



September 10, 2019

Director Scott Frakes  
Nebraska Department of Correctional Services  
P.O. Box 94661  
Lincoln, NE 68509-4681

**Re: Request by [REDACTED] for religious accommodation  
allowing him to tithe**

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OFFICERS AND DIRECTORS  
SUSAN N. HERMAN  
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Dear Director Frakes:

We write to request a religious accommodation for our client, [REDACTED], who is currently incarcerated at the Tecumseh State Correctional Institution. In accordance with Mr. [REDACTED]'s Christian beliefs, he wishes to tithe ten percent of his monthly wage earnings to the Havelock Christian Church in Lincoln, Nebraska.

Tithing is an important expression of Mr. [REDACTED]'s faith. He sincerely believes that Christians should return one tenth of their increase to God, a belief based on his study of the Bible. Havelock Christian Church is a long-established congregation.<sup>1</sup> The church holds weekly worship services and is active in the community. It operates a free clothing and food bank to provide for needy individuals and families. And the church has been welcoming to Mr. [REDACTED]: He corresponds regularly with the board president of the church, discussing, among other topics, the religious significance of tithing.

Although Mr. [REDACTED] has exhausted the internal grievance process by submitting both informal and formal grievances requesting to tithe, they have all been denied. Department of Correctional Services (DCS) staff have refused to process his checks. They maintain that tithes are "not an authorized use of funds" because DCS policies do not specifically permit prisoners to make individual donations.<sup>2</sup> See Neb. Rev. Stat. §§ 83-183, 83-183.01.

<sup>1</sup> Havelock Christian Church (Disciples of Christ), <http://www.havelockcc.org/> (last visited Sept. 3, 2019). The church has been recognized as a legitimate tax-exempt religious organization for more than sixty-eight years. See Havelock Christian Church, *GuideStar.org*, <https://www.guidestar.org/profile/47-0558077> (last visited Sept. 3, 2019).

<sup>2</sup> Mr. [REDACTED]'s grievances are attached to this letter. See Grievance 2019-3232 and responses thereto (citing DCS Inmate Accounting, Policy 113.02 (revised 2018), [https://corrections.nebraska.gov/system/files/rules\\_reg\\_files/113.02\\_2018.pdf](https://corrections.nebraska.gov/system/files/rules_reg_files/113.02_2018.pdf); DCS Inmate Accounting – Use of Funds, Policy 113.09, pts. I(A)(1), I(B) (revised 2018), [https://corrections.nebraska.gov/system/files/rules\\_reg\\_files/113.09\\_2018.pdf](https://corrections.nebraska.gov/system/files/rules_reg_files/113.09_2018.pdf).)

However, there is nothing prohibiting DCS officials from accommodating Mr. ██████'s religious exercise. Indeed, federal law *requires* that they do so. Specifically, under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, DCS may not impose a substantial burden on prisoners' religious practice unless officials demonstrate that the burden "is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest." § 2000cc-1(a)(b). As the Supreme Court has explained, RLUIPA provides "expansive protection for religious liberty." *Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015). The statute is, in fact, much more protective of prisoners' religious-freedom rights than the Free Exercise Clause of the First Amendment to the U.S. Constitution. *See id.* at 860. Whereas the Constitution subjects government impositions on prisoners' religious practice to a reasonableness test, RLUIPA mandates that courts view prison officials' conduct through the lens of strict scrutiny—a rigorous legal standard that demands a much stronger showing by the government. *See Holt*, 135 S. Ct. at 860, 864; *see also Lovelace v. Lee*, 472 F.3d 174, 186, 188 n.3 (4th Cir. 2006).<sup>3</sup>

DCS's refusal to accommodate Mr. ██████'s sincere religious beliefs regarding tithing violates RLUIPA. In a decision binding on all Nebraska federal courts, the U.S. Court of Appeals for the Eighth Circuit has recognized that, for many people, tithing is an "important expression" of faith, and government action impeding this practice imposes a substantial burden on religious exercise. *See In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996).<sup>4</sup> Thus, DCS's outright prohibition on tithing implicates RLUIPA. *See Greene v. Solano Cty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008) (recognizing that an "outright ban on a particular religious exercise is a substantial burden on that religious exercise"); *see also Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014) ("The greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice).").<sup>5</sup>

As discussed below, DCS cannot meet its heavy burden under RLUIPA, which requires courts to "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants and to look to the marginal interest in enforcing the challenged government action in that particular context." *Holt*, 135 S. Ct. at 863 (internal quotation marks omitted). The Department's position must be based on actual, available evidence, not administrators' mere speculation. *Id.* at 867 (Sotomayor, J., concurring). "[B]ecause Congress passed RLUIPA 'to provide very broad protection for religious liberty,' courts [will not] abdicate their responsibility to 'apply RLUIPA's

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<sup>3</sup> For that reason, in denying Mr. ██████'s requested accommodation, DCS may not point to previous cases that have upheld—under the First Amendment—restrictions on prisoners' religious contributions. *See, e.g., Blankenship v. Gunter*, 898 F.2d 625, 627 (8th Cir. 1990); *Abdullah v. Gunter*, 949 F.2d 1032, 1038 (8th Cir. 1991). These cases predate RLUIPA and did not apply the proper legal test now required under RLUIPA.

<sup>4</sup> *Young* was vacated, then reinstated by *In re Young*, 141 F.3d 854, 856 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998). Although *Young* involved a claim under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, RLUIPA is considered RFRA's "sister statute," and applies the same legal standard to government conduct. *Holt*, 135 S. Ct. at 859-60.

<sup>5</sup> RLUIPA is not satisfied because "alternative means of practicing religion" are available. *Holt*, 135 S. Ct. at 862. While alternative means might be relevant to a First Amendment free-exercise claim, "RLUIPA provides greater protection." *Id.*

rigorous standard’ by deferring to the government’s ‘mere say-so’ without question.” *Williams v. Annucci*, 895 F.3d 180, 189 (2d Cir. 2018) (quoting *Holt*, 135 S. Ct. at 859, 864, 866). *Accord Yellowbear v. Lampert*, 741 F.3d 48, 59 (10th Cir. 2014) (noting that RLUIPA’s test “isn’t traditionally the sort of thing that can be satisfied by the government’s bare say-so”).

*The purported ban on tithing does not further a compelling governmental interest.*

As an initial matter, the ban on individual prisoners’ religious contributions does not serve a compelling governmental interest. Any interest—whether based on security, administrative issues, or other concerns—that DCS may attempt to assert regarding prisoners’ ability to transfer funds to groups or individuals outside of DCS facilities is belied by the fact that DCS *already permits* prisoners to direct funds to various outside individuals and groups. *See, e.g., Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015) (“Underinclusiveness can . . . reveal that a law does not actually advance a compelling interest.”); *Annucci*, 895 F.3d at 189 (“[A] policy’s underinclusiveness suggests that the proffered interest is not quite as compelling as the government claims.”). For example, DCS allows prisoners to send funds to family members.<sup>6</sup> Prisoners also routinely order items from a list of designated outside vendors, and they may obtain special permission to order from vendors not on the approved list.<sup>7</sup> DCS further permits prisoners to donate to outside organizations, such as the Red Cross and Wounded Warriors, as part of various facility-wide donation drives. A policy that allows prisoners to direct their funds outside the institution for a variety of non-religious uses, but prohibits tithing outright, simply does not further a compelling governmental interest. On the contrary, it raises the inference that the prison’s “most compelling interest may actually be discrimination against, or at least indifference to, the religious liberties of incarcerated persons—precisely the scenario RLUIPA identified as too prevalent in our society and sought to redress.” *See Yellowbear*, 741 F.3d at 60.

*The purported ban on tithing is not the least restrictive means available to DCS officials.*

Even if DCS officials could demonstrate a compelling interest in managing prisoners’ transfer of funds to outside groups and individuals, the ban on tithing is not the least restrictive means of furthering those interests. “The least-restrictive-means standard is *exceptionally demanding*.” *Holt*, 135 S. Ct. at 864 (emphasis added). It requires the government to “show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party.” *Id.* (internal quotation marks omitted). “If a less restrictive means is available for the Government to achieve its goals, the Government *must* use it.” *Id.* (internal quotation marks omitted) (emphasis added). As with the compelling-interest inquiry, the government’s mere assertion that no other methods would be effective is not adequate. Rather, officials must “come forward with specific evidence of no less restrictive means available.” *Native Am. Council of Tribes v. Weber*, 750 F.3d 742, 751 (8th Cir. 2014).

There is no such evidence here. In the first instance, DCS staff denied Mr. ██████’s grievances simply by citing existing policy. As noted above, those policies do not expressly prohibit the contribution Mr. ██████ seeks to make, but even if they did, RLUIPA requires DCS to affirmatively

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<sup>6</sup> *See* DCS Inmate Accounting – Use of Funds, Policy 113.09, *supra*, note 2.

<sup>7</sup> *Id.* pt. I(A)(5); DCS Inmate Orders, Policy 113.23, pt. I(F) (revised 2018), [https://corrections.nebraska.gov/system/files/rules\\_reg\\_files/ar\\_113.23\\_2018.pdf](https://corrections.nebraska.gov/system/files/rules_reg_files/ar_113.23_2018.pdf).

explore how it can accommodate Mr. ██████'s religious exercise, notwithstanding existing policy. *See Holt*, 135 S. Ct. at 865 (holding that prison officials failed to prove that proposed alternatives were insufficient to serve the prison's interests); *see also Native Am. Council of Tribes*, 750 F.3d at 751 (finding RLUIPA violation where prison administrator testified only that alternatives were "talked about," not "meaningfully considered").

Moreover, the practices of other correctional systems, which permit prisoners to tithe, strongly suggest that there are, in fact, less restrictive alternatives available to DCS. *See Holt*, 135 S. Ct. at 866 (noting that "the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction") (internal quotation marks omitted).<sup>8</sup> For example, the Federal Bureau of Prisons (BOP) permits prisoners to make "donations" and "tithes" to outside entities.<sup>9</sup> Iowa, Arizona, South Dakota, Washington, Delaware, Minnesota, California, and Virginia, among other states, likewise permit such donations.<sup>10</sup> These policies make clear that prisoner-initiated donations are administrable and pose little threat to institutional security or other governmental interests—especially because the incarcerated populations of the BOP and each of these states (with the exception of South Dakota) are larger than the imprisoned population of Nebraska.<sup>11</sup> There is no reason that DCS could not adopt similar policies and practices. *Cf. Holt*, 135 S. Ct. at 861 (finding RLUIPA violation where "neither witness . . . was able to explain why these problems could not be addressed by . . . practice[s] followed in other prison systems"); *Native Am. Council of Tribes*, 750 F.3d at 752 (noting that other correctional facilities' authorization of a particular religious practice "lends substantial credence to the inmates' position that less restrictive alternatives to a complete ban . . . are possible.").

Finally, DCS has already developed adequate procedures to process donations like Mr. ██████'s tithe. Institutional checks directed to prisoners' families and outside vendors are screened by DCS staff, and DCS has successfully administered facility-wide donation drives. If DCS has security or administrative concerns, the same screening applied in these instances can be applied to Mr. ██████'s tithe. *Cf. Holt*, 135 S. Ct. at 864 (noting that contraband-based security concern raised by Muslim prisoner's request to grow half-inch beard could be satisfied "by simply searching petitioner's beard").<sup>12</sup> Moreover, DCS has in place measures to restrict prisoners' use of funds on

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<sup>8</sup> When other prison systems allow the restricted activity, it also bears on the compelling-interest analysis. *See Haight*, 763 F.3d at 563 ("[W]e cannot say that an absolute prohibition on [a practice] serves a compelling government interest when other States allow [it].").

<sup>9</sup> U.S. Dep't of Justice Federal Bureau of Prisons, Program Statement 4500.12, *Trust Fund/Deposit Fund Manual*, pt. 10.5(a) (Mar. 14, 2018), <https://www.bop.gov/policy/progstat/4500.12.pdf>.

<sup>10</sup> *See* Iowa Dep't Corr. Policy OP-RP-01 § IV(G); Ariz. Dep't Corr. Dep't Order 905 pts. 3.2.1.17–18; S.D. Dep't Corr. Policy 1.1.B.2 § IV(6)(c)(2), (3); *Barstad v. State Dep't of Corr.*, No. C14-0523RSL-MAT, 2015 WL 1867082, at \*15 (W.D. Wash. Apr. 23, 2015); *Cole v. Danberg*, No. 10-088-GMS, 2015 WL 5437083, at \*2 (D. Del. Sept. 14, 2015); Minn. Dep't Corr. Policy 300.100 § G(1)(a); Cal. Code Regs. title 15 § 3240.1; Va. Dep't Corr. Operating Procedure 802.2 § VII(F)(3), (6).

<sup>11</sup> *See* Jennifer Bronson & E. Ann Carson, *Prisoners in 2017*, U.S. Dep't of Justice Bureau of Justice Statistics, table 2 (Apr. 2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf>.

<sup>12</sup> DCS may not deny Mr. ██████ an accommodation merely because screening his donation might require DCS to incur operational expenses. *See* 42 U.S.C. § 2000cc-3(c).

an individualized basis if DCS has a specific reason to suspect that a prisoner's transfer of funds has compromised institutional security.<sup>13</sup> These policies and practices represent additional options available to DCS that are less restrictive than an outright ban on tithing.

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Religious freedom is a fundamental right guaranteed to all, including incarcerated individuals. Indeed, for many prisoners of faith, the ability to practice their religion is vital and may aid them in gaining self-respect, reclaiming dignity, and preparing for a socially useful life. *See Barnett v. Rodgers*, 410 F.2d 995, 1002 & n.24 (D.C. Cir. 1969) (citing R. Donnelly, J. Goldstein & R. Schwartz, *The Criminal Law* 428-32 (1962)). Unfortunately, as Congress recognized when it enacted RLUIPA, "frivolous or arbitrary barriers" often impede prisoners' religious exercise, sometimes in "egregious and unnecessary ways." *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005). Prisons control every aspect of prisoners' lives. It is "easy for government officials with so much power . . . to deny capriciously one more liberty to those who have already forfeited so many others." *Yellowbear*, 741 F.3d at 53. Mr. [REDACTED]'s ability to tithe to his church should not be one of those forfeited rights.

We ask that DCS accommodate Mr. [REDACTED]'s request to tithe and immediately begin processing his monthly donation. Further, we ask that you evaluate the relevant DCS policies and revise them to ensure that tithing requests from other prisoners can be individually assessed and approved with appropriate criteria in the future. Please advise us of your position on Mr. [REDACTED]'s religious accommodation, as well as your plans to implement an appropriate policy allowing tithing, no later than October 10, 2019. In the meantime, please do not hesitate to contact us if you have any questions regarding this letter.

Sincerely,



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<sup>13</sup> DCS Inmate Accounting, Policy 113.02, pts. (B), III, IV, *supra*, note 2.

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