IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

JAMES LIMBAUGH, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION NO. 93-A-1404-N
	)	
LESLIE THOMPSON, et al.,	)	
	)	
Defendants.	)	
NATIVE AMERICAN PRISONERS OF ALABAMA - TURTLE WIND CLAN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION NO. 96-A-554-N
	)	
STATE OF ALABAMA DEPARTMENT OF CORRECTIONS, et al.,	)	
	)	
Defendants.		

RECOMMENDATION OF THE MAGISTRATE JUDGE

I. INTRODUCTION AND PROCEDURAL HISTORY

Plaintiffs in this case[1] are Native American inmates challenging Alabama Department of Corrections ("ADOC") policies restricting inmate hair length and prohibiting Native

[1]The court consolidated this case with one initially filed in the Northern District of Alabama entitled, *Native American Prisoners of Alabama v. Alabama Department of Corrections*, 94-U-186-NE. *See* Docs. # 92 & 135. The inmate organization which filed this lawsuit objected to the Alabama Department of Corrections ("ADOC's") refusal to provide them with a ceremonial ground, a sweat lodge, sacred plants, and other objects necessary to the practice of their Native American spirituality.

American inmates from participating in sweat lodge ceremonies.[2] The protracted course of this lawsuit, which approaches its tenth anniversary in this court, is paradigmatic of the difficulties faced by the judiciary and the legislature in defining the appropriate standard of review for First Amendment free exercise of religion claims filed by prisoners.[3] When the activities which ultimately resulted in the filing of this lawsuit occurred, the rational-basis test outlined in *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987), was the indisputable standard for evaluating prison regulations which affected a prisoner's ability to freely practice his or her religion. The *O'Lone* standard permits the promulgation of policies restricting a prisoner's free exercise of religion if the regulation is "reasonably related to legitimate penological interests." 482 U.S. at 349.

Shortly before this lawsuit was filed, Congress enacted the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et. seq*. Congress' stated purpose in enacting this legislation was to create a more favorable standard of review for plaintiffs challenging policies burdening the free exercise of religion.[4] Under the standard outlined in

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[2]*See Infra*, p. 21 for a detailed description of the sweat lodge ceremony.

[3]The Free Exercise Clause "withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 384 (1990) *(citing Sch. Dist. of Abington Township v. Schempp,* 374 U.S. 203, 222-223 (1963)).

[4]Congress enacted the Religious Freedom Restoration Act ("RFRA") in response to the Supreme Court's holding in *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 866 n. 3 (1990), which held, in pertinent part, that "generally applicable, religion-neutral laws which have the effect of burdening a particular religious practice need not be justified by a compelling government interest." In so holding, the Supreme Court rejected the applicability of the tests developed in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1975). In 42 U.S.C. § 2000bb(b)(1), Congress indicates

RFRA, prison officials can promulgate policies which substantially burden the free exercise of religion only if the regulation is "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. While the parties in this case were engaged in settlement negotiations, the Supreme Court, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), declared RFRA unconstitutional and resurrected the rational basis test articulated in *O'Lone*.[5] Guided by the standard outlined in *O'Lone* and the evidence presented during three days of evidentiary hearings, the court concluded that the ADOC's policies restricting inmate hair length and prohibiting sweat lodge ceremonies, issues which the parties were unable to settle extrajudicially,[6] did not impinge on the plaintiffs' constitutional right to the free exercise of their Native American spirituality.[7] The plaintiffs appealed this decision to the Eleventh Circuit Court of Appeals.[8]

While the plaintiffs' appeal was pending, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc, *et. seq.*, which

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that its purpose in enacting RFRA was "to restore the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened."

[5]The Supreme Court concluded that RFRA was a violation of Congress' powers under § 5 of the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

[6]*See* Doc. # 177 fully outlining the issues which the parties settled extrajudicially.

[7]*See* the September 10, 1999 Recommendation of the Magistrate Judge (Doc. # 192) and the district court's June 12, 2000 order adopting the Magistrate Judge's Recommendation (Doc. # 214).

[8]*See* Doc. # 218.

protects prisoners from government-sponsored infringement on religious practices by resurrecting RFRA's substantial burden and strict scrutiny standards. The Act attempts to avoid RFRA's constitutional infirmities by premising Congressional authority for its enactment on both the Spending and Commerce Clauses. *See* 42 U.S.C. § 2000cc-1(b)(1)(2). Based on the potential applicability of RLUIPA to this case, the Eleventh Circuit granted the plaintiffs' motion to remand "to permit the district court to determine . . . whether the new federal statute entitles plaintiffs to the relief that they seek." Shortly after the remand of this case, the United States intervened pursuant to 28 U.S.C. § 2403(a) to defend the Act's constitutionality.[9]

At issue in this most recent chapter of this litigation is RLUIPA's applicability and constitutionality, matters of first impression in this circuit. After a brief period of discovery, the defendants filed a motion for summary judgment and supporting brief (Docs. # 281 & 282), arguing that (1) RLUIPA's jurisdictional requirements are not triggered by the plaintiffs' allegations; (2) RLUIPA is an unconstitutional exercise of Congressional power; and (3) even assuming RLUIPA's constitutionality, the ADOC's policies restricting inmate hair length and prohibiting Native American inmates from participating in sweat lodge ceremonies are in furtherance of compelling governmental interests and the least restrictive means of furthering its compelling governmental interests. After the case was remanded, the

[9]*See* Doc. # 258.

parties stipulated that additional evidentiary hearings were unnecessary.[10]

In defending RLUIPA's constitutionality, the United States argues that the Act is a constitutional exercise of Congress' powers to unambiguously and non-coercively condition the receipt of federal funds pursuant to its spending power. Alternatively, the government argues that the so-called "jurisdictional hook"[11] contained in 42 U.S.C. § 2000cc-1(b)(2) prevents RLUIPA from exceeding the scope of Congress' power under the Commerce Clause. In defending RLUIPA's applicability to the regulations at issue in this case, the plaintiffs argue that restrictions on hair length and participation in sweat lodge ceremonies are substantial burdens on the exercise of their Native American spirituality. Lastly, the inmates argue that the record clearly supports the conclusion that the ADOC's policies are not the least restrictive means of furthering its compelling governmental interests in security and safety.

The court first addresses RLUIPA's applicability because established jurisprudential principles dictate that a case should not be decided on constitutional grounds when it can be resolved on a statutory one. *See Califano v. Yamasaki*, 442 U.S. 682, 692 (1979).[12] Setting aside the issue of the Act's constitutionality, the court concludes that the plaintiffs' claims

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[10]*See* Doc. # 281, p. 2 and Doc. # 282, p. 1.

[11]The Act's legislative history contains the following jurisdictional hook: 42 U.S.C. § 2000cc-1(b)(2) requires that the substantial burden "affect . . . commerce with foreign nations, among the several states, or with Indian tribes."

[12]*See also, United States v. Cong. of Indus. Org.*, 335 U.S. 106, 125 (1948); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936); *White v. State of Ala.*, 74 F.3d 1058, 1061 n. 5 (11th Cir. 1996); *United States v. Bearden*, 659 F.2d 590 (5th Cir. 1981).

in this case are governed by RLUIPA because the record clearly establishes that the ADOC receives federal financial assistance. Next, the court concludes that the plaintiffs have made a prima facie showing that they are sincere adherents of Native American spirituality whose religious exercise has been substantially burdened by the ADOC's policies restricting inmate hair length and prohibiting inmate participation in sweat lodge ceremonies. Furthermore, after a careful review of the briefs filed in support of and in opposition to the motion for summary judgment, the court affirms its initial conclusion that the ADOC's restriction on inmate hair length is the least restrictive means of furthering its compelling governmental interests in prison safety and security. Accordingly, the court concludes that the defendants' motion for summary judgment is due to be granted on this issue.

The viability of the ADOC's absolute ban on inmate participation in sweat lodge ceremonies is a more difficult issue. Despite the parties' stipulation that additional evidentiary hearings were unnecessary,[13] the evidentiary record does not permit the court to evaluate the efficacy of any less restrictive alternatives to the traditional sweat lodge ceremony. Thus, the court is unable to perform the analytical balancing test which RLUIPA requires. Accordingly, the defendants' motion for summary judgment is due to be denied on the issue of whether the ADOC's absolute prohibition on sweat lodge ceremonies is the least restrictive means of furthering the ADOC's compelling governmental interests. *See N.L.R.B. v. Smith Indus., Inc.*, 403 F.2d 889, 893 (5th Cir. 1968) (holding that court should deny ruling

[13]*See* Doc. # 281, p.2 and Doc. # 292, p. 1.

on motion for summary judgment until facts have been sufficiently developed to enable it to be reasonably certain that it is making a correct determination of law).[14] This conclusion also necessitates that the court reserve ruling on constitutional issues until it determines RLUIPA's applicability to the ADOC's prohibition on sweat lodge ceremonies. *See Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1254 (11th Cir. 1999) (explaining that courts should defer ruling on constitutional questions if there are other grounds upon which the case may be decided).

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ. P. 56 (c). The party seeking summary judgment must first inform the court of the basis for the motion, identify pertinent portions of the record, and demonstrate an absence of evidence in support of the non-moving party's claims or defenses. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). If the movant satisfies these prerequisites, then the burden then shifts to the non-moving party to show that a genuine issue of material fact exists for resolution by the factfinder. *Id.* Furthermore, "[A]n adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but

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[14]*See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981, *en banc)*, adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

. . . must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56 (e). *See also, Hammer v. Slater*, 20 F.3d 1137, 1141 (11th Cir. 1994) (explaining that for issues on which the nonmoving party will bear burden of proof at trial, the nonmoving party must either point to evidence in record or present additional evidence "sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency.").

The court's role is not to weigh evidence or determine facts; instead, it is "the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). In doing so, the court must accept the evidence of the non-moving party as true, resolve all doubts against the moving party, construe all evidence in the light most favorable to the non-moving party, and draw all reasonable inferences in the non-moving party's favor. *See Hunt v. Cromartie,* 526 U.S. 541, 550-55 (1999)*; Eastman Kodak Co. v. Image Technical Servs., Inc.,* 504 U.S. 451 (1992)*; Anderson,* 477 U.S. at 255. If more than one reasonable inference can be drawn and that inference creates a genuine issue of material fact, then the motion for summary judgment is due to be denied. *See Hunt,* 526 U.S. at 552*; Patterson & Wilder Const. Co., Inc. v United States,* 226 F.3d 1269, 1273 (11th Cir. 2000). Affirming that it is substantive law which defines materiality, the Supreme Court declared in *Anderson* that: "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." 477 U.S. at 258.

III. APPLICABILITY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

The Act's legislative history demonstrates congressional concern about institutionalized persons' ability to freely practice their religion. Remarks made on July 27, 2000 in the Senate poignantly underscore the basis of this concern:

> Far more than any other Americans, persons residing in institutions are subject to the authority of one or a few local officials. Institutional residents' right to practice their faith is at the mercy of those running the institution, and their experience is very mixed. It is well known that prisoners often file frivolous claims; it is less well known that prison officials sometimes impose frivolous or arbitrary rules. Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.

S. REP. NO. S7775 (July 27, 2000). In attempting to statutorily ensure a level of protection for free exercise claims filed by prisoners which avoids RFRA's constitutional infirmities, Congress limited RLUIPA's application to "a program or activity that receives Federal financial assistance" or to circumstances when a substantial burden on free exercise affects "commerce with foreign nations, among the several states, or with Indian tribes." *See* 42 U.S.C. § 2000cc-1(b)(1)(2).

The substantive portions of the Act provide that "[n]o government shall impose a substantial burden on the religious exercise" of prisoners unless the government can demonstrate that the burden both serves a compelling governmental interest and is the least restrictive means of advancing that interest. 42 U.S.C. § 2000cc-1(a). Although narrower in scope than RFRA, RLUIPA essentially adopts RFRA's requirement that prisoners make

a prima facie showing that a sincerely held religious practice has been substantially burdened and that courts reviewing substantially burdensome prison regulations utilize a strict scrutiny standard. *See Madison v. Riter*, Civ. No. 7:01CV00596, 2003 WL 179990, at *3 (W.D. Va. Jan. 23, 2003) (explaining that in adopting RLUIPA, Congress made no changes to RFRA's strict scrutiny test); H.R. DOC. NO. E1563 (Sept. 22, 2000) (Remarks of Hon. Charles T. Canady).

If the court determines that the challenged prison regulations substantially burden an inmate's religious expression, then the burden then shifts to the defendant to prove that the regulations further a compelling governmental interest. *See* 42 U.S.C. § 2000cc-1(a)(1). Assuming the existence of a compelling governmental interest, the court then evaluates whether a defendant's policies satisfy RLUIPA's requirement that they be the least restrictive means of furthering that compelling governmental interest. *See* 42 U.S.C. § 2000cc-1(a)(2).

Although the defendants bear the burden of proof on the compelling interest/least restrictive means prong of the Act, RLUIPA's legislative history clearly indicates that prison officials are entitled to due deference on issues relating to "good order, security and discipline, consistent with consideration of costs and limited resources." S. REP. NO. S7775 (July 27, 2000). However, this deference is not absolute and "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements." *Id.*, (citing Senate Report 103-111 at 10 (1993)).

A. Jurisdictional Requirements

One method of satisfying RLUIPA's jurisdictional requirement involves a determination of whether the allegedly substantially burdensome prison regulations are imposed in a "program or activity" which receives federal financial assistance.[15] *See* 42 U.S.C. § 2000cc-1(b)(1). The Act explains that "the term 'program or activity' means *all of the operations* of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title." 42 U.S.C. § 2000cc-5(6) (emphasis added). Section 2000d-4a(1)(A) provides that the term "program or activity" refers to "all of the operations of a department . . . of [a] State or of local government." *See* 42 U.S.C. § 2000d-4a(1)(A). Based on this broad definition of program or activity, the court rejects the defendant's argument that RLUIPA's jurisdictional prerequisites are not satisfied because the ADOC does not receive any federal financial assistance for inmate religious programs. The undisputed facts clearly demonstrate that the ADOC receives approximately one percent (1%) of its funding from the federal government for various substance abuse treatment programs and prison construction projects.[16] Consequently, the plaintiffs' claims fall within RLUIPA's jurisdictional ambit.

B. The Prima Facie Case

The next step in accessing RLUIPA's applicability requires plaintiffs to demonstrate that their preference for unshorn hair and desire to participate in sweat lodge ceremonies are

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[15]Because jurisdiction is established under 42 U.S.C. § 2000cc-1(b)(1), the court does not address the alternate method of establishing jurisdiction under 42 U.S.C. § 2000cc-1(b)(2).

[16]*Aff.*, Rachel Lee, App. Vol. III, Tab. 43; *Aff.*, John Jacobs, App. Vol. III, Tab 44.

religious exercises of Native American spirituality which are substantially burdened by the ADOC's policies. *See* 42 U.S.C. § 2000cc-2(b).[17]

(1) Sincere Religious Exercises

RLUIPA defines the term "religious exercise" as including "*any exercise of religion*, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (emphasis added). In this case, the unrebutted testimony indicates that participation in sweat lodge ceremonies and a preference for unshorn hair are central tenets of Native American spirituality and thus, satisfy the Act's broad definition of a religious exercise. Deward Walker ("Walker"), plaintiffs' proffered expert on Native American religious practices, explained the important healing and rehabilitative aspects of the sweat lodge ceremony; described it as one of the most important and frequent expressions of Native American spirituality; and equated the sweat lodge ceremony with a sacrament in the Catholic Church.[18] Although indicating that not all Native Americans wear their hair long, Walker emphasized the importance of unshorn hair to those adhering to a traditional Native American lifestyle.[19] Plaintiffs testifying at the February 1998 evidentiary hearing substantiated Walker's assessments of the centrality of the sweat lodge ceremony, explaining that it was an important physical and mental purification ritual used by Native Americans as

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[17]This threshold requirement is a legal question which is subject to de novo review. *See In Re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996).

[18]*See* Evid. Hrg. Test., Deward Walker, Feb. 10, 1998, R. 97-98; 128-129; 262-263.

[19]*Id.*, Feb. 9, 1998, R.163, 166-167; Feb. 10, 1998, R. 21.

a prerequisite for participation in other important religious ceremonies.[20] Similarly, several plaintiffs testified that prison regulations requiring short hair diminish their ability to approach the Creator with honor.[21]

The defendants do not challenge the centrality of these religious beliefs but rather question the plaintiffs' sincerity. Although not an express statutory requirement, RLUIPA's legislative history clearly indicates Congress' intent to incorporate RFRA's sincerity requirement into the definition of religious exercise. In clarifying the term "religious exercise," Congress indicated that the new definition

> *does not change the rule that insincere religious claims are not religious exercise at all, and thus are not protected.* Nor does it change the rule that an individual's religious belief or practice need not be shared by other adherents of a larger faith to which the claimant also adherers.

(emphasis added). H.R. DOC. NO. E1564 (Sept. 22, 2000) (Remarks of Hon. Charles T. Canady). *See also, Grace United Methodist Church v. City of Cheyenne,* 235 F. Supp.2d 1186, 1194 (D. Wyo. 2002) (holding that RLUIPA incorporates RFRA's sincerity requirement). As an example of what it characterizes as a feigned interest in Native American spirituality, the ADOC argues that the plaintiffs only became religious after their incarceration and had either never attended a sweat lodge ceremony or had limited familiarity

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[20]*See* Evid. Hrg. Test., Billy Ray Jones, Feb. 9, 1998, R. 220-222; Evid. Hrg. Test., Billy Ray Jones, Feb. 10, 1998, R. 22; Evid. Hrg. Test., Douglas Wayne Bailey, Feb. 13, 1998, R. 27.

[21]*See* Evid. Hrg. Test., Billy Ray Jones, Feb. 9, 1998, R. 229-230; Evid. Hrg. Test., Billy Ray Jones, Feb. 10, 1998, R. 32; Evid. Hrg. Test., Douglas Wayne Bailey, Feb. 13, 1998, R. 11; Evid. Hrg. Test., James Limbaugh, Feb. 13, 1998, R. 85.

with them.[22] The court rejects this argument because it erroneously assumes that frequent participation in religious ceremonies is the only indicator of sincerity. Although frequency of participation is a *factor* which might merit consideration in evaluating the sincerity of a religious belief, it is erroneous to conclude that the plaintiffs' failure to participate in sweat lodge ceremonies prior to their incarceration is definitive evidence of insincerity. *Cf.*, *Maguire v. Wilkinson*, 405 F. Supp. 637, 640 (D. Conn. 1975) (explaining that the timing of an inmate's acquisition of a religious belief or preference is not the exclusive indicator of sincerity). Explaining the renewal of his interest in Native American spirituality, Plaintiff Billy Ray Jones ("Jones") indicated that, after his incarceration, he began to yearn for a connection with the Creator.[23] George E. Sullivan ("Sullivan"), a former prison warden who offered expert testimony on the accommodation of Native American religious practices in prison settings, indicated that very few persons entering prison have attended Native American religious ceremonies prior to their incarceration and typically, view prison as an opportunity to develop their spirituality.[24] Based on this testimony, the court concludes that the record sufficiently explains the plaintiffs' renewal of their Native American spirituality. *See Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981) (warning courts to be cautious in distinguishing between fictitious and sincerely held religious beliefs).

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[22]*See* Evid. Hrg. Test., Billy Ray Jones, Feb. 9, 1998, R. 152, 154; Evid. Hrg. Test., Feb. 10, 1998, R. 8. *See* Evid. Hrg. Test., Douglas Wayne Bailey, Feb. 9, 1998, R. 186; Evid. Hrg. Test., James Limbaugh, Feb. 13, 1998, R. 86; Evid. Hrg. Test., Timothy Smith, Feb. 13, 1998, R. 101.

[23]Evid. Hrg. Test., Billy Ray Jones, Feb. 10, 1998, R. 11-12.

[24]Evid. Hrg. Test., George E. Sullivan, Feb. 12, 1998, R. 19-20.

Lastly, the court's comprehensive assessment of the plaintiffs' demeanor and their testimony, which evidences a working knowledge and familiarity with the religious practices at issue in this case, sufficiently establishes their sincerity. In short, the record clearly supports the conclusion that unshorn hair and participation in sweat lodge ceremonies cannot reasonably be interpreted as preferences which the plaintiffs have conveniently labeled as religious for purposes of this litigation. Furthermore, based on RLUIPA's expansive definition of religious exercise and the testimony in this case which establishes that the plaintiffs sincerely believe that unshorn hair and participation in sweat lodge ceremonies are integral to the practice of their religion, the court concludes that the ADOC regulations at issue in this case affect the plaintiffs' religious exercise.

(2) Substantially Burdensome Standard

A more challenging question which the statute does not address is the criteria for determining when prison regulations "substantially burden" an inmate's religious exercise. In their motion for summary judgment and in response to court's questions about this issue, defendants argue that regulations restricting inmate hair length and participation in sweat lodge ceremonies are not substantially burdensome because the ADOC permits Native American inmates to participate in a panoply of other religious practices. In short, the ADOC argues that the substantial burden inquiry does not focus on a specific or isolated religious practice, like hair length or participation in sweat lodge ceremonies, but on whether the plaintiffs' ability to *comprehensively practice* their Native American spirituality is substantially burdened. Plaintiffs object to this characterization, arguing that prison

regulations which require them to cut their hair and which impose an absolute ban on participation in sweat lodge ceremonies are, by definition, a substantial burden on religious practice. According to the plaintiffs, the defendants' interpretation of the substantial burden requirement is inconsistent "with the clear statutory command that RLUIPA 'be construed in favor of a broad protection of *religious exercise*, to the maximum extent permitted by the terms of this chapter and the Constitution.'"

For guidance in applying the substantial burden standard, the court relies on the Act's legislative history, Supreme Court jurisprudence, and case law applying RLUIPA and RFRA's substantial burden requirement. *See Pharm. Research & Mfrs. of Am. v. Meadows*, 304 F.3d 1197, 1210 (11th Cir. 2002) (observing that statutory language must be ambiguous before courts may examine extrinsic materials, including legislative history, to determine Congressional intent) (internal quotations and citations omitted). RLUIPA's legislative history specifically addresses the Act's failure to define substantial burden, explaining that

> it is not the intent of this Act to create a new standard for the definition of "substantial burden" on religious exercise. Instead, that term . . . should be interpreted by reference to Supreme Court jurisprudence. Nothing in this Act, including the requirement in [42 U.S.C. § 2000cc-3(g)] that its terms be broadly construed, is intended to change that principle. The term "substantial burden" as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise.

S. REP. NO. S7776 (July 27, 2000).[25] The Supreme Court's First Amendment jurisprudence

[25] Although the heading under this portion of the legislative history is entitled "Additional Discussion on the Intended Scope On Land Use Provision," the court concludes that, given the similarity between the levels of protection afforded to institutionalized persons, this legislative guidance is equally applicable in this case.

clearly indicates that the Constitution does not forbid all regulations burdening religion. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *Hernandez v. Comm'r of Internal Rev.*, 490 U.S. 680, 699 (1989). Instead, the free exercise clause is only implicated when a regulation imposes a substantial, as opposed to an inconsequential, burden on the litigant's religious practice. *Id.* In determining whether litigants have satisfied this burden, courts are instructed to consider factors like (1) the sincerity of the religious belief, *see Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 384-385 (1990); (2) whether the prison regulation impacts a central religious tenet, *see Id.*; (3) whether the religious practice at issue is based on a honest religious conviction, *see Thomas,* 450 U.S. at 714; and (4) whether the applicable prison regulation has a tendency to coerce individuals into acting contrary to their religious beliefs. *Lyng v. Northwest Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 450-451 (1988); *Cruz v. Beto*, 405 U.S. 319, 322, n. 2 (1972). Courts applying RLUIPA and RFRA's substantial burden standard require that the prohibited religious practice interfere with a tenet or central belief of the inmate's religious practice, curtail the inmate's ability to express adherence to their faith, or deny the inmate a reasonable opportunity to engage in fundamental religious activities.[26] *See e.g., Marria v. Broaddus,* 200 F. Supp. 2d 280, 298 (S.D.N.Y. 2002) (analyzing substantial burden under

[26]The Eleventh Circuit cases addressing RFRA have not analyzed the substantial burden requirement, opting instead to concentrate their discussion on the application of the compelling interest/least restrictive means prong of the statute. *See Lawson v. Singletary*, 85 F.3d 502 (11th Cir. 1996) (applying RFRA to prison officials' refusal to permit adherents of Hebrew Israelite faith, which espoused racial hatred, to receive prison literature); *Fawaad v. Jones*, 81 F.3d 1084 (11th Cir. 1996) (applying RFRA to prison officials' requirement that plaintiff use his chosen religious name and name under which he was convicted on all incoming and outgoing mail).

RLUIPA); *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) (analyzing substantial burden standard under RFRA).

Within the framework of these authorities, the court concludes that the plaintiffs have satisfied their prima facie burden of demonstrating that the ADOC's regulations restricting hair length and banning inmate participation in sweat lodge ceremonies substantially burdens the practice of their Native American spirituality. As evidenced by the discussion in the first section of this opinion and in the September 10, 1999 Recommendation, long hair and participation in sweat lodge ceremonies are central tenets of Native American spirituality of which the plaintiffs are sincere adherents. Additionally, the ADOC's restrictive policies prevent the plaintiffs' from exercising fundamental religious beliefs. Accordingly, the court concludes that the ADOC's curtailment of these religious practices substantially burden the plaintiffs' Native American spirituality.

In reaching this conclusion, the court rejects the ADOC's position that the plaintiffs are not substantially burdened because prison officials allow them to exercise their Native American spirituality through "regular access to ceremonial grounds, individual and group prayer pipes [pipe ceremonies], medicine bags, and special celebrations on Native American sacred days."[27] First, this argument is based on an assumption that all aspects of Native American spirituality are interchangeable and of equal importance. This assumption is clearly unsupported by the record. Walker indicated that sweat lodge and pipe ceremonies

[27]Def's Reply Br., (Doc. # 304), p. 9.

are both fundamental aspects of Native American religion which enable adherents to seek spiritual guidance in dealing with personal problems.[28] However, in answering questions about the interchangeability of the two ceremonies, he testified that "I wouldn't say they're the same ceremonies by any means. But they certainly can serve many of the same purposes .... *[o]ne does not, however, substitute for the other in my experience.*"[29] (emphasis added). According to Walker, the sweat lodge ceremony is essential to the practice of Native American spirituality because of its importance as a purification ritual where adherents seek spiritual rebirth through a collective, communal experience.[30] Second, the ADOC's interpretation of the "substantial burden standard," which would permit prison officials with limited knowledge and familiarity with Native American spirituality[31] to unilaterally determine the interchangeability of various religious practices despite expert testimony to the contrary, is inconsistent with RLUIPA's purpose of prohibiting frivolous or arbitrary rules restricting inmate religious practices. *See* S. REP. NO. S7775 (July 27, 2000). Lastly, the existence of alternate expressions of Native American spirituality does not obviate the centrality of the religious practices at issue in this case. *Cf., Blanken v. Ohio Dep't of Rehab. & Corr.*, 944 F. Supp. 1359, 1365-1366 (S.D. Ohio 1996) (rejecting defendant's claim that

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[28]Evid. Hrg. Test., Deward Walker, Feb. 10, 1998, R. 99-100, 122-123.

[29]*Id.*, at 99-100.

[30]*Id.*, at 97, 204-205.

[31]*See* Evid. Hrg. Test., John Shaver, Feb. 9, 1998, R. 5-6, 8, 49; Evid. Hrg. Test., Charles Sutton, Feb. 13, 1998, R. 180, 198-199.

plaintiff was not substantially burdened based on the availability of other religious practices).

B. Application of the Compelling Interest/Least Restrictive Means Standard

Having determined that the ADOC's policies substantially burden the plaintiffs' religious expression, the burden now shifts to the defendants, who must prove that the regulations further a compelling governmental interest and that its absolute prohibition on sweat lodge ceremonies and restrictions on inmate hair length are the least restrictive means of furthering these interests. *See* 42 U.S.C. § 2000cc-1(a)(1)(2).

1. Hair Length Restrictions

The ADOC's regulations restricting inmate hair length are based on what it characterizes as its compelling interest in prison safety and security. John Shaver ("Shaver") testified that the restriction is primarily based on the increased likelihood that inmates with long hair could easily conceal weapons or other types of contraband.[32] As a preliminary matter, the court observes that states have a compelling interest in security and order in their correctional facilities. *See Harris v. Forsyth*, 735 F.2d 1235 (11th Cir. 1984). Although plaintiffs argue that Sullivan's testimony establishes the speculative nature of Shaver's concerns about safety and security, both RLUIPA and RFRA require that the court defer to the ADOC's judgment that its hair length policy is rooted in its interests in good order, security, and discipline. *See* S. REP. NO. S7775 (July 27, 2000).

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[32]Evid. Hrg. Test., John Shaver, Feb. 9, 1998, R. 94. Shaver also identified uniformity, discipline, and concerns about post-escape identification as additional reasons for refusing to honor the plaintiffs' request that they be allowed to wear their hair long.

The issue of whether RLUIPA invalidates prison regulations restricting inmate hair length is a matter of first impression in this circuit. However, because RLUIPA essentially adopts RFRA's compelling interest/least restrictive means standard and because the plaintiffs' have not otherwise distinguished the facts of this case, the court is bound by the Eleventh Circuit's holding in *Harris v. Chapman*, 97 F.3d 499, 504 (11th Cir. 1996). In *Chapman*, the court upheld the Florida Department of Corrections policy which mandated that all inmates have their hair cut short to medium length. *Id.* In explaining its reasoning, the court indicated "we are unable to suggest any lessor means than a hair length rule for satisfying these interests . . . . we thus join these courts in finding that a reasonable hair length regulation satisfies the least restrictive means test." *Chapman*, 97 F.3d at 504. *Chapman's* holding is consistent with that of other courts which hold that prison grooming regulations restricting inmate hair length are the least restrictive means of advancing the substantial governmental interest in maintaining prison security. *See e.g., Hamilton v. Schriro,* 74 F.3d 1545, 1555, n. 12 (8th Cir. 1996) (collecting cases). Accordingly, the court concludes, as a matter of law, that the ADOC's regulations restricting inmate hair length do not violate RLUIPA.[33]

2. Sweat Lodge Ceremonies

The sweat lodge ceremony occurs in a small dome-like structure, approximately four

[33]The court affirms, without discussion, its decision that the ADOC's differential application of hair length policies is constitutionally permissible. *See* Sept. 10, 1999 Recommendation of the Magistrate Judge, p. 4, n. 3.

feet in height.[34] The lodge is constructed from willow branches or similar materials which can retain heat and exclude light.[35] The frame is either covered with a tarpaulin or an animal hide and is often a temporary structure.[36] Participants enter the sweat lodge through a flap cut from the front of the protective covering.[37] In its previous recommendation, the court briefly outlined the nature of the ceremony:

> Rocks heated in a separate fire are placed in the center of the lodge. During the ceremony, several tools are used including an axe (to split the firewood), a shovel (to transfer the hot rocks from the fire to the sweat lodge) and deer antlers. Participants, who are nude, pour water on the hot rocks to create steam, which causes them to sweat. Throughout the ceremony, the lodge remains covered to retain the steam and to keep out the light. The ceremony lasts between one and three hours.

Sept. 10, 1999 Recommendation, p. 6.

Eighty-eight prisons and approximately seventeen state-run facilities permit periodic inmate participation in sweat lodge ceremonies.[38] However, the ADOC's policy absolutely prohibits inmate participation in these ceremonies. The ADOC argues that this absolute prohibition is justified by its compelling governmental interests in security and by financial constraints which would make accommodating the plaintiffs' request virtually impossible.[39]

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[34]Evid. Hrg. Test., Douglas Wayne Bailey, Feb. 9, 1998, R. 229-221.

[35]*Id.*

[36]*Id.*, R. 228. *See also*, Evid. Hrg. Test., Deward Walker, Feb. 10, 1998, R. 114-116.

[37]*See also*, Evid. Hrg. Test., Deward Walker, Feb. 10, 1998, R. 118-119.

[38]*See* Sept. 10, 1999 Recommendation, p. 8, n. 7.

[39]Def's Br. Mot. Sum. J., p. 21-25.

Shaver, the person who drafted the ADOC's regulations governing inmate religious practices, testified that the secluded nature of the sweat lodge would make visibility extremely difficult and thus, provide inmates with the opportunity to physically assault one another and engage in homosexual activity.[40] According to Shaver, even if the chronically understaffed ADOC were able to adequately supervise the ceremony, the steam and extreme temperatures in the sweat lodge would nevertheless prohibit correctional officers from visually monitoring inmates.[41] These problems would also be exacerbated by the requirement that the sweat lodge be built outdoors, thus, increasing the difficulty of adequate supervision.[42]

Charles Sutton ("Sutton"), the deputy commissioner responsible for security, echoes Shaver's concerns, explaining that the sauna-like conditions in the sweat lodge would make brief visual scans virtually impossible and predicted that wardens would have to reassign officers from other areas to monitor sweat lodge ceremonies.[43] Shaver and Sutton are both concerned that the materials typically used in sweat lodge ceremonies, like shovels, axes, hot stones, and pitchforks, could be used as weapons.[44] Security expert Lansome Newsome ("Newsome") endorsed Shaver and Sutton's concerns about the possibility that inmates could

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[40]Evid. Hrg. Test., John Shaver, Feb. 9, 1998, R. 54, 56, 121, 123.

[41]*Id.*, R. 181-182.

[42]*Id.*, 50, 53.

[43]Evid. Hrg. Test., Charles Sutton, Feb. 13, 1998, R. 181.

[44]Evid. Hrg. Test., John Sutton, Feb. 13, 1998, R. 51, 56; Evid. Hrg. Test., Charles Sutton, Feb. 13, 1998, R. 181-182.

engage in illicit drug use and homosexual activity during sweat lodge ceremonies.[45]

Based on this testimony, the defendants argue that the plaintiffs' proposed alterations to the traditional sweat lodge ceremony, which include prohibiting nudity and permitting correctional officers to monitor the ceremony by periodically raising the entrance flap, fail to assuage their safety concerns. According to the ADOC, a variety of factors like: (1) the visibility problems caused by the intense steam and heat inside the sweat lodge; (2) the inmates insistence that the ceremony be performed with an opaque covering; (3) the easy accessibility to hot rocks, shovels, and other ceremonial objects which could be used as weapons; and (4) the financial hardship which would be undoubtedly caused by the need for additional monitoring of sweat lodge ceremonies make any proposed alterations to the traditional sweat lodge ceremony untenable.[46]

It is well-established in this circuit that states have a compelling interest in security. *See Lawson v. Singletary*, 85 F.3d 502, 512 (11th Cir. 1996); *Forsyth*, 735 F.2d at 1235. Although the evidentiary record permits the court to conclude that the ADOC has compelling governmental interests in prison safety and security and that its ability to protect these interests requires some form of visual monitoring of sweat lodge ceremonies, neither the evidence presented at the 1998 evidentiary hearing nor the various arguments made by counsel at the August 27, 2002 oral argument on the motion for summary judgment, provide

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[45]Lansome Newsome Dep. Test., R. 13-15.

[46]*See* Doc. # 244, p. 5-6.

the court with sufficient information to determine if the ADOC's absolute prohibition on sweat lodge ceremonies is the least restrictive means of furthering its compelling governmental interests.

The Eighth Circuit's holding in *Hamilton,* applying the least restrictive means standard to a prison regulation prohibiting sweat lodge ceremonies under RFRA, highlights the deficiencies in the current evidentiary record. In explaining its decision to uphold prison regulations prohibiting Native American inmate participation in sweat lodge ceremonies, the Eighth Circuit indicated that:

> [a]lthough RFRA places the burden of production and persuasion on the prison officials . . . *the prisoner must demonstrate what, if any, less restrictive means remain unexplored. It would be a herculean burden to require prison administrators to refute every conceivable option in order to satisfy the least restrictive means prong of RFRA.* Moreover, such an onerous requirement would be irreconcilable with the well-established principle, recognized by the Supreme Court and RFRA's legislative history, that prison administrators must be accorded due deference in creating regulations and policies directed at the maintenance of prison safety and security.

74 F.3d at 1556 (emphasis added). Furthermore, the court observed in dicta that:

> *There may very well be less restrictive means of achieving prison safety and security than completely prohibiting sweat lodge ceremonies.* Justice Blackmun recognized the dilemma implicit in a least restrictive means analysis: "a judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation . . .."

Id. (emphasis added and internal citations omitted).[47] The plaintiff in *Hamilton* elected to

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[47]*See also, Werner v. McCotter*, 49 F.3d 1476, 1480-1481 (10th Cir. 1995) (remanding case to the district court for further development of the record and reconsideration under the least restrictive means standard).

take what the court described as an "all-or-nothing" position and rejected the possibility of alterations to the traditional sweat lodge ceremony. *See* 74 F.3d at 1556. Although both parties allude to the existence of proposed alterations to the traditional sweat lodge ceremony, the record does not clearly delineate the nature of these proposed alterations or provide the court with any evidentiary basis for determining if any proposed less restrictive means of accommodating the inmates' request would obviate the ADOC's concerns about security. Consequently, the court cannot conclude, as a matter of law, that an absolute ban on sweat lodge ceremonies is the least restrictive means of safeguarding the ADOC's compelling governmental interests. Additionally, because the parties in this case were operating under a legal standard which did not require an inquiry into the availability of less restrictive alternatives, the court concludes that it would be inappropriate to grant the motion for summary judgment based on the current evidentiary record.

Although the evidence in this case suggests several potential alterations to the traditional sweat lodge ceremony which theoretically might enable the plaintiffs to participate in sweat lodge ceremonies at *de minimis* expense to the ADOC's valid penological interests in safety and security,[48] the current evidentiary record does not permit the court to evaluate the efficacy of any less restrictive alternatives and thus, prevents it from performing the

[48]Specifically, prison officials could potentially reduce the risk of physical and sexual assaults by (1) limiting participation in sweat lodge ceremonies to inmates who are not documented security risks; (2) searching inmates prior to and after sweat lodge ceremonies; (3) requiring that inmates remain fully clothed during the ceremony; and (4) limiting the types of ceremonial items which inmates can use during the ceremony. The court notes that the above-referenced hypotheticals are merely illustrative and not meant to be an indicator of its eventual resolution of this issue.

analytical balancing test which RLUIPA requires. The court recognizes that accommodations which might be theoretically viable could undermine the religious significance of the sweat lodge ceremony. For example, the court could determine that the ADOC could accommodate the plaintiffs without sacrificing the ability to visually monitor participants by requiring that the tarp covering the sweat lodge be made of a transparent material or by requiring the inmates to totally remove the tarp. However, without any evidence about (1) the plaintiffs' ability or willingness to conduct the sweat lodge with these or other less restrictive modifications or (2) the defendants' ability or willingness to accommodate any requested modifications, the court cannot conclude, as a matter of law, that an absolute ban of these ceremonies is the least restrictive means of furthering the ADOC's compelling governmental interests.[49]

IV. CONCLUSION

Based on the foregoing analysis, the RECOMMENDATION of the Magistrate Judge is as follows:

(1) That the defendants' motion for summary judgment be granted on the plaintiffs' claim that the Alabama Department of Corrections' policy restricting inmate hair length violates the Religious Land Use and Institutionalized Persons Act of 2000.

(2) That the defendants' motion for summary judgment be denied on the plaintiffs' claim that the Alabama Department of Corrections' policy prohibiting inmate participation

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[49]The court notes that the above example is merely illustrative and not meant to be an indicator of its eventual resolution of this issue.

in sweat lodge ceremonies violates the Religious Land Use and Institutionalized Persons Act of 2000.

(3) That the court reserve ruling on the constitutionality of the Religious Land Use and Institutionalized Persons Act of 2000 until after a determination of RLUIPA's applicability.

Done this the 14 day of March, 2003.

CHARLES S. COODY
UNITED STATES MAGISTRATE JUDGE

CIVIL ACTION NO. 93-A-1404-N

ORDER

The Clerk of the Court is ORDERED to file the Recommendation of the Magistrate Judge and to serve by mail a copy thereof on the parties to this action. The parties are DIRECTED to file any objections to the said Recommendation within a period of 13 days from the date of mailing to them. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court. The parties are advised that this Recommendation is not a final order of the court and, therefore, it is not appealable.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a de novo determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982). See Stein v. Reynolds Securities, Inc., 667 F.2d 33 (11th Cir. 1982). See also Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981, en banc), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Done this 14 day of March, 2003.

CHARLES S. COODY
UNITED STATES MAGISTRATE JUDGE