as he is no longer able to utilize the PWF to obtain these items." [A14 ¶8 (footnote omitted)].

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[1] Mr. Watkinson testified at trial that he would now face disciple for using PWF firewood.

By contrast, the sweat lodge continues to receive PWF-purchased firewood. [A17 ¶15]. It is "accessible to all inmates; however, … it is run in a 'Lakota Sioux' way, in which there are several rounds of prayer…. [It] is operated by a Native American cultural group that is separate from the Native American religious groups at GCCC." [A17 ¶15].

At trial, a DOC administrator testified that the DOC no longer permits Mr. Watkinson to maintain a virtual account within the PWF because "the Department of Administration and bank rules both prohibit the Alaska DOC from creating individual accounts for groups within the PWF." [A15 ¶10]. Of course, the PWF had previously been able to create and maintain such an account for Mr. Watkinson and the other Asatru practitioners. [A13 ¶6]. No particular statute or regulation was ever cited as substantiating that testimony. Indeed, in deposition testimony admitted into evidence at trial, the administrator admitted that he was "not sure if there's a statute or a regulation that prohibits [a virtual balance] or whether it [is] just a policy issue." Further, although Mr. Watkinson and the Asatru are no longer able to maintain a virtual balance in the PWF, "[a] prisoner organization at the 'Hiland Mountain' facility maintains its own account through the PWF. The group facilitates a greenhouse project and sells plants…. [DOC] and banking institutions allow this group to continue maintaining its own balance due to the longstanding nature of the program." [A17 ¶14 (footnotes omitted)].

The DOC also proffered concerns that allowing virtual accounts may allow fraud and other criminal activity "through 'strong-arming.'" [ER 15 ¶10 (footnote omitted)]. Yet the district court recognized that the

DOC had "produced no evidence of actual fraud that has occurred" in connection with virtual accounts. [A30]. And in his deposition, admitted into evidence, the DOC administrator had testified that he was "unaware of any security problems that did or could arise in that process."

Further, the DOC worried that "it is 'not legal' to allow religious groups to use the PWF to purchase religious items", given the Establishment Clause. [A16 ¶12 (footnote omitted)].

Finally, the DOC administrator maintained in his testimony "that it is 'not feasibly administratively possible' to distribute PWF funds to religious groups in a way that gives each group its 'fair share,' due to the diversity of the inmate population." [A16 ¶13 (footnote omitted)]. He worried "that if Alaska DOC were to make PWF funds available for religious purposes, 'the fund would wind up being a hundred percent [consumed by religious endeavors]…,' which would run counter to its goals of providing recreational and educational activities for the benefit of the entire prison population." [A16 ¶13 (footnote omitted) (alteration in original)].

3. The District Court's Conclusions of Law

The district court ruled against Mr. Watkinson on his RLUIPA claim. It found that he had not established a substantial burden on his religious practice because RLUIPA does not require subsidization of religious belief and because he can obtain firewood donations from family and can purchase juice and honey from the commissary, [A19-A22 ¶¶6-8].

In the alternative, the district court concluded that the DOC's good-faith Establishment Clause concerns over the prior accommodations for Mr. Watkinson constituted a compelling state interest. [A24 ¶10]. The district court also said that potential security concerns from the accommodations counted as a compelling state interest. [A25 ¶11].

The district court concluded that the prohibition on "utilizing the PWF to purchase religious items," whether with or without a virtual balance, was the least restrictive means of furthering the state's compelling interests. [A26 ¶12].

As for Mr. Watkinson's Free Exercise Claim, the district court found no constitutional violation. [ER 022 ¶13]. For the same reasons as for the RLUIPA claim, the district court found that the PWF's rules pose no substantial burden on Mr. Watkinson's religious exercise. [A27 ¶14]. In the alternative, the district court determined that the restrictions on his Free Exercise were reasonable under *Turner v. Safley*, 482 U.S. 78 (1987). [A28 ¶15].

Finally, the district court rejected Mr. Watkinson's Equal Protection Claim. [A32-A33 ¶17]. It believed that there was no evidence of intentional religious discrimination. [A33-A35 ¶18]. Alternatively, it believed that the different treatment between Mr. Watkinson and between the sweat lodge and the Hiland group was reasonable under *Turner*. [A34-35 ¶18].

II. The Appeal to the Ninth Circuit

The Ninth Circuit affirmed. [A1-A5].

With respect to the RLUIPA claim, it affirmed the district court because the DOC's "policies do not deny [Mr. Watkinson] access to any item necessary for his religious ceremonies, and Plaintiff may procure all necessary items without access to the PWF." [A3 ¶1].

As for his Free Exercise claim, the Ninth Circuit held that the same failure to show a substantial burden for RLUIPA purposes precluded a Free Exercise violation. [A4]. Alternatively, it held that the prohibition on religious use of the PWF was "reasonably related to legitimate penological interests: avoiding constitutional issues that might arise from funding one specific religious group, maintaining prison security, avoiding favoritism, and ensuring that PWF funds support charitable, recreational, and educational opportunities available to the entire prison population." [A4 ¶2 (citations omitted)].

As for Equal Protection, the Ninth Circuit held that that claim could not succeed, either. [A4-A5 ¶3]. The reason was that "[t]he prison director testified that the groups are not similarly situated because the sweat lodge is a cultural rather than a religious activity. [It] accord[ed] deference to such testimony in determining whether two groups are similarly situated." [A5 ¶3].

REASONS FOR GRANTING THE PETITION

I. This Court Should Consider the Free Exercise Claim Because the Circuits Are Divided About How to Evaluate Constitutional Religious Liberty Claims from Prisoners.

"[P]risoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison. Inmates clearly retain protections afforded by the First Amendment, including its directive that no law shall prohibit the free exercise of religion." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (citations and quotations omitted). Yet incarceration renders necessary some restrictions on inmates' constitutional rights, "both from the fact of incarceration and from valid penological objectives…." *Id.*

This Court has previously applied the general framework set forth in *Turner v. Safley*, 482 U.S. 78 (1987), to decide how much of a restriction on an inmate's Free Exercise rights the Constitution permits. *O'Lone*, 482 U.S. at 349 (applying *Turner* to a case involving challenge to restriction on congregate worship). Under that test, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. In making that reasonableness determination, courts must consider four factors:

- "First, there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* (quotation and citation omitted). But not just any objective will suffice: "[T]he

governmental objective must be a legitimate and neutral one…." *Id.* at 90.

- "A second factor relevant in determining the reasonableness of a prison restriction…is whether there are alternative means of exercising the right that remain open to prison inmates." *Id.*

- "A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.*

- "Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation. By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable but is an exaggerated response to prison concerns." *Id.* (citations and quotation omitted).

While the lower courts all believe that *Turner* controls how to evaluate a Free Exercise challenge to a prison regulation, they are deeply divided about when to conduct the analysis. One group of courts—including the Ninth Circuit, below—has held that a prisoner must first show that the prison regulation at issue places a "substantial burden" on religious practice before the *Turner* factors might render the regulation unconstitutional. *Jones v. Williams*, 791 F.3d 1023, 1031 (9th Cir. 2015) ("A person [including a prisoner] asserting a free exercise claim must show that the government action in question substantially

burdens the person's practice of her religion." (citation omitted)).[2] But other courts have not required a showing of a substantial burden before considering the *Turner* factors. *Butts v. Martin*, 877 F.3d 571, 586 (5th Cir. 2017) ("Generally, this Court has not required a preliminary showing that a regulation substantially interferes with an inmate's religious rights before assessing whether the regulation is reasonably related to a penological interest." (footnote omitted)).[3]

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[2] *Accord, e.g.*, *Thompson v. Holm*, 809 F.3d 376, 379 (7th Cir. 2016) (requiring prisoner to show that "the defendants personally and unjustifiably placed a substantial burden on his religious practices" (citations omitted)); *Levitan v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002) ("[T]he First Amendment is implicated when a law or regulation imposes a substantial, as opposed to inconsequential, burden on the litigant's religious practice.").

[3] *Accord, e.g.*, *Williams v. Morton*, 343 F.3d 212, 217 (3d Cir. 2003) ("Officials argue that it is…a prerequisite for the inmate to establish that the challenged prison policy 'substantially burdens' his or her religious beliefs. There is no support for that assertion."); *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 983 (8th Cir. 2004) ("In analyzing this [Free Exercise] claim, we consider first the threshold issue of whether the challenged governmental action infringes upon a sincerely held religious belief and then apply the *Turner* factors to determine if the regulation restricting the religious practice is reasonably related to legitimate penological objectives." (quotations omitted)).

For his part, Mr. Watkinson would submit that the Ninth Circuit's substantial-burden prerequisite is wrong, at least in a case like this one. After all, this case involves the government treating non-religion *better* than religion. The PWF is categorically authorized to subsidize secular uses of firewood and edible items like honey and juice. But religious requests for those same items are categorically prohibited. [A12-13 ¶4 ("Religious groups are not able to obtain funding from the PWF." (footnote omitted)].

In the civilian context, this Court has not required plaintiffs in similar situations to show an actual burden on their religious practice, much less a substantial one. For example, this Court recently held that the Free Exercise Clause barred Maine from excluding religious schools from its voucher program. *Carson v. Makin*, __ U.S. __, 142 S. Ct. 1987 (2022). In *Espinoza v. Montana Dep't of Revenue*, 591 U.S. __, 140 S. Ct. 2246 (2020), the Court held that Montana could not forbid publicly funded scholarships to be used to for religious schools. And in *Trinity Lutheran Church v. Comer*, __ U.S. __, 137 S. Ct. 2012 (2017), the Court held that Missouri could not exclude a grant applicant just because the applicant was a church. In those cases, what mattered was that the government required secularism to receive a benefit at all. *See Trinity Lutheran*, __ U.S. at __, 137 S. Ct. at 2024 ("The State has…expressly den[ied] a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far. The Department's policy violates the Free Exercise Clause." (footnote omitted)).

Furthermore, as Mr. Watkinson argued below, the *Turner* reasonableness test should not even apply at

all here. In *Johnson v. California*, 543 U.S. 499 (2005), which applied strict scrutiny instead of *Turner* reasonableness to a policy of racial segregation in prisons, this Court made clear that *Turner* applies "*only* to rights that are inconsistent with proper incarceration." *Johnson*, 543 U.S. at 510 (quotation omitted). The right to be free from racial discrimination "is not a right that need necessarily be compromised for the sake of proper prison administration," thus making *Turner* irrelevant. *Id.* at 510. The right to expect religious neutrality from the government ought to be held just as fully compatible with proper prison administration as is the right to be free from racial discrimination. After all, religious discrimination is also "odious to our Constitution. "*Trinity Lutheran*, __ U.S. at __, 137 S. Ct. at 2025.

Reviewing the Free Exercise claim would bring much-needed clarity to the lower courts about how to evaluate claims that prisons refuse to place religion on equal footing with non-religion.

II. This Court Should Also Review the RLUIPA Claim to Determine Whether a Nonconstitutional Ground for Reversal Exists.

Consistent with the policy of judicial restraint, "prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981) (citation omitted). Because RLUIPA provides a statutory basis for the relief Mr. Watkinson sought below, this Court should review Ninth Circuit's rejection of the RLUIPA claim, too.

Using its Commerce Clause authority, Congress enacted RLUIPA to provide "expansive protections for religious liberty" in prisons. *Holt v. Hobbs*, 574 U.S. 352, 358 (2015). *See also Mayweathers v. Newland*, 314 F.3d 1062, 1069 (9th Cir. 2002) ("[Under RLUIPA,] prison officials remain free to run their prisons as they see fit. RLUIPA just prohibits prison officials from unduly burdening inmates' free exercise of religion in the process…. If states disagree with the requirements of RLUIPA, they remain free to forgo federal funding and opt out of its mandates."). Congress enacted the statute after it "documented, in hearings spanning three years, that frivolous or arbitrary barriers impeded institutionalized persons' religious exercise." *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005) (quotation omitted).

In state prisons where RLUIPA applies, like in Alaska, the government cannot lawfully "impose a substantial burden on the religious exercise" of a prisoner, "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, Congress intentionally substituted strict scrutiny for the government-friendly *Turner* reasonableness test. *See e.g.*, *Warsoldier v. Woodford*, 418 F.3d 989, 998 (9th Cir. 2005) ("RLUIPA replaced *Turner*'s 'legitimate penological interest' test with a 'compelling government interest' test." (citation omitted)).

The Ninth Circuit below, however, never engaged in otherwise-applicable strict-scrutiny analysis because it thought that Mr. Watkinson had not shown a

substantial burden. Mr. Watkinson respectfully submits that the Ninth Circuit was wrong. As a matter of fact, the district court found that "the new interpretation of Alaska DOC's [PWF] policy [has] subjected [Mr. Watkinson] to increased personal expense, delay, and uncertainty in obtaining firewood, juice, and honey…. [T]here were times when he was not able to obtain these items….for the [blot] ceremony." [A14 ¶8]. That ought to have been enough—as a matter of law—to qualify as a substantial burden. *See Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005) (collecting cases) (finding that "delay, uncertainty, and expense" sufficed to show a substantial burden under RLUIPA and rejecting the notion that a burden must be "insuperable" to be substantial).

Had the Ninth Circuit reached the strict-scrutiny analysis, it should have ruled for Mr. Watkinson.

While the district court was certainly correct that complying with the Constitution is a compelling governmental interest, [A24 ¶10], it was wrong to have believed that the Constitution somehow requires intentional discrimination against religion with respect to consideration to grant-funding requests. "[T]he guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995) (citations omitted) (holding that the Establishment Clause did not allow a university to refuse to allow religious student groups to compete for funds available to secular student groups).

Likewise, while the district court was correct that maintaining prison security is a compelling governmental interest, [A25 ¶11], it was wrong to have believed that those considerations justified the reinterpretation of the PWF policy. During the almost two years preceding the reinterpretation of the policy, no actual or threatened security issues arose. The district court should have focused on the real-world experience here rather than deferring to mere hypothetical concerns from a prison administrator:

> [Caselaw only requires] deferring to prison officials' reasoning when that deference is due—that is, when prison officials offer a plausible explanation for their chosen policy that is supported by whatever evidence is reasonably available to them. But the deference that must be "extend[ed to] the experience and expertise of prison administrators does not extend so far that prison officials may declare a compelling governmental interest by fiat." *Yellowbear v. Lampert*, 741 F.3d 48, 59 (CA10 2014). Indeed, prison policies "'grounded on mere speculation'" are exactly the ones that motivated Congress to enact RLUIPA. 106 Cong. Rec. 16699 (2000) (quoting S. Rep. No. 103-111, p, 10 (1993)).

Holt, 574 U.S. at 371 (Sotomayor, J., concurring).

Because RLUIPA could provide a statutory basis to award relief to Mr. Watkinson, this Court should con-

sider that basis before it reaches the constitutional claim.

CONCLUSION

For the forgoing reasons, this Court should grant this Petition and reverse the judgment below.

Dated: August 1, 2022

Respectfully submitted,

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s/Howard W. Anderson III
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Counsel for Petitioner

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APPENDIX

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TABLE OF CONTENTS OF THE APPENDIX

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD R. WATKINSON, Plaintiff-Appellant, v. ALASKA DEPARTMENT OF CORRECTIONS; EARL HAUSER; JAMES DUNCAN; SCOTT DIAL, Defendants-Appellees, and KEITH ROGERS; JOHN CONANT, Defendants.	No. 21-35084 D.C. No. 3:17-cv-00236-JMK MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska.
Joshua M. Kindred, District Judge, Presiding.
February 15, 2022, Argued and Submitted
San Francisco, California

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*This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: McKEOWN and W. FLETCHER, Circuit Judges, and VRATIL,** District Judge.

Plaintiff Richard Watkinson—a prisoner in the Alaska Department of Corrections ("ADOC") and a practitioner of Asatru—appeals from the district court's judgment for Defendants ADOC, Earl Hauser, James Duncan, and Scott Dial. Plaintiff claims that Defendants violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.*, Plaintiff's First Amendment right to free exercise of religion, and Plaintiff's Fourteenth Amendment right to equal protection. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

We review district court findings of fact for clear error. *Winding Creek Solar LLC v. Peterman*, 932 F.3d 861, 864 (9th Cir. 2019). We review *de novo* the district court's conclusions of law and determinations on mixed questions of law and fact. *Cal. First Amend. Coal. v. Woodford*, 299 F.3d 868, 872-73 (9th Cir. 2002).

1. Plaintiff argues that the Defendants substantially burdened his religious exercise in violation of the RLUIPA by preventing him from using firewood purchased through ADOC's Prison Welfare Fund ("PWF") for religious purposes and from using the PWF to pool funds with other prisoners to purchase his juice and honey at discounted rates from outside bulk vendors. The RLUIPA provides that "'[n]o gov-

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** The Honorable Kathryn H. Vratil, United States District Judge for the District of Kansas, sitting by designation.

ernment shall impose a substantial burden on the religious exercise' of prisoners unless the government can demonstrate that the burden both serves a compelling government interest and is the least restrictive means of advancing that interest." *Mayweathers v. Newland*, 314 F.3d 1062, 1065 (9th Cir. 2002) (quoting 42 U.S.C. § 2000cc-1(a)). Plaintiff bears the initial burden of persuasion as to whether a policy "substantially burdens" his religious exercise. 42 U.S.C. § 2000cc-2(b). A substantial burden must be more than a mere inconvenience, imposing "a significantly great restriction or onus upon [religious] exercise." *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004). The RLUIPA does not require a state to facilitate or subsidize the exercise of religion or pay for devotional accessories. *Cutter v. Wilkinson*, 544 U.S. 709, 720 n.8, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005); *see Mayweathers*, 314 F.3d at 1068-69.

ADOC policies do not deny Plaintiff access to any item necessary for his religious ceremonies, and Plaintiff may procure all necessary items without access to the PWF. Defendants' policies thus did not substantially burden the exercise of Plaintiff's religious practice, and the district court did not err in determining that Defendants did not violate the RLUIPA. *See Hartman v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1125 (9th Cir. 2013) (prison not required to provide an additional religious accommodation of a full-time Wiccan chaplain).

2. Plaintiff argues that Defendants violated his First Amendment rights for the same reasons. The Free Exercise Clause of the First Amendment states that the government shall make no law "prohib-

it[ing] the free exercise of religion." *O'Lone v. Est. of Shabazz*, 482 U.S. 342, 348, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987). Though the right to engage in religious practices does not terminate at the prison door, the right "is necessarily limited by the fact of incarceration." *Jones v. Williams*, 791 F.3d 1023, 1032 (9th Cir. 2015) (citation omitted). As with the RLUIPA, a prisoner asserting a free exercise claim must show that the government policy has substantially burdened his practice of religion. *Id.* at 1031. If the burden is substantial, the challenged conduct will be valid if "reasonably related to legitimate penological interests." *Id.* at 1032 (quoting *O'Lone*, 482 U.S. at 349).

For reasons stated above, the district court did not err in determining that Defendants' conduct did not substantially burden Plaintiff's religious exercise. Furthermore, even if it did so, PWF policies were reasonably related to legitimate penological interests: avoiding constitutional issues that might arise from funding one specific religious group, maintaining prison security, avoiding favoritism, and ensuring that PWF funds support charitable, recreational, and educational opportunities available to the entire prison population. *See Thornburgh v. Abbott*, 490 U.S. 401, 415, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989); *Walker v. Beard*, 789 F.3d 1125, 1138 (9th Cir. 2015). The district court thus did not err in denying relief on Plaintiff's Free Exercise claim.

3. Plaintiff argues that Defendants violated his Fourteenth Amendment rights when they treated the Native American cultural group differently from Asatru practitioners by allowing the Native Ameri-

can group to use PWF-purchased firewood at the prison sweat lodge.

The Equal Protection Clause states that no state shall "deny to any person . . . the equal protection of the laws." U.S. Const. amend XIV, § 1. To state an equal protection claim, an inmate must identify a group of individuals to whom he is similarly situated and allege intentional and disparate treatment. *See McCollum v. Cal. Dep't of Corr. & Rehab.*, 647 F.3d 870, 880-81 (9th Cir. 2011). The similarly situated group need not be similar in all aspects but must be similar "in respects that are relevant to the state's challenged policy." *Gallinger v. Becerra*, 898 F.3d 1012, 1016 (9th Cir. 2018).

The prison director testified that the groups are not similarly situated because the sweat lodge is a cultural rather than a religious activity. We accord deference to such testimony in determining whether two groups are similarly situated. *See O'Lone*, 482 U.S. at 349; *Thornton v. City of St. Helens*, 425 F.3d 1158, 1168 (9th Cir. 2005) ("Evidence of different treatment of unlike groups does not support an equal protection claim."). The district court did not clearly err in relying on that testimony to determine that the two groups are not similarly situated for purposes of the Equal Protection Clause.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

RICHARD R. WATKINSON, Plaintiff, vs. STATE OF ALASKA, DEPARTMENT OF CORRECTIONS; EARL HOUSER, JAMES DUNCAN; and SCOTT DIAL, Defendants.	Case No. 3:17-cv-00236-JMK **MEMORANDUM OF DECISION**

I. INTRODUCTION

This matter came before the Court for bench trial, which commenced on November 9, 2020, and concluded with the parties submitting written closing arguments on November 13, 2020, and December 9, 2020, respectively.[1] Plaintiff, Richard Watkinson, alleges Defendants State of Alaska Department of Corrections (Alaska DOC), Earl Houser,[2] James

[1] Dockets 92; 99.

[2] The parties misspelled Mr. Houser's name on various pleadings. In this Order, the Court uses the name listed on the State of Alaska Employee directory.

Duncan, and Scott Dial in their official capacities, violated his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA)[3] and the First and Fourteenth Amendments of the United States Constitution.[4]

II. PROCEDURAL HISTORY

On November 8, 2017, Mr. Watkinson, an inmate incarcerated at the Goose Creek Correction Center (GCCC) in Wasilla, Alaska, filed a Complaint *pro se* against the Alaska DOC and five of its employees in their individual and official capacities alleging three causes of action.[5]

First, Mr. Watkinson alleged his constitutional First and Fourteenth Amendment rights were violated when Defendants "discriminat[ed] against the religion of Asatru"; "treat[ed] practitioners of the Asatru faith as if they were members of an STG group[6] based solely upon their race and religious preference . . . [and] retaliat[ed] against Plaintiff and Asatru practitioners for pursuing fair treatment

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[3] Docket 1 at 2-3.

[4] *Id.*

[5] Mr. Watkinson's Complaint named as Defendants: John Conant, the Superintendent of GCCC "at all times relevant"; "Earl Hauser," who is Earl Houser, the "current" Superintendent; James Duncan, Chaplaincy Coordinator for the Alaska DOC; Scott Dial, a correctional officer of the Alaska DOC; and Keith Rogers, a correctional officer of the Alaska DOC. *Id.* at 1-3.

[6] STG refers to a "Security Threat Group." *Id.* at 4.

and their religious rights . . . ."[7] Second, Mr. Watkinson alleged his constitutional First and Fourteenth Amendment rights were violated when Defendants: (1) engaged in "discriminatory and biased practices that discourage[d] prisoners from the practice of Asatru, while encouraging the practice of other religions"; (2) "subject[ed] practitioners of the Asatru faith to treatment not leveled at other religious practices"; (3) "den[ied] a benefit to Asatru practitioners that is afforded to other prisoners and/or religious practices"; and (4) "creat[ed] a negative environment that places Asatru practitioners under emotional distress . . . ."[8] Third, Mr. Watkinson alleged Defendants "placed a substantial burden upon Plaintiff['s] religious practice" in violation of RLUIPA by: (1) "unnecessarily separating Asatru practitioners from their consecrated religious items"; (2) preventing Plaintiff and other Asatru practitioners from observing "religious High Feasts"; (3) "preventing Asatru practitioners access and utilization of the Prisoner Welfare Fund in support of [] religious practice"; and (3) "forcing Plaintiff and Asatru practitioners to pay exorbitant prices for all natural juice from the facility commissary."[9] Mr. Watkinson requested various declaratory and injunctive relief, punitive damages in the amount of $50,000 against each named defendant, and costs.[10]

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[7] *Id.* at 17-18.

[8] *Id.* at 18-19.

[9] *Id.* at 19-20.

[10] *Id.* at 21-22.

On December 5, 2017, Howard Walton Anderson, III, entered an appearance on behalf of Mr. Watkinson.[11] Alaska DOC filed an Answer to Mr. Watkinson's Complaint on June 18, 2018; Defendants Conant, Dial, Duncan, Houser, and Rogers filed an Answer on October 22, 2018.[12] On March 29, 2019, the Court dismissed, as per the parties' stipulation, "all claims against Defendants John Cogant [sic] and Keith Rogers" without prejudice, "all claims against Defendant State of Alaska—except those relating to the Prisoner Welfare Fund under 42 U.S.C. 2000cc et seq and/or for declaratory and injunctive relief" without prejudice, and "all claims against Defendants Earl Hauser [sic], Scott Dial, James Duncan, and Keith Rogers—except those relating to the Prisoner Welfare Fund," without prejudice.[13]

On January 22, 2020, Mr. Watkinson moved to withdraw his prayer for damages, and the Court granted his request for leave to pursue only declaratory and injunctive relief against Defendants, as well as costs and fees.[14] His demand for a jury trial was withdrawn.[15] Mr. Watkinson now specifically requests that this Court declare: (1) "[t]he Defendants violated his RLUIPA, First Amendment, and

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[11] Docket 7.

[12] Dockets 14; 24.

[13] Dockets 29; 30. It appears that the parties only meant to preserve claims against Defendants Houser, Dial, and Duncan, and mistakenly included Rogers in this list. *See* Docket 68 at 1 (Joint Statement of Issues) (listing Earl Houser, James Duncan, and Scott Dial as the remaining defendants).

[14] Dockets 59; 62.

[15] Docket 80 at 2.

Equal Protection Rights, in that they have unlawfully deprived him of the right to compete for PWF funds to purchase firewood and food/beverage products"; (2) that "DOC Policy and Procedure § 302.10, Paragraph III and/or Policy & Procedure 815.03 Paragraph (V)(A)-(C) are illegal insofar as they categorically exclude religious organizations from being eligible to obtain PWF funds"; and (3) "Mr. Watkinson and other religious practitioners can individually or collectively donate funds to reimburse the PWF for purchases that would not otherwise have sufficiently broad appeal to merit PWF purchase without inmate reimbursement, subject to the Superintendent's ability to deny particular requests for religiously neutral reasons."[16]

"Mr. Watkinson also requests that the Court order the Defendants: (1) [t]o cease discrimination against religion in general and Asatru in particular with respect to the PWF; and (2) [t]o develop criteria independent of religion for evaluating PWF funding requests within 45 days of the entry of judgment."[17]

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Federal Rule of Civil Procedure 52(a) provides that "in an action tried on the facts without a jury . . . the court must find the facts specially and state its conclusions of law separately." Having considered the testimony of the witnesses, the exhibits admit-

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[16] Docket 92 at 14.

[17] *Id.* at 14-15.

ted into evidence, and the parties' arguments and filings, this Court now makes the Findings of Fact and Conclusions of Law as set forth below.[18]

A. Findings of Fact

1. The Parties. Mr. Watkinson is a prisoner of the Alaska DOC and is incarcerated at GCCC.[19] Alaska DOC is a state agency charged with the care of prisoners and is subject to RLUIPA. Defendant Houser is the Superintendent of GCCC, where Lieutenant Dial is a correctional officer.[20] Defendant Duncan is the Chaplaincy Coordinator for Alaska DOC.[21]

2. The Asatru Faith. Mr. Watkinson is a practitioner of Asatru, a recognized faith group within the Alaska DOC, and belongs to a congregation known as the Blodtryggr Kindred.[22] Asatru is a polytheistic religion with roots in ancient Scandinavia, and followers worship deities such as Thor, Odin, and

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[18] This Memorandum of Decision does not purport to recite all of the evidence submitted and arguments made by the parties. *See* Fed. R. Civ. P. 52(a) Advisory Committee's Note (1946 Amendment). ("[T]he judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaboration of detail or particularization of facts.").

[19] Docket 80 at 3.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 3-4.

Freya.[23] The Court finds the testimony of Mr. Watkinson to be credible.

3. Religious Items. Firewood is used by Asatru practitioners during a weekly ceremony known as a blot.[24] During the blot, a fire is built, which has spiritual and religious significance to Asatru practitioners.[25] Three drinking rounds are held using juice and honey to simulate mead, and worshipers speak in honor of certain gods, goddesses, or heroes.[26]

4. The Prisoner Welfare Fund (PWF). Alaska DOC administers the PWF at GCCC in accordance with DOC policy 302.10 ("Prisoner Welfare Fund"). The PWF is "[a] fund established at an institution in order to provide loans or grants to prisoners or prisoner organizations for activities not funded by general appropriations from the Department."[27] The PWF may only be used for "charitable, recreational and educational purposes when approved and authorized in writing by the Superintendent or their designee."[28] Cultural groups and non-religious groups are able to submit requests to utilize funds

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[23] *Id.* at 4.

[24] Docket 93 at 20.

[25] *Id.*

[26] *Id.* at 20, 24-25.

[27] Docket 69-1 at 1 ("It is the policy of the Department that money in the Prisoner Welfare Fund will be used to the benefit of the prisoners or prisoner organization for activities not funded by the Department through general appropriations.").

[28] *Id.* at 2.

from the PWF, but they are not guaranteed to receive what they request.[29] Religious groups are not able to obtain funding from the PWF.[30] The PWF is funded by a three percent (3%) surcharge on most commissary items.[31]

5. Faith Group Property Policy. DOC policy 816.01 ("Faith-Based Programming and Chaplaincy Services") provides that "[t]he Department is not responsible for the procurement of any faith group property or equipment."[32]

6. Access to the PWF. Prior to a reevaluation of Alaska DOC's policy in May 2017 (discussed *infra*), Mr. Watkinson was able to donate money from his Offender Trust Account ("OTA") to the PWF, which would be held for the benefit of the Asatru faith group.[33] Asatru members could pool their money together and access the fund to the purchase firewood, juice, and honey for their worship. This allowed the Asatru faith group to circumvent the prison commissary, where the items otherwise are available. Items are subject to a mark-up in price if purchased through the commissary.[34]

7. Alaska DOC's Reevaluation of the PWF Policy. In February 2017, Defendant Duncan sent

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[29] Docket 93 at 51-52.

[30] *Id.* at 51.

[31] Docket 80 at 4.

[32] Docket 69-12 at 5.

[33] Docket 80 at 6.

[34] Dockets 80 at 7; 88 at 4.

an email to Keith Rogers (a correctional officer) agreeing with Mr. Rogers' analysis that the PWF should not be used to purchase firewood.[35] Subsequently, Defendant Dial announced that the Alaska DOC had reevaluated its policy with respect to the PWF and determined that it would no longer allow the Asatru faith group to obtain firewood purchased with funds from the PWF.[36] Mr. Watkinson filed grievances, but was unsuccessful in reversing the prison's new application of its policy.[37]

8. Burden on Religious Exercise. Mr. Watkinson testified that the new interpretation of Alaska DOC's policy subjected him to increased personal expense, delay, and uncertainty in obtaining firewood, juice, and honey, as he is no longer able to utilize the PWF to obtain these items.[38] He testified there were times when he was not able to obtain the items because the Asatru faith group did not have the "financial accommodations" to be able to buy enough, or the families of members were unable to donate items or funds in time for the ceremony.[39] Defendants did not present any evidence to refute this testimony.

9. Obtaining Firewood, Honey, and Juice Through Other Means. Mr. Watkinson testified he was able to purchase juice and honey through the

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[35] Docket 69-7.

[36] Dockets 80 at 7; 69-8.

[37] Dockets 69-4; 69-5; 69-10; 69-13.

[38] Docket 93 at 26-28.

[39] *Id.* at 27.

prison commissary,[40] and that Asatru practitioners were able to facilitate arrangements for their families to purchase items and have a vendor deliver to the prison.[41] Prison officials encouraged Mr. Watkinson to seek assistance from the wider Asatru faith community for donated goods.[42] Again, the Court finds this testimony credible.

10. Concerns About Fraud. Jeremy Hough, Director of Institutions for the Alaska DOC, testified that Department of Administration and bank rules both prohibit the Alaska DOC from creating individual accounts for groups within the PWF.[43] He testified that Alaska DOC has contacted banks about setting up separate accounts, which have denied the permission required to do so.[44] These institutions are concerned about "possible fraud," and other criminal activity achieved through "strong-arming" "that can go on under the guise of a club, organization, or religious practice."[45] The Court found the testimony of Mr. Hough to be credible.

11. Virtual Balance. According to Mr. Hough, no other religious or cultural group maintained or maintains a virtual balance within the PWF at

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[40] *Id.* at 26-27.

[41] *Id.*

[42] Docket 69-13.

[43] Docket 93 at 41.

[44] *Id.* at 49.

[45] *Id.* at 48.

GCCC.[46] Plaintiff did not present any evidence to the contrary.

12. Legal Concerns. Mr. Hough stated it is his understanding that it is "not legal" to allow religious groups to use the PWF to purchase religious items.[47] Alaska DOC cited to concerns about constitutional establishment clause violations.[48]

13. Administrative Efficiency and Fairness. Mr. Hough testified that it is "not feasibly administratively possible" to distribute PWF funds to religious groups in a way that gives each group its "fair share," due to the diversity of the inmate population.[49] He further testified that if Alaska DOC were to make PWF funds available for religious purposes, "the fund would wind up being a hundred percent [consumed by religious endeavors] because that's where the push would be,"[50] which would run counter to its goals of providing recreational and educational activities for the benefit of the entire prisoner population. Plaintiff presented no evidence to the contrary, and the Court finds this testimony to be credible.

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[46] *Id.* at 34.

[47] *Id.* at 42. The Court interprets Mr. Hough's testimony as a statement of Alaska DOC's policy and belief, rather than a legal conclusion.

[48] *Id.* at 14.

[49] *Id.* at 40, 42.

[50] *Id.* at 43.

14. The Hiland Mountain Group. A prisoner organization at the "Hiland Mountain" facility maintains its own account through the PWF.[51] The group facilitates a greenhouse project and sells plants.[52] According to Mr. Hough, the Department of Administration and banking institutions allow this group to continue maintaining its own balance due to the longstanding nature of the program.[53] Plaintiffs do not refute this assertion.

15. The Sweat Lodge. The PWF is drawn upon to purchase firewood for a sweat lodge at GCCC.[54] The sweat lodge is accessible to all inmates; however, Mr. Watkinson testified it is run in a "Lakota Sioux way," in which there are several rounds of prayer.[55] Defendants presented no evidence to the contrary, and the Court found this testimony to be credible. Further, the sweat lodge is operated by a Native American cultural group that is separate from the Native American religious groups at GCCC.[56] Mr. Watkinson has **attended** the sweat lodge at GCCC close to a dozen times.[57]

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[51] *Id.* at 48.

[52] *Id.*

[53] *Id.* at 49.

[54] Dockets 80 at 5; 88 at 2.

[55] Docket 93 at 19, 43. According to Mr. Hough, "[n]o preference is given to any particular offender, nor is it denoted as to their religious affiliation." *Id.* at 43. Plaintiff did not refute this assertion.

[56] *Id.* at 63-64.

[57] *Id.* at 19.

B. Conclusions of Law

1. Federal Substantive Law Applies. The Court applies federal substantive and procedural law.

2. Standard of Review. "[T]he decision to grant declaratory relief is a matter of discretion[.]"[58]

3. The Religious Land Use and Institutionalized Persons Act (RLUIPA). RLUIPA "prescribes that no government shall impose a substantial burden on the religious exercise of prisoners unless the government can demonstrate that the burden both serves a compelling government interest and is the least restrictive means of advancing that interest."[59] "Religious exercise" under RUILPA includes "any exercise of religion, whether or not compelled by, or central to, a religious belief."[60] "Government," under RLUIPA, includes a "person acting under color of State law."[61]

4. RLUIPA is Applicable. Here, both parties agree that RLUIPA applies to Alaska DOC's actions

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[58] *United States v. State of Wash.*, 759 F.2d 1353, 1356 (9th Cir. 1985).

[59] *Mayweathers v. Newland*, 314 F.3d 1062, 1065 (9th Cir. 2002) (citing to 42 U.S.C. § 2000cc-1(a) (2000)) (internal quotation marks omitted)).

[60] *Warsoldier v. Woodford*, 418 F.3d 989, 994 (9th Cir. 2005) (citing to § 2000cc-5(7)(A)).

[61] *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 921-22 (9th Cir. 2011) (citing 42 U.S.C. § 2000cc-5(4)(A)(iii)).

because the agency receives federal financial assistance.[62]

5. Mr. Watkinson's Beliefs are Religious and Sincere. It is undisputed that Mr. Watkinson is a member of a bona fide religion and sincere in his beliefs. The parties agree that the blot ceremonies described by Mr. Watkinson, which involve the use of firewood and drinking of juice and honey, constitute a religious exercise of Asatru in accordance with RLUIPA.[63]

6. Mr. Watkinson Bears of Burden of Proving Defendants Substantially Burdened His Religious Exercise. Mr. Watkinson bears the burden of showing Defendants imposed a substantial burden on his religious exercise.[64] RLUIPA does not specifically define what constitutes a "substantial burden"; however, the Ninth Circuit has described the burden as one that "must impose a *significantly* great restriction or onus upon such exercise."[65] A substantial burden "must place more than an inconvenience on religious exercise,"[66] and the Supreme Court has

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[62] 42 U.S.C. §§ 2000cc(b)(1); Dockets 80 at 9; 88 at 5.

[63] *See Cutter v. Wilkinson*, 544 U.S. 709, 720, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005) ("The exercise of religion often involves not only belief and profession but the performance of physical acts such as assembling with others for a worship service or participating in sacramental use of bread and wine.") (internal quotations omitted).

[64] *Warsoldier*, 418 F.3d at 994.

[65] *Id.* at 995 (emphasis added).

[66] *Guru Nanak Sikh Soc. of Yuba City v. Cty of Sutter*, 456 F.3d 978, 987 (9th Cir. 2006).

found a substantial burden where the state's conduct creates "substantial pressure on an adherent to modify his behavior and to violate his beliefs."[67] Although "compulsion may be indirect,"[68] RLUIPA "does not impose affirmative duties on states that would require them to facilitate or subsidize the exercise of religion."[69] The statute must be construed broadly in favor of protecting an inmate's right to exercise his or her religious beliefs.[70]

Mr. Watkinson's fundamental argument is that Defendants have substantially burdened his practice of Asatru by no longer affording him the benefit of accessing monies from the PWF for the purchase of juice and honey at a discounted rate, or for the purchase of firewood that the facility already obtains. Defendants assert that the failure to subsidize Mr. Watkinson's religious celebrations cannot be construed as a substantial burden on his ability to practice Asatru. The Court agrees with Defendants.

7. RLUIPA Does Not Demand the State Pay for or Subsidize Items of Worship. RLUIPA explicitly denies creating a right for religious organiza-

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[67] *Warsoldier*, 418 F.3d at 995 (quoting *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 717-18, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981)).

[68] *Warsoldier*, 418 F.3d at 995.

[69] *Mayweathers v. Newland*, 314 F.3d at 1068-69.

[70] *Warsoldier*, 418 F.3d at 995.

tions to receive funding from the government.[71] As Defendants state in their closing brief, the Supreme Court has held that "[d]irected at *obstructions* institutional arrangements place on religious observances, RLUIPA does not require a State to pay for an inmate's devotional accessories."[72] Simply put, affirmative subsidization of religious activities is not mandated under RLUIPA. The fact that Asatru practitioners previously benefitted from access to the PWF, or the fact that other cultural groups benefit from the administration of the fund, is not evidence of a substantial burden on Mr. Watkinson's religious practice. Indeed, other courts have found that "a prison's voluntary decision to exceed RLUIPA's requirements should not subject it to further RLUIPA liability."[73]

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[71] *See* 42 U.S.C. § 2000cc-3(c) ("Nothing in this chapter shall create . . . a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.").

[72] *Cutter*, 544 U.S. at 720 n.8 (citing *Charles v. Verhagen*, 348 F.3d 601, 605 (7th Cir. 2003) (overturning a prison prohibition on the possession of Islamic prayer oil but placing the responsibility for purchasing the oil on the prisoner)) (emphasis added)).

[73] *Knows His Gun v. Montana*, 866 F. Supp. 2d 1235, 1241 (D. Mont. 2012) ("Plaintiffs' claims concerning inadequate or inappropriate materials that are provided by the prison—including wood, tarps, and tobacco—fail because RLUIPA does not require prisons 'to pay for an inmate's devotional accessories.'") (citing *Cutter*, 544 U.S. at 720 n.8).

8. Defendants Have Not Substantially Burdened Mr. Watkinson's Religious Practice. Importantly, the evidence introduced at trial did not show that Defendants have, in any way, "deni[ed] [Plaintiff an important benefit] because of conduct mandated by religious belief, thereby putting substantial pressure on [him] to modify his behavior and to violate his beliefs."[74] Mr. Watkinson still may purchase juice and honey from the prison commissary, or arrange for family members to purchase the juice and a vendor to deliver it to the prison.[75] Mr. Watkinson also testified that GCCC allows family members to deliver firewood for the blots, and that he was encouraged by prison officials to "request reasonable alternatives to obtain it."[76] Indeed, Mr. Watkinson still can avail himself of the PWF funds for secular purposes, and testified that he does just that by attending the sweat lodge and utilizing the firewood purchased by the PWF for that purpose.[77] The Court cannot find that Mr. Watkinson faces a substantial burden under RLUIPA when he is not meaningfully obstructed from or penalized by practicing his sincerely held religious beliefs. He, thus, has not established a violation of RLUIPA.[78]

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[74] *Warsoldier*, 418 F.3d at 995 (citing *Thomas*, 450 U.S. at 717-18).

[75] Docket 93 at 27.

[76] Dockets 93 at 24; 69-5 at 1.

[77] Docket 93 at 19.

[78] *See Riggins v. Clarke*, 403 Fed. Appx. 292, 295 (9th Cir. 2010) (finding State corrections officials' refusal to allow prisoner to purchase prayer oils did not violate his right to exercise his religion under RLUIPA).

9. Defendants Bear the Burden of Showing a Compelling Governmental Interest. Assuming, *arguendo*, Mr. Watkinson could produce evidence of a substantial burden on his practice of Asatru, the Court still would find that Defendants have met their burden to then show Alaska DOC's policies are the least restrictive means of furthering compelling governmental interests. Defendants advance four compelling interests. First, "DOC has a compelling governmental interest in not treating various religious groups unequally or unfairly, both as a matter of justice and in order to avoid fomenting interreligious strife."[79] Second, "DOC has a compelling governmental interest in funding 'charitable, recreational and educational' activities among the prison population through PWF."[80] Third, Defendants identified an interest "in not intermingling the funds of particular religious groups with those designated for other purposes, for reasons of administrative efficiency and to prevent fraud."[81] Fourth, Defendants allude to establishment clause concerns with supporting religious activities by using intermingled state funds.[82] Defendants assert that requiring religious groups to separately purchase items intended for their group's religious practice is the least restrictive means of furthering those governmental interests.[83]

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[79] Docket 99 at 11.

[80] *Id.*

[81] Docket 88 at 6.

[82] Docket 93 at 14.

[83] Docket 88 at 6.

The Ninth Circuit has found compelling government interests in prison security[84] and in complying with the Constitution.[85] The Supreme Court has acknowledged that RLUIPA's standard of review should be applied with "due deference to the experience and expertise of prison and jail administrators in establishing the necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources."[86]

10. Complying with the Constitution is a Compelling Governmental Interest. The Court finds that the government's interest in ensuring it does not violate the Constitution's establishment clause by institutionally supporting religious activities of the Asatru faith group is compelling. The Court need not assess the exact probability of success of a constitutional claim, but is satisfied that "the State has shown more than merely a good faith belief" that Mr. Watkinson's request may run afoul of the establishment clause of the Constitution and there is an objective legal basis for believing that is the case.[87]

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[84] *See Warsoldier*, 418 F.3d at 998.

[85] *See Walker v. Beard*, 789 F.3d 1125, 1136 (9th Cir. 2015) ("Compliance with the Constitution can be a compelling state interest.").

[86] *Cutter v. Wilkinson*, 544 U.S. 709, 723, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005) (quoting S. Rep. No. 103-111, at 10 (1993)).

[87] *Walker v. Beard*, 789 F.3d 1125, 1137 (9th Cir. 2015). Mr. Watkinson cites to *Everson v. Bd. Of Educ.*, 330 U.S. 1, 17, 67

11. Maintaining Security is a Compelling Governmental Interest. The Court further recognizes the Defendants' interest in preventing the illegal criminal activity (fraud, strong-arming, debt payoff) described by Mr. Hough. Alaska DOC's interest is compelling because it poses a threat to institutional security, as does preventing interreligious strife that may be stoked by showing favoritism to certain groups over others.

S. Ct. 504, 91 L. Ed. 711 (1947) and *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019, 198 L. Ed. 2d 551 (2017), for the proposition that providing funding to religious institutions on the same terms as secular institutions does not violate the establishment clause. *See* Docket 92 at 8-9. In *Everson*, the Supreme Court upheld the right of a New Jersey school board to fund the transportation of pupils to both public and parochial schools. The Supreme Court found that the resolution provided a "general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Everson*, 330 U.S. at 18. In *Trinity Lutheran Church*, the Supreme Court held that a church had the right to compete with other secular organizations for a playground resurfacing grant. *Trinity Lutheran Church of Columbia, Inc.*, 137 S. Ct. at 2025. Both cases are inapplicable here because Mr. Watkinson is seeking to use the PWF funds to support his religious exercise. The Ninth Circuit has found that "a government act is consistent with the establishment clause if it: (1) has a secular purpose; (2) has a principal or primary effect that neither advances nor disapproves of religion; and (3) does not foster excessive governmental entanglement with religion." *Vasquez v. Los Angeles ("LA") County*, 487 F.3d 1246, 1255 (9th Cir. 2007) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (9th Cir. 1971)). Although the Court makes no assessment of the validity of such a constitutional claim, it does recognize that Alaska DOC's hesitancy to utilize its funds to directly advance Mr. Watkinson's religious exercise is not without merit.

12. Least Restrictive Means. The Court also would be able to find that prohibiting the Asatru faith group from maintaining a virtual balance within the PWF is the least-restrictive means of achieving Defendants' compelling governmental interests. "The least-restrictive-means standard is exceptionally demanding,"[88] but the government "is under no obligation to dream up alternatives that the plaintiff himself has not proposed."[89] Here, Mr. Watkinson proposed no alternatives to utilizing the PWF to purchase religious items. Mr. Hough testified it was effectively impossible, due to the rules of the banks and the State of Alaska's Department of Administration, for the Asatru faith group to continue to maintain a virtual balance. When doing so could expose the institution to constitutional liability and security concerns, maintaining such a policy is the least-restrictive option available to continuing to operate the PWF. The Court thus concludes Alaska DOC's actions were the least restrictive means of furthering their compelling governmental interests.

13. First Amendment Free Exercise Clause. "Inmates retain the protections afforded by the First Amendment, 'including its directive that no law shall prohibit the free exercise of religion,'" and an inmate who adheres to a minority religion must be given a "reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious pre-

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[88] *Holt v. Hobbs*, 574 U.S. 352, 364, 135 S. Ct. 853, 190 L. Ed. 2d 747 (2015).

[89] *Walker*, 789 F.3d at 1137.

cepts."[90] However, "reasonable opportunities" does not mean identical treatment.[91] "In order to establish a free exercise violation, [Plaintiff] must show the defendants burdened the practice of his religion, by preventing him from engaging in conduct mandated by his faith, without any justification reasonably related to legitimate penological interests."[92] Only those beliefs which are rooted in religion and sincerely held are entitled to constitutional protection.

14. Mr. Watkinson Has Not Proven His Religious Practice Was or Is Burdened. As discussed *supra*, the Court cannot find that Defendants substantially burdened Mr. Watkinson's practice of the Asatru faith. The Court finds that while Defendants' failure to administer the PWF in a way that subsidizes firewood, juice, and honey may be inconvenient to Mr. Watkinson, it does not amount to a prohibition on his ability to practice his religion or a punishment for doing so.[93]

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[90] *See Shakur v. Schriro*, 514 F.3d 878, 883-84 (9th Cir. 2008) (quoting *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987)); *Cruz v. Beto*, 405 U.S. 319, 322, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972) (per curiam).

[91] *Cruz*, 405 U.S. at 322 n.2.

[92] *Freeman v. Arpaio*, 125 F.3d 732, 736 (9th Cir. 1997) (abrogated on other grounds by *Shakur*, 514 F.3d 878) (internal citations omitted); *see also Jones v. Williams*, 791 F.3d 1023, 1031 (9th Cir. 2015) ("A person asserting a free exercise claim must show that the government action in question substantially burdens the person's practice of her religion.").

[93] *See Lewis v. Ollison*, 571 F. Supp. 2d 1162, 1171 (C.D. Cal. 2008) ("The First Amendment does not prohibit a prisoner from

15. Defendants Bear the Burden of Showing Their Policies Are Reasonably Related to Legitimate Penological Interests. Assuming, *arguendo*, Mr. Watkinson was able to show that the additional expense and logistical challenge of obtaining firewood, juice, and honey constituted a substantial burden on his religious exercise, the Court still finds that Alaska DOC's policy with respect to the PWF is reasonably related to a legitimate penological interest. The Ninth Circuit follows the four-part test formulated by the Supreme Court in *Turner v. Safley* [94] in determining the reasonableness of a prison regulation affecting constitutional rights.[95]

16. *Turner* Factors. First, there must be "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it."[96] The "legitimate governmental interest" at stake here is the fair and equitable administration of the PWF. Prohibiting religious organizations from utilizing the PWF for purely religious activities is rationally related to this interest. Mr. Hough testified that if the Alaska DOC allowed the PWF to fund religious activities it would effectively end the use of the fund for its intended purpose: funding activities for all inmates to enjoy re-

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being inconvenienced in practicing his faith so long as the penological practices do not prevent or prohibit the inmate from participating in the practice or mandates of his religion.").

[94] *See generally Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

[95] *Resnick v. Adams*, 348 F.3d 763, 768-770 (9th Cir. 2003).

[96] *Id.* at 769.

gardless of religious affiliation.[97] The first *Turner* factor is thus satisfied.

The second factor the Court turns to in determining the reasonableness of a prison regulation under *Turner* is "whether there are alternative means of exercising the right that remain open to prison inmates."[98] As discussed *supra*, Mr. Watkinson still may obtain juice, honey, and firewood without accessing the PWF. Although the Court need not find there are alternative means to practicing the exact religious right Mr. Watkinson claims has been burdened,[99] in this case, it can find exactly that. Mr. Watkinson testified that even after the Asatru group was prohibited from using PWF funds to obtain firewood, they continued to conduct blot ceremonies when members' families assisted in securing firewood and juice.[100] This factor thus weighs in favor of Defendants.

Third, under *Turner*, the Court considers "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally."[101] The Court also may consider whether "special arrange-

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[97] Docket 93 at 42-43.

[98] *Resnick*, 348 F.3d at 769.

[99] *See O'Lone*, 482 U.S. at 352 ("In *Turner*, we did not look to see whether prisoners had other means of communicating with fellow inmates, but instead examined whether the inmates were deprived of 'all means of expression.'").

[100] Docket 93 at 23-24, 27.

[101] *Turner*, 482 U.S. at 90.

ments for one group could create an appearance of favoritism that could generate resentment and unrest," although this consideration alone may not be dispositive, because such appearance will be present in every case where accommodations are made.[102] The accommodation Mr. Watkinson seeks is an exemption from Alaska DOC's policy that it is not responsible for the procurement of faith group property. Exempting the Asatru faith group from this general rule would be unfair to other religious groups that are unable to take advantage of the PWF to fund their activities, as well as to the general inmate population that benefits from the secular activities the fund is intended to sponsor. Defendants point out that allowing one group (or several) to maintain a virtual balance could result in such resentment and unrest contemplated by courts, or in the elimination of the PWF altogether. Mr. Hough also identified the possibility of fraud and other criminal activity that can go on when individual groups are allowed to maintain separate virtual balances. It is of no consequence that Defendants produced no evidence of actual fraud that has occurred.[103] Taken together, these considerations cut in favor of prison officials.

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[102] *Standing Deer v. Carlson*, 831 F.2d 1525, 1529 (9th Cir. 1987); *see Henderson v. Terhune*, 379 F.3d 709, 714 (9th Cir. 2004).

[103] *See Friedman v. State of Ariz.*, 912 F.2d 328, 332-33 (9th Cir. 1990) ("*Turner* requires that courts allow prison officials 'to *anticipate* security problems and to adopt innovative solutions to the intractable problems of prison administration.'") (citing *Turner*, 482 U.S. at 89) (emphasis in original).

The fourth and final *Turner* factor is the availability of "obvious, easy alternatives."[104] An obvious alternative to prohibiting Asatru practitioners from maintaining a virtual PWF balance that allows Alaska DOC to administer the fund in an equitable manner, is allowing each recognized religious group to maintain its own virtual PWF balance. However, the evidence shows that this alternative is not "easy." Mr. Hough testified that it would be "extremely hard" to allocate funds in a way that would give each **religious** organization its "fair share."[105] Indeed, the Sixth Circuit has found that

> [r]equiring prisons to maintain comprehensive records as to the religious composition of their populations and to allocate resources for religious activities accordingly would undoubtedly spark countless claims by various groups that they were not receiving their fair share. Moreover, predicating resource allocation on such an elusive standard as the numbers of regularly practicing inmates would compel prison officials and courts to scrutinize the consistency of individual inmates' religious practices and to decide controversies regarding the precise contours of the various competing religious groups. Furthermore, the constant turnover of prison populations would render wholly impracticable any attempt to require that the religious resources allocation scheme conform exactly to the denominational distribution present in a prison at any given time. Adoption of plaintiffs' position would,

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[104] *Turner*, 482 U.S. at 90.

[105] Docket 93 at 42.

> therefore, embroil the prisons and courts in dangerous and inappropriate areas of inquiry and would prove exceedingly difficult to implement in an orderly and even handed fashion.[106]

The Court finds this reasoning persuasive. It is not reasonable to suggest that prison officials take responsibility for the bookkeeping of every religious organization within its walls so that it may administer a fund—it has no obligation to administer at all—in a fair and even-handed manner. Further, Mr. Hough testified that, from a purely administerial standpoint, the banking institutions utilized by the prison system no longer allow the PWF to contain line items for specific organizations, or the pooling of OTA funds, as Mr. Watkinson requests.[107] It is administratively burdensome, and in some ways impossible, to fashion an alternative to Alaska DOC's religious property procurement policy that still achieves its interests with regard to administering the PWF. Each of the *Turner* factors weighs in favor of Defendants. Alaska DOC's policies reasonably are related to a legitimate penological interest and cannot be said to abridge Mr. Watkinson's First Amendment rights.

17. Fourteenth Amendment Equal Protection Clause. "The Constitution's equal protection guarantee ensures that prison officials cannot

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[106] *See Thompson v. Com. of Ky.*, 712 F.2d 1078, 1081 (6th Cir. 1983).

[107] Docket 93 at 40.

discriminate against particular religions."[108] "To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class."[109] Again, Mr. Watkinson cannot succeed "if the difference between the defendants' treatment of him and their treatment of [] inmates [of a different religion] is reasonably related to legitimate penological interests."[110]

18. Intentional Discrimination. The sweat lodge at GCCC, run by a Native American cultural group, is permitted to use firewood obtained through the PWF, while the Asatru faith group is prohibited from maintaining a virtual balance within the PWF to purchase firewood for blot ceremonies.[111] Mr. Watkinson argues that the Asatru faith group is treated differently from the Native American cultural group and the Hiland Mountain cultural group at another prison, which is able to maintain a virtual balance in the PWF.[112]

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[108] *Freeman*, 125 F.3d at 737.

[109] *Furnace v. Sullivan*, 705 F.3d 1021, 1030 (9th Cir. 2013) (quotation marks and citation omitted) (rejected equal protection claim where inmate failed to show that he was treated differently than any other inmates in the relevant class).

[110] *Shakur*, 514 F.3d at 891(internal citations and quotation marks omitted).

[111] Docket 92 at 12.

[112] *Id.* at 13.

Mr. Watkinson has not put forth any evidence of intentional discrimination. Although discriminatory intent may be inferred from disparate treatment, Mr. Watkinson has not alleged that he has been treated differently from any other religious group. The Court recognizes that the differences in classification between what constitutes a "religious" group as opposed to a "cultural" one, according to Alaska DOC policy, are susceptible to a certain degree of subjectivity. However, absent evidence of ill-intent or abject arbitrariness, it is improper—and indeed inappropriate—for the Court to interfere with Alaska DOC's classifications. In this case, it must defer to prison officials' assessment of the sweat lodge as a cultural activity and the Native American group that administers the sweat lodge as cultural.[113]

However, even if the Court were to find that the Native American cultural group principally was religious in nature, it notes that "[p]risons need not provide identical facilities . . . to different faiths, but must make good faith accommodation of the [prisoners'] rights in light of practical considerations."[114] Again, it appears from the record that prison officials made reasonable accommodations to ensure that Asatru practitioners could continue conducting blot ceremonies. As discussed *supra*, Asatru could obtain firewood via family members, and was en-

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[113] *Turner*, 482 U.S. at 85 ("Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.").

[114] *Freeman*, 125 F.3d at 737 (alterations in original) (citing to *Allen v. Toombs*, 827 F.2d 563, 569 (9th Cir. 1987)).

couraged to seek assistance through other means. In summary, Mr. Watkinson has not shown that he intentionally was discriminated against in violation of the Fourteenth Amendment.

19. Reasonably Related to Legitimate Penological Interests. Further, as explained *supra*, even if Mr. Watkinson could show intentional discrimination by Defendants, they have carried their burden of showing that Alaska DOC's policies are reasonably related to the legitimate penological interest of orderly and securely administering a fund for the general welfare of all inmates.

20. The Missing Witness Rule. Mr. Watkinson argues the so-called "missing witness rule" should apply in this case because the individual Defendants did not testify at trial.[115] He asks this Court to infer from their absence: (1) "[d]uring the period in which virtual balances within the PWF were allowed, no actual security or fraud problems occurred"; (2) "the 'administrative burden' of maintaining a virtual balance in the PWF is negligible"; and (3) "Mr. Hauser [sic] would never approve any PWF funding proposal from a religious group"; but only "to the extent that the evidence already is not undisputed on these points."[116] It is entirely within the discretion of the Court to give such instruction.[117]

Mr. Watkinson does not cite to any Ninth Circuit authority governing the applicability of the uncalled-

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[115] Docket 92 at 13-14.

[116] *Id.*

[117] *United States v. Bautista*, 509 F.2d 675, 678 (9th Cir. 1975).

witness rule in civil trials, and other courts have remarked on the Ninth Circuit's lack of jurisprudence governing the precise contours of the rule in such situations.[118] In the criminal context, the Supreme Court has stated, "[i]f a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable."[119] But, "[i]n order to justify the inference drawn from the failure to call a witness, the testimony of the uncalled witness must not be cumulative or inferior to the evidence already presented."[120]

21. Cumulative Testimony. Mr. Hough already testified to the administrative burden that maintaining a virtual balance in the PWF would cause. Mr. Hough also already testified that religious groups are not able to obtain funding through the PWF.[121] Thus, drawing the second and third inferences requested by Plaintiff would be duplicative to the evidence already produced, and would not change the Court's ultimate ruling. The Court declines to do so.

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[118] *Apple Inc. v. Samsung Electronics Co.*, Ltd., No. 11-CV-01846-LHK, 2012 U.S. Dist. LEXIS 114714, 2012 WL 3536797, *2 (N.D. Cal. August 13, 2012) ("The parties have not cited, and the Court has not found, any Ninth Circuit authority governing the applicability of the uncalled-witness rule in civil trials.").

[119] *See Graves v. U.S.*, 150 U.S. 118, 121, 14 S. Ct. 40, 37 L. Ed. 1021 (1893).

[120] *Kean v. C.I.R.*, 469 F.2d 1183, 1187 (9th Cir. 1972).

[121] Docket 93 at 51.

22. Reasonable Inference. Further, "a missing witness instruction is proper only if from all the circumstances an inference of unfavorable testimony from an absent witness is a natural and reasonable one."[122] The Court finds it unreasonable to infer that, during the period in which virtual balances within the PWF were allowed, no actual security or fraud problems occurred. Plaintiff could have sought clarification on this fact from Mr. Hough during trial, but chose not to. Plaintiff cannot now assert that the lack of testimony on this precise point provides reasonable grounds for assumption; especially when a witness with specialized knowledge of the PWF administration testified at trial. Further, as discussed *supra*, even if the Court were to draw this inference as requested by Plaintiff, it would not alter the outcome of the Court's findings.

IV. CONCLUSION

For the foregoing reasons, the Court finds and concludes that Plaintiff Watkinson has not established a violation of RLUIPA, and has not established violations of his First and Fourteenth amendment rights.

IT IS SO ORDERED this 31st day of December, 2020, at Anchorage, Alaska.

/s/ Joshua M. Kindred
JOSHUA M. KINDRED
United States District Judge

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[122] *United States v. Bramble*, 680 F.2d 590, 592 (9th Cir. 1982).