

No. 18-35018

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID R. PRIEST,
Plaintiff-Appellant,

v.

D. HOLBROOK, SUPERINTENDENT; JACKSON, CUSTODY PROGRAM
SUPERVISOR; A. ALVAREZ-JACKSON, CUSTODY UNIT SUPERVISOR;
DAVID BREWER, UNIT SGT; DUNCAN, CORRECTION OFFICER
#7388W; DOE, CORRECTION OFFICER #7423,
Defendants-Appellees.

On Appeal from the United States District Court for the
Eastern District of Washington

OPENING BRIEF FOR PLAINTIFF-APPELLANT
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JURISDICTIONAL STATEMENT

Plaintiff-Appellant David R. Priest brought this action pursuant to 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1, *et seq.*, alleging, *inter alia*, violations of his constitutional and statutory right to freely exercise his religion. The United States District Court for the Eastern District of Washington had jurisdiction under 28 U.S.C. § 1331.

On December 11, 2017, the district court entered an order and judgment dismissing Priest's complaint for failure to state a claim under 28 U.S.C. §§ 1915(e)(2) and 1915A(b)(1) and instructing the clerk to terminate the action. ECF Nos. 17 & 18 (ER 2-10). Priest timely filed a notice of appeal on January 4, 2018. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether Priest, an inmate in the Washington state prison system, stated a claim under 42 U.S.C. § 1983 when he alleged that Defendants, prison officials acting under color of state law, violated the Free Exercise Clause of the First Amendment by desecrating, confiscating, and withholding sacred eagle feathers that are integral to his sincere Native American religious practice.
2. Whether Priest stated a claim for relief under RLUIPA when he alleged that he is entitled to monetary *and* non-monetary relief from Defendants based

on their having substantially burdened his ability to freely exercise his sincerely held religious beliefs.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

Excerpts of pertinent constitutional provisions, statutes, and regulations are contained in the Addendum bound with this brief.

PRELIMINARY STATEMENT

David Priest sought to practice his sincerely held Native American religious beliefs while he was an inmate at the Washington State Penitentiary through the use of rare eagle feathers he had specially procured from the federal government for use in traditional spiritual ceremonies. Defendants prevented him from doing so, however, by desecrating, confiscating, and refusing to return the feathers. After Priest exhausted the grievance process and applied for appropriate judicial relief, the district court dismissed his complaint *sua sponte*, holding that he had failed to state a free exercise claim under the First Amendment or RLUIPA.

That decision is wrong. Priest adequately alleged that Defendants substantially burdened his free exercise in multiple ways: by defiling feathers he had ritually cleaned, blessed, and prepared for use in religious ceremonies; by confiscating them and thus precluding Priest from participating in religious ceremonies during the remainder of his term of incarceration; and finally, by continuing to withhold them, preventing Priest from using them for the religious

practices for which they had been specifically consecrated. The district court also misapplied the relevant law in finding that *Hudson v. Palmer*, 468 U.S. 517 (1984), bars Priest's First Amendment claim. Although *Hudson* bars *procedural due process* claims when State law offers an adequate remedy, that case has no bearing on the (substantive) *First Amendment* violations alleged here.

The district court's ruling on Priest's RLUIPA claim is equally flawed. The district court dismissed that claim on the ground that Priest sought exclusively monetary damages. But Priest's complaint demonstrates that he both requested and is plausibly entitled to non-monetary relief, including an order requiring Defendants to return the sacred feathers. Dismissal was therefore inappropriate.

Given these serious errors of law, this Court should reverse the district court's dismissal of Priest's constitutional and statutory free exercise claims under Section 1983 and RLUIPA.

STATEMENT OF THE CASE

A. Factual Background¹

David Priest is a registered member of the Colville Indian Tribe. Compl. ¶ 4 (ER 16). As "a practicing Native American," Priest sought to continue to exercise

¹ Because the district court dismissed Priest's complaint at the pleading stage, the following well-pleaded facts, taken as true, are drawn from the complaint.

his deeply and sincerely held religious beliefs during his incarceration in the Washington state prison system. *Id.* ¶ 6 (ER 17).

Priest, like many Native Americans, considers eagle feathers to be sacred items that are integral to his faith. *Id.* ¶ 9 (ER 18). Because the feathers constitute essential elements for religious practice, the U.S. Department of the Interior expressly excepts members of federally recognized tribes from the Department's restrictions on the possession and exchange of these scarce items. 50 C.F.R. § 22.22 (allowing permits specifically for “engage[ment] in religious activities”); *see* Compl. ¶ 4 (ER 16-17). In accordance with that regulation and his religious beliefs, Priest ordered twenty immature golden eagle feathers from the Department around June 2014. ECF No. 1-2 (ER 40) (Letter from U.S. Fish and Wildlife Service to Priest).

Over a year later, on July 24, 2015, the prison chaplain issued these feathers to Priest while he was in custody at the Washington State Penitentiary. Compl. ¶¶ 5, 18 (ER 17-18). Priest thereafter engaged in elaborate rituals to sanctify the “sacred items,” by cleaning them, smudging them with smoke, blessing them, and bringing them to a sweat where they were prayed over by other believers.² *Id.* ¶ 9 (ER 18). Priest intended to continue these rites by assembling the feathers into a

² A sweat is a form of Native American religious activity and worship service. The Washington Department of Corrections requires Washington correctional facilities to maintain a sweat lodge. WASH. DEP'T OF CORRS. POLICY, DOC 560.200 (IV)(C)(1)(b).

fan for the purposes of “spread[ing] the spirits,” an “important part” of Native American religious practices like the traditional naming ceremony Priest planned to perform. *Id.* ¶¶ 1, 9 (ER 16, 18).

On August 9, 2015, when Priest was alone with the feathers spread across his bed in preparation for the ritual practice of making such a fan, Defendants Duncan and Doe, officers at the prison operating under Defendant Brewer’s orders, entered Priest’s single-man cell to move him to a segregated unit. Compl. ¶¶ 1, 6, 14 (ER 16-17, 19). Duncan and Doe confiscated the feathers and desecrated them by throwing them into a box, failing to include them in an inventory list, and refusing to store them in an appropriate manner. *Id.* ¶¶ 1, 6, 7, 8, 9, 24, 25 (ER 16-18, 21). Their actions reflected “normal customs” at the prison, where guards regularly demonstrate “deliberate indifference” to prisoners’ personal property, often as “personal” “pay back” for some prior interaction with the prisoners. *Id.* ¶¶ 1, 6, 7, 8, 15, 25 (ER 16-19, 21). Defendants Brewer, Jackson, Alvarez-Jackson, and Holbrook personally contributed to these norms by failing to properly supervise or train officers, and by refusing to seriously investigate prisoners’ grievances or hold officers accountable, despite knowledge of this regular practice. *Id.* ¶¶ 8, 10, 23-24, 26-27, 32, 35-36 (ER 17-18, 21-23).

Defendants never returned the eagle feathers Priest had consecrated. Priest filed several requests for their return and several grievances regarding their

mistreatment and confiscation, both when he was in the segregated unit and after he had returned to his single-person cell, but Defendants never adequately responded. Compl. ¶¶ 24, 27, 32 (ER 21-22). When Priest eventually obtained a list of his property, the inventory omitted any mention of the whereabouts or condition of his eagle feathers. It did, however, include a letter from the U.S. Department of the Interior confirming that the feathers had been issued to him for religious purposes. *Id.* ¶ 18 (ER 20); *see* ECF No. 1-2 (ER 40). Priest requested a new issuance of feathers in March 2017, but the Department of the Interior denied his request, stating that the Department had adopted a policy of “a one-order limit on requests from Native American inmates” given the extended wait time for the eagle parts. ECF No. 1-2 (ER 39) (citing Priest’s “prior order request received on or after June 01, 2014”).

B. Procedural History

After exhausting the prison’s grievance procedures and the Department of the Interior’s process for obtaining new feathers, Priest, acting *pro se*, brought the present action in the U.S. Eastern District of Washington in April 2017. ECF No. 1 (ER 28-40). Priest amended his complaint in September 2017. ECF No. 15 (ER 11-27). Among other claims not pressed on appeal,³ the operative complaint

³ Priest also alleged that Defendants’ actions violated (i) the Religious Freedom Restoration Act (RFRA); (ii) the Eighth Amendment to the United States Constitution; (iii) the Due Process Clause of the United States Constitution; and

alleges, pursuant to 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1, that Defendants violated his constitutional and statutory right to freely exercise his religion. Priest sought both “[c]ompensatory damages[] and [p]unitive damages against each defendant,” as well as all “such other relief as it may appear plaintiff is entitled to.” Compl. at 8 (ER 25).

In December 2017, before Priest’s complaint was ever served on Defendants, the district court dismissed it in its entirety, with prejudice, for failure to state a claim under 28 U.S.C. §§ 1915(e)(2) and 1915A(b)(1). Specifically, the district court held that Priest had not stated a claim under the First Amendment for two reasons: first, he had not alleged a substantial burden on his religious exercise because his “position regarding his religious practice was no different after the deprivation of his feathers than it was immediately before”; and second, “he has alleged a single incident of the unauthorized deprivation of his religious property,” which the court concluded was foreclosed by *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). Decision 6:13-27 (ER 8). In addition, the district court dismissed Priest’s RLUIPA claim because it understood Priest to limit his request for relief to monetary damages, holding that “money damages are not available as a remedy to RLUIPA violations.” *Id.* 6:6-9 (ER 8).

(iv) the prison’s grievance procedures. The district court dismissed these claims, which are not at issue in this appeal.

Priest timely filed this appeal. After initially issuing an order to show cause why the appeal should proceed, Dkt. No. 3, this Court vacated that order upon Priest's demonstration that he is represented by counsel on appeal and paid the necessary filing and docketing fees, Dkt. No. 11. Although Priest was released from prison in March 2018 (after filing his notice of appeal), to date the eagle feathers have not been returned to him.

SUMMARY OF ARGUMENT

I. Priest's complaint adequately alleges that Defendants have desecrated, confiscated, and withheld sacred eagle feathers that are essential to his Native American religious practice. *See United States v. Hugs*, 109 F.3d 1375, 1378 (9th Cir. 1997) (recognizing that "eagles and eagle parts play a central role in the practice of Native American religions"). Because Defendants' actions substantially burdened the exercise of Priest's sincerely held religious beliefs without justification, Priest adequately stated a claim under Section 1983 for a violation of his First Amendment right to freely exercise his religion.

In nevertheless holding that Priest failed to state a free exercise claim under Section 1983, the district court erred in two distinct ways. First, the district court found that Priest's right to freely exercise his religious beliefs was not substantially burdened. That conclusion cannot be reconciled with the facts asserted in Priest's complaint, which, taken to be true, allege that Defendants have restricted his

practice of his sincere Native American religious beliefs in at least three ways: (1) by mishandling the feathers he had consecrated for participation in religious ceremonies, Defendants defiled the sacred items; (2) by confiscating the feathers, Defendants prevented him from using these particular feathers for the religious practices to which they had been specifically dedicated; and (3) by permanently withholding these feathers from Priest, Defendants precluded him from participating in *any* religious ceremonies for which eagle feathers are required because he was barred from obtaining any new feathers during the remainder of his term of incarceration. Priest continues to suffer from the ongoing defilement and deprivation of the feathers.

Second, the district court held that *Hudson v. Palmer*, 468 U.S. 517 (1984), forecloses Priest's Section 1983 claim. ER 7-8. That conclusion is incorrect. It is well established that *Hudson* and its predecessor, *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-331 (1986), bar only *procedural due process* claims when State law offers an adequate remedy. These cases have no bearing on a Section 1983 claim that alleges *substantive* constitutional violations—in this case, violations of the free exercise right protected by the First Amendment.

II. The district court dismissed Priest's RLUIPA claim solely on the ground that sovereign immunity bars monetary relief. That too was error. Not only did

Priest expressly request non-monetary relief, but the district court had an obligation to assess whether Priest is entitled to *any* available relief. Because Priest’s complaint demonstrates that he is at least entitled to an injunction directing Defendants to return the feathers, the district court erred in dismissing Priest’s RLUIPA claim.

STANDARD OF REVIEW

This Court “review[s] de novo a district court’s dismissal of a complaint under 28 U.S.C. § 1915A for failure to state a claim.” *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014). “Dismissal for failure to state a claim under § 1915A ‘incorporates the familiar standard applied in the context of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).’” *Id.* (quoting *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 2012)); *see also Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (same with dismissal for failure to state a claim under 28 U.S.C. § 1915(e)(2)). Accordingly, this Court must reverse the lower court’s decision if the “complaint *** contain[s] sufficient factual matter *** to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

In making this determination, this Court must “accept as true the facts alleged in the complaint” and “must draw inferences in the light most favorable to the plaintiff.” *Barker v. Riverside Cty Office of Educ.*, 584 F.3d 821, 824 (9th Cir.

2009) (internal quotation marks and citations omitted). Moreover, where, as here, plaintiff filed his complaint *pro se*, the Court has “an obligation ***, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt.” *Byrd v. Phoenix Police Dep’t*, 885 F.3d 639, 642 (9th Cir. 2018).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING PRIEST’S FIRST AMENDMENT FREE EXERCISE CLAIM

A. Priest Adequately Alleged A Violation Of His First Amendment Right To Freely Exercise His Religion

The Supreme Court and this Court have long held that prisoners do not forfeit constitutional protections at the prison gates. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). Specifically, “[i]nmates retain the protections afforded by the First Amendment, ‘including *** the [right to] free exercise of religion.’” *Shakur v. Schriro*, 514 F.3d 878, 883-884 (9th Cir. 2008) (quoting *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987)); *see also McElyea v. Babbitt*, 833 F.2d 196, 197 (9th Cir. 1987). The free exercise of religion undoubtedly “involves not only belief and profession” but also “the performance of (or abstention from) physical acts,” such as “assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, [and] abstaining from certain foods or certain modes of transportation.” *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). The physical religious acts at issue here

are the consecration of Native American religious items and their subsequent use in traditional religious ceremonies.

To adequately plead a claim under the Free Exercise Clause, a prisoner must allege that: (1) the defendants substantially burdened his religious belief or practice; (2) his religious belief or practice is sincere; and (3) the challenged action is not reasonably related to a legitimate penological interest. *Jones v. Williams*, 791 F.3d 1023, 1031-1032 (9th Cir. 2015). Priest's complaint pleaded all three requirements.

1. Priest adequately alleged that Defendants substantially burdened his religious belief or practice.

“A person asserting a free exercise claim must show that the government action in question substantially burdens the person's practice of her religion.” *Jones*, 791 F.3d at 1031. State officials impermissibly “place[] a substantial burden on an individual's right to free exercise of religion” when they take action that “tends to coerce the individual to forego her sincerely held religious beliefs or to engage in conduct that violates those beliefs.” *Id.* at 1033. Such unconstitutional actions can include “indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.” *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-451 (1988).

The mistreatment and deprivation of a prisoner's religious property constitutes a substantial burden on the free exercise of religion. This Court

recently recognized that a prisoner adequately alleged a violation of his First Amendment rights when a state official intentionally desecrated his Koran by “throwing it on the ground and stepping on it, thereby rendering it unusable for [the prisoner’s] daily prayers.” *Harris v. Escamilla*, -- F. App’x --, No. 17-15230, 2018 WL 2355123, at *1 (9th Cir. May 24, 2018); *see also Rouser v. White*, 825 F.3d 1076, 1079 (9th Cir. 2016) (reinstating consent decree based in part on court’s holding that “prison officials substantially burdened [inmate’s] religious exercise by inhibiting his timely receipt of religious articles” (internal quotation marks, citation, and alterations omitted)). Other Circuits have reached similar conclusions. *See, e.g., Kendrick v. Pope*, 671 F.3d 686, 688 (8th Cir. 2012) (reversing grant of summary judgment in favor of defendant on prisoner’s free exercise claim where prison officials confiscated and did not return her Bible, rosary beads, and other religious materials); *Crowder v. Lash*, 687 F.2d 996, 1005 (7th Cir. 1982) (reversing a directed verdict denying free exercise claim where prisoner presented evidence that prison officials confiscated and did not return prisoner’s Bible).

In line with those precedents, Priest stated a free exercise claim here by alleging that Defendants substantially burdened his Native American religious exercise when they desecrated, confiscated, and withheld his sacred eagle feathers. As this Court has acknowledged, “eagles and eagle parts play a central role in the

practice of Native American religions.” *Hugs*, 109 F.3d at 1378. Accordingly, when considering a challenge to the licensing requirements mandated by the federal Bald and Golden Eagle Protection Act—governmental action that is far less invasive than the mishandling and deprivation at issue here—this Court found that it was beyond question “that [officials] impose[] a substantial burden on the practice of [Native American] religions by restricting the ability of adherents to obtain and possess eagles and eagle parts.” *Id.* (holding that the licensing requirements do not run afoul of RFRA because they promote a compelling government interest in protecting eagles and are the least restrictive means of furthering that interest); *see also, e.g., McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 472 (5th Cir. 2014) (“[A]ny scheme that limits the access that *** a sincere adherent to an American Indian religion[] has to possession of eagle feathers has a substantial effect on the exercise of his religious beliefs.”); *Gibson v. Babbitt*, 72 F. Supp. 2d 1356, 1360 (S.D. Fla. 1999) (“[D]enial of *** eagle feathers *** makes it impossible for the plaintiff to obtain essential elements for religious worship. Without eagle feathers, he cannot perform a series of religious rites.”), *aff’d*, 223 F.3d 1256 (11th Cir. 2000). The mistreatment and deprivation of these sacred items substantially burdened Priest’s First Amendment rights.

2. *Priest adequately alleged the remaining factors to state a claim under the Free Exercise Clause.*

Although the district court did not reach the issues of the sincerity of Priest's religious belief or the absence of Defendants' penological interest in burdening his religious exercise, it is beyond reasonable dispute that Priest adequately pleaded facts supporting these elements of his First Amendment claim.

First, Priest pleaded a sincere belief that eagle feathers are sacred and necessary to his free exercise. Courts look to the sincerity of the plaintiff's belief, rather than the centrality of a particular practice to his faith, to determine whether a religious claim merits protection. *See Shakur*, 514 F.3d at 884-885 (refusal to provide kosher meat is substantial burden given plaintiff's belief that he was personally required to eat kosher meat to maintain his spirituality); *see also Howard v. Skolnik*, 372 F. App'x 781, 782 (9th Cir. 2010) (canceling prayer service could amount to a substantial burden where the plaintiff believed that the prayer service was required to maintain his spirituality). This is largely a subjective determination based on the plaintiff's own understanding of his religious exercise, as "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to faith, or the validity of particular litigants' interpretation of those creeds." *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989).

Here, Priest alleged that he is a registered member of the Colville Indian Tribe who has consistently practiced Native American religion since he was a

child. “[P]articipating in Native American Religion ceremonies” is an integral part of the “practice [of Priest’s] religion in accordance with his Native American beliefs.” Compl. ¶¶ 9, 19 (ER 18, 20). Prison officials were or should have been well aware of Priest’s religious convictions because, in addition to his regular participation in public worship ceremonies while he was incarcerated at the Washington State Penitentiary, he expressly notified Defendants of his religious beliefs and Defendant Holbrook approved his use of religious items. *Id.* ¶¶ 5, 8, 14, 24 (ER 17-19, 21).

Priest also pleaded his sincere belief in the particular practice in question—his use of and reverence for eagle feathers, “sacred items [that are] required when participating in Native American Religion ceremonies.” Compl. ¶ 9 (ER 18). Among other religious purposes, Priest creates fans from the feathers he ritually consecrates, and uses these “religious items” to “spread the spirits, [which is] an important part of the ceremon[ies].” *Id.* ¶¶ 1, 9 (ER 16, 18). Indeed, their religious significance can hardly be disputed given that the Department of the Interior expressly excepts the permitted use of eagle feathers by “members of Indian entities *** engaged in religious activities” from its otherwise tight restrictions on these sacred and scarce items, 50 C.F.R. § 22.22; *see* Compl. ¶ 4 (ER 16) (citing regulations), and allows incarcerated members of federally recognized tribes to obtain twenty eagle feathers each, *see* ECF No. 1-2 (ER 39-40) (Letters from U.S.

Fish and Wildlife Service). It is also why the Washington State Department of Corrections explicitly lists eagle feathers as “sacred” religious items that “require special handling” by correctional staff, WASH. DEP’T OF CORRS. POLICY, DOC 560.200, Attachment 1, at 1—and why the prison chaplain issued the feathers to Priest for his religious practice “just days prior to” when Defendants took them. Compl. ¶¶ 5, 18 (ER 17, 20).

Second, Priest adequately pleaded facts demonstrating that defendants lacked any “legitimate penological interest” in desecrating, confiscating, and withholding his sacred feathers. *Walker v. Beard*, 789 F.3d 1125, 1138 (9th Cir. 2015).⁴ The Washington State Department of Corrections explicitly allows prisoners (who are otherwise eligible under federal law) to possess twenty eagle feathers, WASH. DEP’T OF CORRS. POLICY, DOC 560.200, Attachment 1, at 1, foreclosing any argument that their mere possession and use for religious purposes is irreconcilable with the “institutional objectives [or] the loss of freedom concomitant with incarceration.” *Hartmann v. California Dep’t of Corrs. &*

⁴ Whether a legitimate penological interest exists generally turns on an evaluation of four factors:

- (1) whether there is a valid, rational connection between a state interest and the prison regulation;
- (2) whether prisoners have an alternative method of engaging in religious practice;
- (3) the impact accommodation of the asserted constitutional right would have on guards and other inmates; and
- (4) the absence of ready alternatives to the challenged regulation.”

Walker, 789 F.3d at 1138-1139 (citing *Turner v. Safley*, 482 U.S. 78, 89-90 (1987)).

Rehab., 707 F.3d 1114, 1122 (9th Cir. 2013). In fact, as noted, Defendant Holbrook “pre-approved” the feathers and the prison chaplain issued them to Priest, Compl. ¶ 5 (ER 17), and prison guidelines expressly mandate that eagle feathers receive “special handling *** with respect.” WASH. DEP’T OF CORRS. POLICY, DOC 420.320(V)(C); *id.* 560.200, Attachment 1, at 1 (expressly identifying feathers as “allowable individual religious items” that “require special handling”). Thus, even if the State could ultimately prove exigent or special circumstances that justified the temporary taking of Priest’s feathers, it cannot show a legitimate penological interest in handling them without special care or, especially, in *permanently* withholding them, given their acknowledged rarity and status as “required” for participation in Native American religious ceremonies, Compl. ¶ 9 (ER 18).

In sum, Priest alleged sufficient facts to demonstrate that his religious beliefs were sincere; that Defendants burdened those religious beliefs through the desecration, confiscation, and withholding of sacred feathers; and that those actions do not reasonably relate to a legitimate penological interest. He has thus adequately stated a claim under the First Amendment.

B. The District Court Erred In Holding That Priest Failed To State A Free Exercise Claim Under Section 1983

Notwithstanding the widespread recognition that eagle feathers are sacred and serve an integral purpose in Native American religious practice, the district court held that Priest failed to show that the desecration, confiscation, and refusal to return these important religious objects stated a Free Exercise Clause claim under Section 1983. The court based that decision on two determinations: first, Priest failed to adequately allege a substantial burden; and second, his claim was foreclosed by precedent involving post-deprivation remedies for due process violations. Both conclusions are wrong.

1. The district court was wrong to conclude that Priest failed to adequately allege a substantial burden on his religious belief or practice.

As the discussion above makes clear, the district court was wrong to conclude that Priest failed to adequately allege a substantial burden on his religious practice. The district court concluded that, although “the loss or deprivation of federally protected eagle feathers is most unfortunate,” Defendants’ alleged actions were not unlawful because Priest’s “position regarding his religious practice was no different after [Defendants mishandled and took] his feathers than it was immediately before.” Decision 6:18, 6:23-27 (ER 8). In reaching that conclusion, the district court relied on its observations that Priest “had not yet assembled [the

feathers] into the fan he claims he needed to ‘spread the spirits,’” and “had received the feathers less than three weeks before they were lost.” *Id.*

The district court’s conclusion—which fails to draw “inferences in the light most favorable to” Priest, *Barker*, 584 F.3d at 824—cannot be squared with the complaint’s factual allegations. The suggestion that the feathers lacked spiritual significance because Priest had not yet fully assembled them into a fan misunderstands the profound religious nature of the feathers and of the injury Priest suffered. The feathers themselves are considered “sacred items,” as alleged in the Complaint (*see, e.g.*, ¶ 9 (ER 18)) and as recognized by this Court, the federal government, and the State, *see* pp. 13-14, 16-17, *supra*. The feathers that were issued to Priest took on additional spiritual significance, personal to Priest, after he followed traditional Native practices of cleaning, smudging, and blessing them. Defendants’ actions therefore impeded Priest’s free exercise in multiple ways: by depriving him of the feathers, by interrupting his participation in the ritual of making the fan (which Priest had already commenced by blessing and otherwise preparing the feathers), and by mishandling and therefore desecrating the holy items. Just as a Catholic prisoner might allege a Free Exercise violation through the cavalier destruction of Eucharistic elements that had been consecrated by a priest, Defendants’ defilement of the feathers effected such harm here, and their continued improper storage of the feathers renders the injury ongoing.

Nor is it material to the substantial-burden analysis that Priest “had received the feathers less than three weeks before they were lost.” Decision 6:22 (ER 8). By depriving Priest of these feathers—and, indeed, of *any* feathers, given the Department of the Interior’s one-time allotment rule for prisoners—Defendants prevented him from participating in the ceremonies for which they were required. That action substantially burdened his free exercise regardless of when he first received them.

Accordingly, Priest’s allegations more than adequately state that he “was prevented from ‘engaging in religious conduct or having a religious experience’” within the meaning of this Circuit’s law. Decision 6:19-22 (ER 8) (quoting *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1091 (9th Cir. 2008) (Fletcher, J., dissenting) (en banc)). That is especially true given the Court’s “obligation *** where the petitioner is *pro se*, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt.” *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (internal quotation marks and citation omitted). Under that liberal (and proper) construction of Priest’s complaint, there can be no doubt that Defendants’ actions constitute a substantial burden on Priest’s

free exercise. The district court's contrary conclusion is incorrect and must be reversed.⁵

2. *The district court was wrong to conclude that Hudson forecloses Priest's Section 1983 claim.*

The district court also erroneously concluded that “the door to [Priest's] § 1983 claim *** was closed by *Hudson v. Palmer*, 468 U.S. [517], 533 [(1984)]” because Priest “alleged a single incident of the unauthorized deprivation of his religious property” and “Washington state provides a post deprivation remedy.” Decision 5:15-16, 6:14-17 (ER 7-8). That conclusion is incorrect, as *Hudson* applies only to violations of “the procedural requirements of the Due Process Clause,” not to substantive First Amendment violations. 468 U.S. at 532-533. Under a proper understanding of prevailing law, Priest's allegations that

⁵ In dismissing Priest's Free Exercise claim, the district court noted that “Plaintiff does not allege a prison regulation has interfered with his right to practice his religion. Rather, he has alleged a single incident of the unauthorized deprivation of his religious property.” Decision 6:13-27 (ER 8). As a matter of law, a single incident suffices to state a claim. *See, e.g., Jones*, 791 F.3d at 1029-1030 (holding that a prisoner adequately alleged a free exercise violation where prison officials ordered him, on one occasion, to cook pork, even though the prisoner explained that he was a Muslim and that cooking pork was against his religion); *Harris*, 2018 WL 2355123, at *1 (reversing grant of summary judgment to defendant because evidence of single incident of defendant's having desecrated prisoner's Koran could suffice to prove substantial burden on free exercise of religion). Regardless, rather than alleging an isolated incident, Priest alleges that “the property was taken pursuant to the sanctioned standard operating [procedure] of the prison.” Compl. ¶ 10 (ER 18); *see also id.* ¶¶ 7, 16 (ER 17, 19) (alleging Defendants acted consistent with “normal customs” “when packing/boxing offender property”); *id.* ¶¶ 8, 36 (ER 17-18, 23) (alleging supervising officials were “informed of customs” and “authorized a system that allowed” them).

Defendants violated the Free Exercise Clause while “acting under color of law,” Compl. ¶ 2 (ER 16), more than suffice to state a claim under Section 1983.

In *Hudson*, the Supreme Court held that “an unauthorized intentional deprivation of property by a state employee” (as opposed to a deprivation “caused by conduct pursuant to established state procedure”) “does not constitute a violation of the *procedural requirements* of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available.” 468 U.S. at 532-533 (emphasis added). *Hudson* followed the rationale developed in *Parratt v. Taylor*, in which the Court held that a plaintiff cannot state a *procedural* due process claim for the negligent deprivation of property when the State’s tort remedies “satisfy the requirements of *procedural* due process.” 451 U.S. at 536 (emphasis added).

In contrast to the claims at issue in *Hudson* and *Parratt*, Priest’s First Amendment claim is based on Defendants’ *substantive* violation of the First Amendment. Under this Court’s precedent, “the question of the adequacy of post-deprivation remedies, so important in section 1983 cases involving only procedural due process deprivations,” is simply “irrelevant” to a claim, like the one at issue in this appeal, “not *** based in procedural due process.” *Buckley v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992); see *Mann v. City of Tucson, Dep’t of Police*, 782 F.2d 790, 793 (9th Cir. 1986) (district court “erred by dismissing

[plaintiff's] substantive constitutional claims under *Parratt* [and *Hudson*]”). Regardless of whether the state’s post-deprivation remedies would cure any procedural due process violations, “[t]he *Parratt* [and *Hudson*] rationale *does not apply* to a denial of [a] substantive [constitutional right], for in such a case the deprivation is the taking of property or liberty itself, not the process by which the taking is accomplished, and the availability of neither pre- nor post-deprivation process is relevant.” *Mann*, 782 F.2d at 792.

Many other decisions of this Court are in accord. *See, e.g., Taylor v. Knapp*, 871 F.2d 803, 806 (9th Cir. 1989) (“To the extent that the complaint advances a fourth amendment claim, *** [*Hudson* and] *Parratt* do[] not apply,” regardless of whether “a state postdeprivation remedy for the recovery of property exist[s].”); *Wood v. Ostrander*, 851 F.2d 1212, 1215 (9th Cir. 1988) (“[T]he existence of state remedies is irrelevant and the *Parratt*[/*Hudson*] bar inapplicable where the plaintiff alleges a violation of a substantive right under either the Bill of Rights or the Due Process Clause.”); *Robins v. Harum*, 773 F.2d 1004, 1009 (9th Cir. 1985) (same) (citing cases from other Circuits). And this Court’s binding precedent is in accord with Supreme Court precedent as well. *See Zinermon v. Burch*, 494 U.S. 113, 124-125 (1990) (explaining that when a claim is based on either a “specific protection[] defined in the Bill of Rights” or the “substantive component” of the Due Process Clause, a plaintiff “may invoke § 1983 regardless of any state-tort remedy that

might be available to compensate him for the deprivation of these rights,” because “overlapping state remedies are generally irrelevant to the question of the existence of a cause of action”); *see also Daniels*, 474 U.S. at 338-39 (Stevens, J., concurring) (explaining that if a claim is for “a violation of one of the specific constitutional guarantees of the Bill of Rights[], a plaintiff may invoke § 1983 regardless of the availability of a state remedy,” whereas a “procedural due process claim[] is fundamentally different” because “a complaint does not state a valid procedural due process objection—and a valid § 1983 claim—if it does not include a challenge to the fundamental fairness of the State’s procedures”). Because the district court’s dismissal of Priest’s First Amendment claim contravenes this precedent, it must be reversed.⁶

II. THE DISTRICT COURT ERRED IN DISMISSING PRIEST’S RLUIPA CLAIM

A. Priest Has Stated A Claim Under RLUIPA

The district court also erred in dismissing Priest’s claim under RLUIPA. Congress enacted RLUIPA “in order to provide very broad protection for religious liberty,” especially within prison walls. *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015) (internal quotation marks and citation omitted). In particular, the statute responded

⁶ The district court’s holding that *Hudson* forecloses Priest’s claim is wrong for the independent reason that, rather than alleging a “random and unauthorized action,” *Hudson*, 468 U.S. at 532-533, Priest alleges that his feathers were mishandled and taken pursuant to prison customs that supervising officials knew of and sanctioned, *see note 5 supra*.

to the express concern “that prisoners’ religious possessions, such as the Bible, the Koran, the Talmud or items needed by Native Americans[,] *** were frequently treated with contempt and were confiscated, damaged or discarded by prison officials.” *Cutter v. Wilkinson*, 544 U.S. 709, 716 n.5 (2005) (quoting testimony from relevant Congressional hearings) (alteration and ellipses in original) (internal quotation marks and citation omitted). RLUIPA’s cause of action effects this heightened protection by importing the First Amendment’s “substantial burden” and sincerity tests, while requiring defendants to establish that the challenged governmental action was the “least restrictive means” of furthering a “compelling governmental interest.” 42 U.S.C. § 2000cc–1(a)(1)-(2); *Patel v. United States Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008) (explaining that “the same definition of ‘substantial burden’ applies” under the Free Exercise Clause and RLUIPA).

Priest adequately pleaded this cause of action. As explained above, Priest alleged that Defendants substantially burdened his sincerely held religious beliefs by detailing in his complaint how Defendants desecrated, confiscated, and permanently withheld his specially issued and religiously significant eagle feathers. *See* pp. 12-17, *supra*. And because Defendants’ actions lack any connection to legitimate penological interests, *see* pp. 17-18, *supra*, they necessarily fail RLUIPA’s more exacting compelling-interest standard. *See Shakur*,

514 F.3d at 888 (“RLUIPA *** mandates a stricter standard of review for prison regulations that burden the free exercise of religion than the reasonableness standard under *Turner*.”) (internal citations omitted); *Warsoldier v. Woodford*, 418 F.3d 989, 994 (9th Cir. 2005) (explaining that in RLUIPA, Congress “accord[ed] religious exercise heightened protection from government-imposed burdens” “by replacing the ‘legitimate penological interest’ standard [applicable to First Amendment challenges] with the ‘compelling governmental interest’ and ‘least restrictive means’ tests codified at 42 U.S.C. § 2000cc–1(a)”).

In any event, it is Defendants who ultimately bear the burden of persuading the Court that their actions were justified, *see* 42 U.S.C. § 2000cc–2(b)—a high bar given congressional instruction that RLUIPA be “construed in favor of a broad protection of religious exercise,” *id.* § 2000cc–3(g). Defendants have not done so—nor have they even been given the opportunity, since the district court dismissed the complaint before it was ever served.

B. Priest Seeks Relief That Is Available Under RLUIPA

Instead of addressing the substance of Priest’s RLUIPA claim, the district court rejected it outright in two sentences focused on the court’s understanding of Priest’s requested relief: “[T]he United States Supreme Court has ruled money damages are not available as a remedy to RLUIPA violations. *Sossamon v. Texas*, 563 U.S. 277, 293 (2011). Therefore, Plaintiff has failed to state [a] plausible

claim[] for relief under *** RLUIPA.” Decision 6:6-9 (ER 8). The district court assumed that Priest sought only monetary damages, and the district court read *Sossamon* to hold that the Eleventh Amendment’s sovereign immunity doctrine bars such relief under RLUIPA. That conclusion is wrong for two reasons: Priest requested non-monetary relief, and, in any event, his complaint shows that he is plausibly entitled to non-monetary relief.

1. The district court overlooked Priest’s prayer for non-monetary relief.

The district court dismissed Priest’s RLUIPA claim for the sole reason that “money damages are not available as a remedy to RLUIPA violations.” Decision 6:7-8 (ER 8). That conclusion improperly restricts Priest’s prayer for relief: While he requested “[c]ompensatory damages[] and [p]unitive damages against each defendant,” Compl. at 8 (ER 25)—relief that is applicable to his First Amendment claim under Section 1983—Priest *also* expressly requested that the court “[g]rant plaintiff such *other* relief as it may appear plaintiff is entitled to,” *id.* (emphasis added). In *Sossamon*, the only authority the district court cited in dismissing Priest’s RLUIPA claim, the Supreme Court held that the Eleventh Amendment bars monetary damages against State officials who violated the Act, but it did not question the availability of non-monetary relief. 563 U.S. at 285-289; *see also id.* at 299 (Sotomayor, J., dissenting) (noting “majority’s implicit acceptance of [RLUIPA] suits for injunctive and declaratory relief”). Indeed, this Court has

recognized that injunctive relief is permissible in RLUIPA actions against state officials. *Mayweathers v. Newland*, 314 F.3d 1062, 1069-1070 (9th Cir. 2002) (“[U]nder RLUIPA[,] *** a suit by citizens of California against *officials* of the State of California for prospective injunctive relief *** does not violate the Eleventh Amendment.”) (emphasis in original).

The district court thus erred by overlooking Priest’s express prayer for relief that is available to his claim. *See Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1066 (9th Cir. 2002) (explaining that when a plaintiff has “made a broad request for such other relief as the court deemed appropriate, *** this circuit may construe such requests for relief broadly” (internal quotation marks and citation omitted)); *cf. Jet Inv., Inc. v. Department of Army*, 84 F.3d 1137, 1143 (9th Cir. 1996) (construing, in an inverse situation to the one at bar, a prayer for relief for “declaratory and injunctive relief and ‘such other orders and further relief as may be proper in the circumstances’” to include damages). The court’s dismissal of Priest’s RLUIPA action must be reversed.

2. *Priest alleged facts showing he is plausibly entitled to non-monetary relief.*

In any event, the district court was required to “grant the relief to which [Priest] is entitled, even if [he] ha[d] not demanded that relief in [his] pleadings.” FED R. CIV. P. 54(c). Accordingly, even if Priest’s prayer for relief was not sufficiently precise to flag his request for non-monetary relief, his “failure to

specify relief to which the plaintiff was entitled would not warrant dismissal *** for failure to state a claim[.]” *Bontkowski v. Smith*, 305 F.3d 757, 762 (7th Cir. 2002). As is well recognized throughout this Circuit, the district court has an obligation to “ascertain from the face of the complaint [whether] some relief can be granted.” *Palantir Techs., Inc. v. Palantir.net, Inc.*, No. C 10-04283 CRB, 2011 WL 3047327, at *3 (N.D. Cal. July 25, 2011); *see also Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 893 F.2d 1012, 1015 (9th Cir. 1989) (“[T]he question is not whether the precise relief sought *** is still available. The question is whether there can be *any* effective relief.” (alteration in original) (internal quotation marks and citations omitted)); *Oppenheimer v. Southwest Airlines Co.*, No. 13-cv-260-IEG (BGS), 2013 WL 3149483, at *3 (S.D. Cal. June 17, 2013) (distinguishing a remedy from a claim, and explaining that “the availability of *** damages [does not] control or even pertain to the sufficiency of any claim”); *Traylor v. Avnet, Inc.*, No. CV-08-0918-PHX-FJM, 2008 WL 2945509, at *2 (D. Ariz. July 28, 2008) (“[T]he demand for relief is not itself a part of the plaintiff’s claim *** [and] [t]herefore, failure to specify relief to which a plaintiff is entitled would not warrant dismissal for failure to state a claim under Rule 12(b)(6).” (internal quotation marks and citation omitted)). The district court ignored this duty here.

A fair construction of Priest's complaint reveals that, at a minimum, he is plausibly entitled to an injunction directing Defendants to return the eagle feathers he was issued and personally consecrated. Throughout his pleading, Priest alleged that these particular twenty feathers, which he had cleaned and blessed through several rites, are "sacred" and "irreplaceable," Compl. ¶¶ 1, 24 (ER 16, 21); detailed his efforts to find them by filing grievances, reviewing "a property list," and otherwise "inquiring about" them, *id.* ¶ 18 (ER 20); and expressed his concern about their "permanent deprivation" and inappropriate storage given that the "Eagle feathers [were] [n]ever seen again," *id.* ¶¶ 6, 19 (ER 17, 20).⁷ An order directing Defendants to return these feathers would constitute "appropriate relief" to partially redress the injury Defendants caused by ending their ongoing desecration and allowing Priest to participate in the religious ceremonies for which they were dedicated. 42 U.S.C. § 2000cc-2(a).⁸

⁷ Although the complaint notes that the feathers may have been destroyed, *see* Compl. ¶¶ 11, 16 (ER 18-19), such speculation is merely based on the fact that the feathers were not inventoried and were "[n]ever seen again" by Priest, *id.* ¶ 6 (ER 17). Even when a plaintiff has alleged that his personal property was "completely destroyed," this Court has permitted his claim to survive the motion-to-dismiss stage where he sought the return of that personal property. *Rhodes v. Robinson*, 408 F.3d 559 (9th Cir. 2005) (emphasis omitted). On remand, Defendants would bear the burden of proving that the requested injunction is inappropriate if, indeed, they have destroyed the feathers.

⁸ Because the return of these particular feathers would end Defendants' desecrating storage of them and enable Priest to participate in the ceremonies for which they were specifically prepared, Priest's release from incarceration has not rendered his claim moot. And even if these particular feathers cannot be returned,

Sovereign immunity—the sole reason the district court dismissed Priest’s RLUIPA claim—poses no hurdle to such relief, as “[a]lthough [Priest’s] allegations are rooted in events that occurred in the past,” an injunction requiring Defendants to return the feathers “would prevent future and ongoing illegality” from their otherwise continued deprivation and improper storage. *Porter v. Jones*, 319 F.3d 483, 491 (9th Cir. 2003) (“The Eleventh Amendment poses no bar to *** [such] prospective relief.”). Nor would qualified immunity shield Defendants, as the widespread recognition by this Court, the federal government, and the State itself that eagle feathers are a sacred element of Native American religious practice, *see* pp. 13-14, 16-17, *supra*, “provided a ‘fair and clear warning’” to Defendants that desecrating, confiscating, and permanently withholding the feathers would violate the First Amendment and RLUIPA. *Jones*, 791 F.3d at 1033 (reversing the district court’s grant of qualified immunity because “[i]t [is] well established *** that government action places a substantial burden on an individual’s right to free exercise of religion when it tends to coerce the individual to forego her sincerely held religious beliefs or to engage in conduct that violates those beliefs”). In any event, where, as here, “[t]he district court did not decide whether [a defendant] is entitled to qualified immunity,” this Court typically “decline[s] to reach that issue

it may be appropriate for the district court to grant other relief, such as ordering Defendants to facilitate the procurement of replacement feathers from the U.S. Fish and Wildlife Service, given Defendants’ role in their deprivation or destruction.

in the first instance.” *Cortez v. Skoi*, 776 F.3d 1046, 1053 n.7 (9th Cir. 2015); *Richardson v. Runnels*, 594 F.3d 666, 672 (9th Cir. 2010) (“[W]e do not reach qualified immunity because the issue has never been addressed by the district court.”).

Were there any question whether Priest’s factual allegations plausibly support an entitlement to non-monetary relief, every presumption this Court must apply favors Priest’s action. Of course, this Court must “accept as true the facts alleged in the complaint” and “must draw inferences in the light most favorable to the plaintiff.” *Barker*, 584 F.3d at 824 (internal quotation marks and citations omitted); *Nordstrom*, 762 F.3d at 908 (“Dismissal for failure to state a claim under § 1915A incorporates the familiar standard applied in the context of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).” (internal quotation marks and citations omitted)); *Watison*, 668 F.3d at 1112 (same under 28 U.S.C. § 1915(e)(2)). Moreover, because Priest drafted his complaint *pro se*, he must be afforded “the benefit of any doubt,” *Hebbe*, 627 F.3d at 342 (internal quotation marks and citation omitted), and his complaint, “however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citation omitted). Layered on top of that liberal standard for reviewing Priest’s complaint is Congress’s express instruction that RLUIPA, including its cause of action allowing an inmate to

“obtain appropriate relief,” “shall be construed in favor of a broad protection of religious exercise.” 42 U.S.C. §§ 2000cc–3(g) (rule of construction), 2000cc–2(a) (cause of action). Finally, with the exception of Priest’s duty to show that the government substantially burdened his free exercise, “the government shall bear the burden of persuasion on any [other] element of the claim,” *id.* § 2000cc–2(b), including whether relief is “appropriate,” *id.* § 2000cc–2(a).

Rather than properly apply these presumptions, the district court dismissed Priest’s complaint absent *any* analysis concerning the non-monetary relief to which Priest may be entitled. That “decision on the propriety of particular damages” was not only incorrect, but at a minimum, was also “premature at this stage,” given that Priest has not even served the complaint on Defendants. *Planned Parenthood Fed’n Of America, Inc. v. Center For Medical Progress*, -- F. App’x --, No. 16-16997, 2018 WL 2229329, at *2 (9th Cir. May 16, 2018) (citing *Laird v. Integrate Res., Inc.*, 897 F.2d 826, 841 (5th Cir. 1990) (holding that the court should, as a general matter, “allow a plaintiff any relief that the pleaded claim supports” and that “requesting an improper remedy is not fatal”)). No prejudice would have resulted from the district court’s evaluating whether any available relief could redress Priest’s alleged harm.

The district court's dismissal of this claim must be reversed and the matter remanded to permit Priest the opportunity to demonstrate that he has stated a claim for non-monetary relief that is appropriate under RLUIPA.

CONCLUSION

For the foregoing reasons, Priest respectfully requests that this Court reverse the district court's dismissal of his constitutional and statutory free exercise claims under Section 1983 and RLUIPA, and remand this matter to allow his claims properly to proceed in the district court.

Priest also respectfully requests that this Court schedule oral argument and issue its decision as a published opinion. Given the complaint's allegation that prisoners' religious items are routinely mishandled, the issues addressed in this appeal are of "substantial public importance." Circuit R. 36-2(d). Additionally, the district court's misunderstanding of the scope and application of prior case law indicates that this Court's decision will helpfully "[c]all attention to *** rule[s] of law that appear[] to have been generally overlooked." *Id.* 36-2(b). Finally, "clarif[y]ing [the] rule[s] of federal law" at the center of this matter by publishing this Court's opinion, *id.* 36-2(a), would be of particular benefit to parties (and courts) in future civil rights cases because incarcerated plaintiffs, who are likely to encounter these same issues and litigate them *pro se*, often have limited access to unreported decisions.

Dated: August 1, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32-1 because this brief contains 8,281 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32-1(c).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, 14 point Times New Roman.

Dated: August 1, 2018

/s/ Lide E. Paterno
Lide E. Paterno

Counsel for David R. Priest

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiff-Appellant Priest states that there are no known related cases pending in this Court.

ADDENDUM

**PERTINENT CONSTITUTIONAL PROVISIONS,
STATUTES, AND REGULATIONS**

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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.

United States Code

Title 42. The Public Health and Welfare

Ch. 21. Civil Rights

Subchapter I. Generally

§ 1983. Civil action for deprivation of rights

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

United States Code

Title 42. The Public Health and Welfare

Ch. 21C. Protection of Religious Exercise in Land Use and by Institutionalized Persons

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

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(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.

United States Code

Title 42. The Public Health and Welfare

Ch. 21C. Protection of Religious Exercise in Land Use and by Institutionalized Persons

§ 2000cc-2. Judicial Relief

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) Full faith and credit

Adjudication of a claim of a violation of section 2000cc of this title in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) Omitted

(e) Prisoners

Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) Authority of United States to enforce this chapter

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) Limitation

If the only jurisdictional basis for applying a provision of this chapter is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes

United States Code

Title 42. The Public Health and Welfare

Ch. 21C. Protection of Religious Exercise in Land Use and by Institutionalized Persons

§ 2000cc-3. Rules of construction

(a) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated

Nothing in this chapter shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) Claims to funding unaffected

Nothing in this chapter shall create or preclude 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.

(d) Other authority to impose conditions on funding unaffected

Nothing in this chapter shall—

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this chapter.

(e) Governmental discretion in alleviating burdens on religious exercise

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) Effect on other law

With respect to a claim brought under this chapter, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this chapter.

(g) Broad construction

This chapter shall 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.

(h) No preemption or repeal

Nothing in this chapter shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this chapter.

(i) Severability

If any provision of this chapter or of an amendment made by this chapter, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this chapter, the amendments made by this chapter, and the application of the provision to any other person or circumstance shall not be affected.

Code of Federal Regulations

Title 50. Wildlife and Fisheries

Ch. I. United States Fish and Wildlife Service, Department of the Interior

Subchapter B. Taking, Possession, Transportation, Sale, Purchase, Barter, Exportation, and Importation of Wildlife and Plants

Part 22. Eagle Permits

Subpart C. Eagle Permits

§ 22.22. What are the requirements concerning permits for Indian religious purposes?

We will issue a permit only to members of Indian entities recognized and eligible to receive services from the United States Bureau of Indian Affairs listed under 25 U.S.C. 479a-1 engaged in religious activities who satisfy all the issuance criteria of this section. We may, under the provisions of this section, issue a permit authorizing the taking, possession, and transportation within the United States, or transportation into or out of the United States of lawfully acquired bald eagles or golden eagles, or their parts, nests, or eggs for Indian religious use. We will not issue a permit under this section that authorizes the transportation into or out of the United States of any live bald or golden eagles, or any live eggs of these birds.

WASH. DEP'T OF CORRS. POLICY

DOC 420.320. Searches of Facilities

DIRECTIVE:

V. Offender Property Searches

C. Offender personal religious items identified as requiring special handling per DOC 560.200 Religious Programs will be searched with respect.

1. Authorized items stored in a religious items box will be listed on the copy of DOC 05-062 Offender Property stored inside the box. The box and the form do not require special handling. Items which require special handling may be searched by lifting the box cover and conducting a visual search without touching the items.

a. If an employee believes an adequate search cannot be conducted in this manner and a more detailed search is necessary, the offender should be present during the search.

1) Employees may empty the entire contents of the religious items box and spread them on a flat, clean surface so the items requiring special handling can be easily observed and searched without being touched.

2) The offender may be directed to show a specific item(s) to an employee for closer inspection.

3) If the offender refuses to comply with the instructions of an employee during the search process, the contents will be sealed in the box, and the offender will be provided with a copy of DOC 05-384 Search Report as a receipt. With the approval of the Shift Commander or higher authority, the contents will be inspected by an employee with a Chaplain or religious provider present.

- b. If any employee believes there is an immediate threat to facility security, safety, or health involving explosives, weapons, or illegal drugs, a search may be conducted by an employee without the offender present. Prior authorization for the search must be obtained from the Shift Commander/Correctional Unit Supervisor.
2. If contraband or an item(s) not listed on the offender's DOC 05-062 Offender Property is discovered in the box, the item(s) will be returned to the box, which will be sealed with tape signed and dated by the employee, and stored in the evidence room. The Chaplain, Correctional Unit, Supervisor, or Shift Commander will review the item and approve or recommend necessary action. The offender will be provided a copy of DOC 05-384 Search Report as a receipt for confiscated property.
3. Offenders with a medicine bag will, as instructed by employees, present its content for view. If an illegal item(s) is found, the medicine bag and illegal item(s) will be confiscated, and the offender will receive a copy of DOC 05-384 Search Report as a receipt.
4. Tarot cards will be removed from their wrap or bag by the offender and displayed for the search.

WASH. DEP'T OF CORRS. POLICY

DOC 560.200. Religious Programs

DIRECTIVE:

IV. Religious Programs in Prison

C. Religious Activity Area(s)

1. Each facility will designate an area(s) appropriate for conducting requested religious activities.

- b. All Prisons will maintain a sweat lodge.

E. Religious items

1. Offenders may possess religious items as outlined in Attachment 1, with some exceptions for offenders in Intensive Management Units (IMUs) and RDCs.

4. Religious items will be stored in an approved religious items box, with the exception of oversized items (e.g., prayer rug), clothing, and books.

- f. The box itself is not sacred. However, religious items will be handled with respect.
5. Chaplain/designee approval will be required for all religious items that require special handling per Attachment 1.

ALLOWABLE INDIVIDUAL RELIGIOUS ITEMS

Items that require special handling (formerly referred to as sacred) are identified by **CAPITALIZED, BOLDED, AND ITALICIZED TEXT**. In Prisons, handling requirements for these items are outlined in DOC 420.320 Searches of Facilities.

ITEM	DESCRIPTION	QTY
ALTAR	Altar maximum 6" x 6" x 6"; wood, paper, or plastic/resin; NO COMPARTMENTS	1
Altar Cloth	Cloth maximum 36" x 40"; no dark colors	1
Bell/Bowl and Striker with Cushion	Bell maximum diameter 2½" not including the handle, light metal; Bowl maximum 3" x 3" x 5", light metal; Striker maximum 6" x ¾", soft wood	1
Beads	Beads, including shells and pendants, no natural or artificial teeth or claws	3 lbs. per month
Book/Literature	Bible any authorized version, Prayer Books, Book of Mormon, Bhagavad-Gita, Bhagovata Purana, QUR'AN , New World Translation, TORAH , Kebrá Nagast, Guru GRANTH SAHIB , POETIC EDDA , PROSE EDDA , BOOK OF SHADOWS , Sutra Book, The Doctrine and Covenants, The Pearl of Great Price, Satanic Bible, church magazines, religious calendars, and Sacred Writings, Hadith, cloth wrapped; may be electronic versions, including language tapes and CDs; SEE HANDBOOK OF RELIGIOUS BELIEFS AND PRACTICES FOR ADDITIONAL INFORMATION	1 each
Bowl	Bowl maximum diameter 4" maximum; plastic/resin, wood, or seashell; MUST BE FIRE RETARDANT	3
CAULDRON	Cauldron maximum diameter 4"; light metal, plastic/resin, wood, or terra cotta	1
CHALICE	Chalice maximum height 8"; light metal, plastic/resin, or wood	1
Choker	Choker maximum 5 strands, may be beaded; WORN IN CELL OR DURING RELIGIOUS SERVICES ONLY	1
CLOTH STRIPS/SQUARES; PRAYER TIES	Strip/tie maximum 3" x 3" in red, yellow, green, black, or white; Cloth square maximum 2½" x 2½" in red, yellow, green, black, or white; Prayer ties may contain Sage, Kinnikinnick, Red Willow Bark, or Red Osier Dogwood	25
Dagger, Paper	Paper dagger constructed from a single sheet of paper; 1/16 th inch thick or less	1
DEITY	God, goddess, or religious leader; with or without lei and clothing; deity maximum height 10"; maximum weight 26 ounces, plastic/resin, wood, or terra cotta	1 each
DEITY IMAGES	God, goddess, or religious leader; deity image maximum 6" x 6", postcard size	12
DREAMCATCHER	May have beads attached	1
DRESS	<u>FEMALE ONLY</u> Must cover shoulders to below the knees and may be beaded; DURING RELIGIOUS SERVICES ONLY	1
Earrings	<u>FEMALE ONLY</u> Earring maximum diameter 3 ½"; may be beaded (1 set = 1 beaded item); DURING RELIGIOUS SERVICES ONLY	1 pair
Earth	In plastic bag or plastic bottle	2 oz.
EGG WITH CLOTH BAG	Egg maximum 2 ½" x 2" wood, or 3" x 4" paper mache	1
FAN	30 feathers maximum, may have beads attached	1
FEATHER	Feather maximum length 13", may have beads attached; EAGLE FEATHER MUST MEET FEDERAL REQUIREMENTS; MAY COME FROM THE NATIONAL EAGLE REPOSITORY OR DONATED/HANDED DOWN FROM A COMMUNITY NATIVE AMERICAN TO A SPECIFIC NATIVE AMERICAN OFFENDER	20
HAND DRUM/Beater	Hand drum maximum diameter 10"; beater maximum length 14"	1
Head Covering	Bandana, headband, or handkerchief: maximum 26" x 26"; non-paisley, with Native American drawing, white, cream, yellow, green, or black; MUST BE AT LEAST ½" ABOVE EYEBROWS; WORN IN CELL OR DURING RELIGIOUS SERVICES ONLY	4
	Fez: unlined, non-paisley; WORN IN CELL OR DURING RELIGIOUS SERVICES ONLY	2
	<u>FEMALE ONLY</u> Hijab, Snood, Tichel (scarf), veil, shawl, or scarf: maximum 40" x 80"; used to cover hair, shoulders or upper body; white, cream, yellow, green, or black	4

ALLOWABLE INDIVIDUAL RELIGIOUS ITEMS

Items that require special handling (formerly referred to as sacred) are identified by **CAPITALIZED, BOLDED, AND ITALICIZED TEXT**. In Prisons, handling requirements for these items are outlined in DOC 420.320 Searches of Facilities.

ITEM	DESCRIPTION	QTY
Head Covering (cont.)	MALE ONLY Keffiyeh: maximum 48" X 48"; unlined; white, cream, yellow, green, black, tan, brown, gray, or multi-colored, non-paisley; no red or blue; CAN BE WORN DURING PRAYER AND WORN DURING RELIGIOUS SERVICES ONLY; MAY NOT BE USED AS A FACE COVER	1
	MALE ONLY Kippah, Yarmulke, or skull cap: unlined, white, cream, yellow, green, black, multi-colored; non-paisley	2
	MALE ONLY Kufi: unlined; white, cream, yellow, green, black, tan, brown, gray, or multi-colored; non-paisley; MUST BE AT LEAST ½" ABOVE EYEBROWS	2
	MALE ONLY Turban: maximum 37" x 73", white, cream, yellow, green, black, gray, or beige; non-paisley; MUST BE AT LEAST ½" ABOVE EYEBROWS AND CANNOT BE WORN WITH A TAIL	2
Herbs/Plants	Bayberry, Bitterroot, California Bay, Cedar, Chamomile, Cinquefoil, Comfrey, Corn Pollen, Epazote, Eucalyptus, Fennel, Frankincense, Jasmine, Juniper, Kinnikinnick (must be tobacco free), Lavender, Lemon Balm, Licorice Root, Mint (any type), Mullein, Mugwort, Myrrh, Osha Root, Patchouli, Red Willow Bark, Sage (any type), Sweetgrass, Uva Ursi (Bearberry), Verbena, Yarrow, and Yerba Santa; may be stored in cloth or leather bag	3 oz. each
Holy Water	In plastic bottle	1 oz.
ICON	Icon maximum 4" x 4" x 2"	1 each
Incense Burner	Burner maximum 2" x 12"; no ceramic or glass	1
Incense Stick/Cone	Incense maximum 1/8" x 15"; Frankincense, Frank and Myrrah, Gardenia, Honey Vanilla, Jasmine, Lavender, Rose, Sandalwood, Somali Rose, or Vanilla	100
Istinja Bottle	Bottle maximum 32 oz.; plastic	1
Kara	Light metal bracelet for prayer	1
LEATHER TIES	Tie maximum length 9"; for tying hair or braids	2
Long Sleeved Tee Shirt	FEMALE ONLY Gray, replaces short sleeved shirt issued per DOC 440.050 State Issued Clothing/ Linen	6
Medallion	Medallion maximum 2" on necklace maximum 24"; medallion and necklace may be made from light metal, wood, leather, or plastic/resin, no gold; cross, crucifix, Star of David, Chai, star and crescent, Catholic Saints, THOR'S HAMMER , amulet, pentacle, Triskele, pentagram, talisman, or lion; MUST BE WORN UNDER CLOTHES ONLY EXCEPT IN CELL OR DURING RELIGIOUS SERVICES ; in IMU, must comply with DOC 320.255 IMU/ITU/Segregation/Mental Health Segregation Operations; SEE HANDBOOK OF RELIGIOUS BELIEFS AND PRACTICES FOR ADDITIONAL INFORMATION	1
MEDICINE BAG	Bag maximum 2 ½" x 2 ½" on necklace maximum 24"; leather or cloth; tie shut drawstring (cannot be sewn shut); may have beads or other embellishments, including religious medallion, talisman, or amulet; MUST BE WORN UNDER CLOTHES ONLY EXCEPT IN CELL OR DURING RELIGIOUS SERVICES ; in IMU, must comply with DOC 320.255 IMU/ITU/Segregation/Mental Health Segregation Operations	1
MISWAK	Branch maximum length 6"	1
Neck Beads	48" maximum length; neck beads must be worn on natural, plant-based string for stringing; single or triple strand of natural thread, woven or twisted together; wood; can only be worn with breakaway necklace	1
OGHAM STAVES/DISC	Wood or paper; may be wrapped/stored in cloth or leather	1 set

ALLOWABLE INDIVIDUAL RELIGIOUS ITEMS

Items that require special handling (formerly referred to as sacred) are identified by **CAPITALIZED, BOLDED, AND ITALICIZED TEXT**. In Prisons, handling requirements for these items are outlined in DOC 420.320 Searches of Facilities.

ITEM	DESCRIPTION	QTY
Oil	Anise, Basil, Bayberry, Bergamot, Cedar, Chamomile, Cinnamon, Citrus, Clove, Dragon's Blood, Frankincense, Geranium, Holly Berry, Jasmine, Juniper, Lavender, Mint, Mulberry, Musk, Myrrh, Olive, Patchouli, Peppermint, Pine, Rose, Rosemary, Sandalwood, and Vanilla; any combination of the above approved oils is also allowed	3 oz. total
Palm	Palm leaf maximum length 2 ft.; as needed; MAY ONLY BE KEPT FOR 2 MONTHS AFTER RECEIPT ON PALM SUNDAY	2
PEBBLES	Pebbles no larger than nickel-size; must come in from approved vendor or found on site	12
PENTACLE	Pentacle maximum 8" x 8"; cardboard	1
PIPE	Pipe maximum length separated 17", maximum length intact 24"; may be stored in cloth or leather bag	1
Prayer Beads	Breakaway; 16, 22, 27, 33, 54, 72, 99, or 108 beads per strand; light metal, wood, plastic/resin, or Bodhi seeds; no red or blue; MAY NOT BE WORN AROUND NECK	1
Prayer Mat	Mat maximum 28" x 40"	1
Prayer Rug	Rug maximum 28" x 40"	1
RIBBON SHIRT	MALE ONLY May be beaded; must not resemble officer uniform; WORN DURING RELIGIOUS SERVICES ONLY	1
Rosary	Light metal or plastic/resin cross with plastic/resin beads; no red or blue; MAY NOT BE WORN AROUND NECK	1
RUNE CARDS	May be stored in cloth or leather bag	1 set
RUNE CASING CLOTH	Cloth maximum 18" x 24"; plastic/resin or wood; no blue or black	1
RUNE TILE SET	Card, ceramic, or wood; may be stored in cloth or leather bag	1 set
Salt	MAY BE REPLENISHED AS NEEDED	2 oz.
Scapular	Scapular maximum 2" x 2" x 24"	1
SHELL	Seashell maximum 6" x 6" or conch shell maximum 4"	1
TALLIT WITH BAG	Prayer shawl maximum 36" x 72"; no dark colors; CAN BE WORN DURING PRAYER	1
TAROT CARDS	Paper or cardboard; may be stored in cloth wrap or leather bag; may include an instruction book	1 set
TEFILLIN WITH BAG	Maximum length 13'; two small boxes with straps	1
Thawb	Robe, may be cream, tan, white; no red or blue; CAN BE WORN DURING PRAYER AND WORN DURING RELIGIOUS SERVICES ONLY	1
Tunic	Tunic length variable, knee to ankle; may be worn belted; no red or blue; may be embroidered; CAN BE WORN DURING PRAYER AND WORN DURING RELIGIOUS SERVICES ONLY	1
Tzitzit, Shirt	MALE ONLY No dark colors; small tallit worn as an undershirt; MAY BE WORN AT ANY TIME	2
Tzitzit, Strap	MALE ONLY No dark colors; tzitzit strap may be worn on a belt loop; MAY BE WORN AT ANY TIME	4
Vase	Vase maximum height 12"; plastic/resin or wood	1
WAND	Wand maximum ³ / ₈ " x 16"; soft wood	1

Soft wood includes pine, cedar, and fir. Light metals include aluminum and nickel.

CERTIFICATE OF SERVICE

I hereby certify that, on August 1, 2018, I served the foregoing brief upon counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system.

Dated: August 1, 2018

/s/ Lide E. Paterno
Lide E. Paterno

Counsel for David R. Priest