



HUY



November 1, 2023

**Via Email and Certified Mail**

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CC: Representative John Paul Hott, Representative Joey Garcia, Representative Josh Holstein, Senator Vince Deeds, Senator Jack David Woodrum, Mr. Brian Abraham, and Mr. Berkeley Bentley

Dear Governor Justice, Secretary Sorsaia, Commissioner Marshall, and Superintendent Ames:

Rights Behind Bars, Native American Rights Fund, Huy, Mountain State Justice, and the undersigned organizations write to express our deep concern over the repeated and ongoing violations of constitutional and statutory protections of religious rights suffered by Indigenous people incarcerated in Mount Olive Correctional Complex ("MOCC").

State prisons must not violate religious rights guaranteed to incarcerated individuals by the First Amendment of the United States Constitution and the Religious Land Use and Institutionalized Persons Act ("RLUIPA").<sup>1</sup> Under the Constitution, incarcerated people retain the protections afforded by the First Amendment.<sup>2</sup> This includes its directive that no law shall prohibit the free exercise of religion, which forbids the adoption of laws designed to suppress religious beliefs or

<sup>1</sup> 42 U.S.C. §§ 2000cc to 2000cc-5.

<sup>2</sup> See *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

practices.<sup>3</sup> Further, the Religious Land Use and Institutionalized Persons Act (RLUIPA), prohibits State and local governments from imposing “a substantial burden on the religious exercise of a person residing in or confined to an institution unless the burden furthers ‘a compelling governmental interest,’ and does so by ‘the least restrictive means’” even if the burden results from a generally applicable rule.<sup>4</sup> Further, Congress has made it the official policy of the United States to protect and preserve the rights of Indigenous people to believe, express, and exercise traditional religions under the American Indian Religious Freedom Act (“AIRFA”).<sup>5</sup> And the Executive Branch has underscored the United States’ commitment to similar policy through its participation in drafting the United Nations Declaration on the Rights of Indigenous Peoples and its stated support of UNDRIP in 2011.<sup>6</sup>

Naturally, we were alarmed when, during our contact with over a dozen Indigenous people in MOCC, we learned they had suffered, and continue to suffer, deeply troubling denials of their religious rights, including:

- A. MOCC and WVDCR’s unlawful ban on essential ceremonial tobacco;**
- B. MOCC and WVDCR’s unlawful refusal to provide Indigenous religious guides and unlawfully requiring that Indigenous incarcerated people complete Christian training to become a religious guide;**
- C. MOCC and WVDCR’s unlawful denial of Indigenous individuals’ access to items necessary to exercise their religious beliefs, such as traditional foods, blankets, drums, feathers, and buffalo skulls;**
- D. MOCC and WVDCR’s unlawful denial of Indigenous individuals’ ability to smudge monthly;**
- E. MOCC and WVDCR’s unlawful denial of Indigenous individuals’ ability to conduct ceremony communally;**
- F. MOCC and WVDCR’s unlawful denial of Indigenous individuals’ ability to access items or practices necessary to pray individually while in segregation, when other faiths are permitted to do so;**
- G. MOCC and WVDCR’s unlawful denial of Indigenous individuals’ ceremonial religious practices that are required by religious customs.**

MOCC and WVDCR must stop these policies and practices that deny Indigenous incarcerated individuals’ the ability to participate in their chosen religions and discriminate against traditional Indigenous religious practices. Below, we describe MOCC’s unlawful policies and practices further and request your immediate action to remove the substantial burden they place upon Indigenous people’s exercise of religion.

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<sup>3</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993).

<sup>4</sup> 42 U.S.C. § 2000cc-1. RLUIPA was intended to provide more expansive protections than the constitutional floor. See *Ramirez v. Collier*, 142 S. Ct. 1264, 1277, 212 L. Ed. 2d 262 (2022)( RLUIPA aims to “ensure ‘greater protection for religious exercise than is available under the First Amendment.’”)

<sup>5</sup> 42 U.S.C. § 1996.

<sup>6</sup> UNITED STATES DEPARTMENT OF STATE, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples* (January 12, 2011).

**I. MOCC and WVDCR’s restrictions and prohibitions on Indigenous incarcerated individuals’ religious practices impose a substantial burden on their religious exercise.**

**A. MOCC and WVDCR unlawfully ban essential ceremonial tobacco use.**

MOCC completely denies access to tobacco for incarcerated Indigenous people who follow religious practices that require tobacco as a uniquely significant religious item and medicine. Tobacco is used in milestone ceremonial practices and as a vehicle for prayers in individual worship by many adherents of traditional Indigenous religions. MOCC’s policy currently allows sweetgrass and sage use in ceremony,<sup>7</sup> but tobacco cannot be “replaced” by other plants as an essential religious item or medicine. Furthermore, it is unclear whether these other non-tobacco items are even being consistently provided to incarcerated people.<sup>8</sup> We are aware of dozens of grievances that Indigenous individuals in MOCC have filed requesting MOCC lift this ban because it substantially burdens their religious practices. As you are aware, these individuals have explained to MOCC leadership that tobacco is necessary to exercise their religious beliefs because it connects them and their prayers to Creator and ancestral guides, and they have explained that using non-tobacco substances alone in ceremony is like “connecting to no one.”

MOCC has responded to these grievances that “there is no requirement that the pipe mixture include tobacco.” That response is unsupported and incorrect. General practice of many traditional Indigenous religions requires ceremonial tobacco use. MOCC has suggested that their denial of tobacco access is grounded in security or health concerns, but there are numerous measures MOCC and WVDCR could adopt to address those concerns that would lessen the burden on religious expression significantly. To enable incarcerated people to act on their sincerely held religious beliefs, while acknowledging MOCC and WVDCR’s interest in health and safety, MOCC could (a) store ceremonial tobacco in a locked office instead of leaving it insufficiently secured in the chapel area, (b) store tobacco in another WVDCR facility to be brought in when appropriate, or (c) allow ceremonial tobacco smoking outside only. Despite the availability of these reasonable measures, MOCC and WVDCR have refused to take any meaningful steps to protect Indigenous religious rights.

**B. MOCC and WVDCR unlawfully refuse to provide religious guides of traditional Indigenous religions and unlawfully requires practitioners of those religions to complete Christian training to become guides.**

WVDCR policy allows approved religious guides to enter the facility to facilitate communal prayer,<sup>9</sup> but MOCC has *never* obtained guides for Indigenous religions, despite practitioners’ consistent requests for these guides. A guide is important for practitioners because MOCC policy forbids many ceremonial practices without one: use of sacred prayer drums, flutes, and other

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<sup>7</sup> See MOUNT OLIVE CORRECTIONAL COMPLEX & JAIL, *Native American Religious Practices*, Operational Procedure No. 515 at I.C.4 (September 15, 2022).

<sup>8</sup> See Section I.C.

<sup>9</sup> WEST VIRGINIA DIVISION OF CORRECTIONS & REHABILITATION, *Religious Services & Activities*, Policy Directive No. 510 at II-III (September 30, 2021).

items for ceremony, for example, require the presence of a religious guide.<sup>10</sup> MOCC has also denied requests for communal prayer, sweat lodge, and various tribe-specific ceremonies because no guide is available to assist with them. MOCC policy creates an impossible problem for practitioners of traditional Indigenous religions: they cannot exercise many aspects of their religious beliefs because they lack a guide, and they lack a guide because MOCC will not permit one. Other incarcerated people in MOCC who practice other religions do not appear to suffer this dilemma. For example, those who practice Christianity may always lead Christian services and they receive pastors and various organizations as religious guide visitors for holidays, and representatives from Appalachian Christian Ministries regularly congregate for worship with Christian practitioners as well as provide Christian-specific programming and one-on-one guidance at MOCC.

The issue goes beyond denial of visits by outside religious guides. West Virginia Division of Corrections and Rehabilitation Policy Directive No. 510 (“WV State Policy”) allows incarcerated people to become religious guides.<sup>11</sup> Specifically, WV State Policy states that the Chaplain may designate a resident to lead prayer or religious discussions. But MOCC has created a distinctively insidious problem by not allowing anyone in MOCC to become a religious guide—for any religion—unless they graduate from a Christian “Bible College.” Catalyst Ministries and Appalachian Bible College run the “Bible College” program for incarcerated people in MOCC. The program requires intensive study of Christian principles that openly “advance[] the Gospel of Christ to redeem lives”<sup>12</sup> and results in certification in Bible Studies.

We are not aware of any traditional Indigenous religion that requires its leaders to intensively study the Bible or Christian principles to lead indigenous ceremony. We *are* aware, however, of deeply harmful attempts by Christian religious organizations to forcibly assimilate Indigenous peoples (primarily young children) in boarding schools across the country, peaking between the mid-1800’s and early-1900’s.<sup>13</sup> The curriculum at those schools often included religious instruction, and school officials required students to adopt Christian beliefs and practices. More than that, school officials forbade students from practicing their own indigenous religions, participating in cultural traditions, or speaking their Indigenous languages – the latter punishable by having one’s mouth washed with caustic lye that often caused chemical burns and tissue damage.

MOCC’s requirement that incarcerated people become Bible-proficient before leading traditional Indigenous religious practices (a) discriminates on the basis of religion, (b) repeats a deeply troubling period in our country’s history when institutionalized individuals who expressed any aspect of indigeneity were punished for doing so, and (c) violates statutory and constitutional

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<sup>10</sup> MOUNT OLIVE CORRECTIONAL COMPLEX & JAIL, *Native American Religious Practices*, Operational Procedure No. 515 at I.C.8-9; I.D (September 15, 2022).

<sup>11</sup> WEST VIRGINIA DIVISION OF CORRECTIONS & REHABILITATION, *Religious Services & Activities*, Policy Directive No. 510 at III.F. (September 30, 2021).

<sup>12</sup> *Bible College*, CATALYST MINISTRIES, <https://www.catalystministriesinc.com/bible-college> (last visited Sept. 11, 2023, 5:56 PM)

<sup>13</sup> David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875-1928* (2d ed. 2020).

rights of those seeking to practice Indigenous religions at MOCC by imposing a substantial burden on incarcerated people's religious exercise without furthering a compelling governmental interest using the least restrictive means.

**C. MOCC and WVDCR unlawfully deny access to items necessary for Indigenous people to exercise their religious beliefs, including traditional foods, blankets, drums, feathers, buffalo skulls, and smudging medicine.**

MOCC policy allows certain items necessary for Indigenous religious exercise to be purchased, such as drums, feathers, buffalo skulls, and smudging materials. Incarcerated people in MOCC report, however, that MOCC denies them access to drums, feathers, buffalo skulls, and smudging medicine (e.g., sage, kinnikinnick, and sweetgrass), as well as traditional foods and blankets. While these items were once previously available, based on our conversations with incarcerated people, many of these items are now unavailable because MOCC's commissary supplier has changed, and the new commissary supplier does not carry traditional Indigenous religious items. We understand this is the same supplier used in all of WVDCR. This means all incarcerated people in West Virginia who seek to practice traditional Indigenous religions cannot access these commonly used items.

MOCC even denies practitioners of traditional Indigenous religions the right to use their own religious items. For example, practitioners have explained that blankets are ceremonial necessities for many tribal religions. But when they bring their own blankets for prayers – during the one time a week they are allowed to pray – MOCC officers remove them. By contrast, MOCC allows Muslim practitioners to use prayer rugs in accordance with WV State Policy.

MOCC also refuses to let practitioners of traditional Indigenous religions eat traditional foods or observe feast days according to their religious practices. Instead, MOCC has unilaterally designated one day – unrelated to any period of Indigenous religious significance– as “Native American Day.” If MOCC took the day seriously, it would offer at least one opportunity for practitioners to eat foods with Indigenous spiritual significance. But MOCC takes none of this seriously. They fail to consult with practitioners about what traditional foods are appropriate. Rather, MOCC gives practitioners Stouffers lasagna on “Native American Day.” When practitioners have explained that Stouffers is not a traditional Indigenous food, MOCC officers have derided the practitioners, insisting the food honors the “lasagna tribe.”

MOCC and WVDCR's unlawful denial of access to drums, feathers, buffalo skulls, and smudging medicine (e.g., sage, kinnikinnick, and sweetgrass), as well as traditional foods and blankets discriminates on the basis of religion (with a particular animus towards traditional Indigenous religions) and imposes a substantial burden on practitioners' religious exercise without furthering any compelling governmental interest, let alone doing so using the least restrictive means.

**D. MOCC and WVDCR unlawfully deny individuals the right to smudge their cells monthly.**

Smudging is a ritualistic burning of essential plant medicines – e.g., sage, sweetgrass, and tobacco – to cleanse a person or place and to connect to ancestors and other spiritual relatives. Many traditional Indigenous religions implement smudging in ceremony and daily religious exercise. Indeed, MOCC’s policy recognizes that smudging must be allowed monthly.<sup>14</sup> Yet, individual adherents to traditional Indigenous religions report they have *never* been allowed to smudge their cell while incarcerated at MOCC. This prohibition on a ritual central to many traditional Indigenous religions imposes a substantial burden on a central tenet of Indigenous people’s religious exercise.

**E. MOCC and WVDCR unlawfully deny individuals the right to pray or conduct ceremony while in segregation.**

MOCC forbids individuals who practice traditional Indigenous religions from praying, smudging, or performing any relevant spiritual practice while in segregation or in lock-down for long periods. These practitioners have reported this has caused them to forego prayer for weeks or months at a time. By contrast, Christian practitioners at MOCC who are in segregation may have Christian representatives from the Bible College visit the segregation unit to pray or facilitate other religious practice.

MOCC and WVDCR’s targeted, undue restrictions on individual religious exercise by Indigenous people in segregation is discriminatory on the basis of religion and imposes a substantial burden on its exercise.

**F. MOCC and WVDCR unlawfully prohibit Indigenous people from communally praying or conducting ceremony.**

When not in segregation, traditional Indigenous religion practitioners have only one hour weekly to pray. If the practitioners pray in the same general space, they may pray and smudge individually only; no group prayer ceremonies are allowed. These practitioners have requested group ceremonial practices because they are vital to sincerely held religious beliefs such as kinship, and their traditional tribal practices that require group ceremonies. MOCC denies communal prayer because it cannot, purportedly, be led without a peer mentor or guide.<sup>15</sup> By contrast, other religions, such as those that follow the Christian faith, may pray communally at MOCC.

MOCC and WVDCR’s prohibition on communal prayer contravenes the law, especially when all other religions are able to communally pray. MOCC’s blanket ban on communal prayer particularly for Indigenous people is an unequal application of their policies and practices and is a substantial burden on its exercise without furthering any compelling governmental interest.

**G. MOCC and WVDCR unlawfully deny individuals the right to perform ceremonial religious practices that are required by religious customs.**

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<sup>14</sup> See MOUNT OLIVE CORRECTIONAL COMPLEX & JAIL, *Native American Religious Practices*, Operational Procedure No. 515 at IV.C. (September 15, 2022).

<sup>15</sup> See Section I.B.

Indigenous people in MOCC who follow traditional Indigenous religions are forbidden from performing traditional rituals associated with significant life events.

For example, one Indigenous person lost his beloved grandmother while he was at MOCC and asked MOCC officers to let him cut and bury his own hair, as required by his religion. MOCC refused, “because it’s just not right.” MOCC forbade the same individual from performing a ceremony called “going to water,” a water immersion ritual performed at major life events (he typically requested this when he had upcoming court hearings). Going to water involves dunking an individual into a body of water in each cardinal direction, as each cardinal direction has a particular significance. MOCC denied the individual’s request to perform this ceremony multiple times, yet Christian practitioners use a baptismal pond for water immersion ceremony at MOCC frequently.

MOCC and WVDCR’s targeted denial of age-old Indigenous ritual performances, even though they pose no danger to the individual involved, is discriminatory on the basis of religion and imposes a substantial burden on its exercise without furthering any compelling governmental interest.

## **II. MOCC and WVDCR must cease their unlawful restrictions and prohibitions on religious exercise of individuals who practice traditional Indigenous and tribal religions.**

MOCC and WVDCR has discriminated against Indigenous incarcerated people on the basis of their religion, and it has imposed a substantial burden on their religious exercise without furthering a compelling governmental interest. All of the above limits on Indigenous religious rights contravene constitutional and statutory law. Representatives from Rights Behind Bars have alerted your offices to these concerns and repeatedly requested meetings with your agencies. Your agencies have ignored these requests.

We urge you to respect the very basic religious rights of Indigenous people in your custody. **We again ask WVDCR and MOCC leadership to meet with us to develop solutions that would respect the rights of incarcerated people who follow traditional Indigenous religions. Given this issue’s importance, please respond by November 30, 2023. Absent a response, we will pursue other relief.**

Sincerely,

/s/Amaris Montes

**Amaris Montes, Esq.**

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