No. 10-30982

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HENRY LEONARD,
Plaintiff-Appellee,

v.

STATE OF LOUISIANA, on behalf of Department of Public Safety and Corrections; RICHARD STALDER, individually and in his official capacity as Secretary of the Department of Public Safety and Corrections; VENETIA MICHAEL, individually and in her official capacity as Warden of David Wade Correctional Center; JACKIE HAMIL, individually and in his official capacity as a corrections officer at David Wade Correctional Center,
Defendants-Appellants.

On Appeal from the United States District Court
Western District of Louisiana

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

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State of Louisiana	James D. "Buddy" Caldwell
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/s/ Katie M. Schwartzmann
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary in this case, which contains straightforward claims by Appellee Leonard, based upon an extensive record and well-established jurisprudence. However, Defendants raise a novel question of law in their appeal brief, for the first time questioning which standard applies to First Amendment Free Exercise claims. To the extent that the Court entertains Defendants' argument that a different standard should apply on appeal than that applied in the district court, Leonard does believe that oral argument may assist the Court in consideration of this issue.

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INTRODUCTION

Plaintiff Henry Leonard is a prisoner and a member of the Nation of Islam who is housed at David Wade Correctional Center in Homer, Louisiana. Mr. Leonard brings this case because the Defendants have denied him access to *The Final Call*, which is the weekly publication of his faith, the Nation of Islam. This denial is a violation of the Religious Land Use and Institutionalized Persons Act, or "RLUIPA," as well as the First Amendment to the United States Constitution. In this straightforward case, the parties agreed that the matter was ripe for summary adjudication, and filed cross motions for summary judgment. The district court correctly concluded that Plaintiff was entitled to summary judgment, and this Court should affirm.

STATEMENT OF FACTS

Plaintiff Leonard is a former Baton Rouge police officer and correctional officer who is incarcerated for the murder of his estranged wife's boyfriend. Rec. Doc. 47-4 at 13-14; 19. Mr. Leonard has been a member of the Nation of Islam since 1985. Rec. Doc. 47-4 at 33. Nation of Islam members are believers in Islam who adhere to the teachings of the Qu'ran, but build upon them. Specifically, the Nation of Islam believes that in the 1930s, Allah came in the person of W. Fard Muhammad, who provided inspired teachings to the Most Honorable Elijah Muhammad. Rec. Doc. 47-8 at 11-13. They believe that Allah so appeared with the

mission to raise "the mentally and spiritually dead," those being the black communities of America. They believe he appeared to reactivate the higher levels of the mind in the black communities of America, "who for all intents and purposes are dead" due to slavery and its aftermath. Rec. Doc. 47-8 at 20, 22. The import of W. Fard Muhammad and Elijah Muhammad is the "cardinal principle" of the Nation of Islam, and distinguishes it from orthodox Islam, which rejects as blasphemy the idea that Allah appeared in the person of W. Fard Muhammad. Rec. Doc. 47-12 at 17-18. This theological distinction is significant, as orthodox Islam rejects the Nation of Islam's messenger of God. Rec. Doc. 47-5 at 101; Rec. Doc. 47-6 at 125-126; Rec. Doc. 47-10 at 103-104.

There are no services, study groups or chaplains for the Nation of Islam at David Wade Correctional Center, or at any other Louisiana Department of Corrections facility. Rec. Doc. 47-5 at 99. The only thing connecting Mr. Leonard to the other "body of believers" of his faith is *The Final Call* newspaper, which is a weekly publication printed by the Nation of Islam. Indeed, it is the only newspaper of the religion, and is the primary way that the religion communicates with its members. Rec. Doc. 47-6 at 116-118; Rec. Doc. 47-11 at 166-168. The newspaper contains informative news articles as well as faith-based pieces. The last page of every issue is called "The Muslim Program," hereinafter "Program." The Program

was written by Elijah Muhammad in the 1960s, and has appeared in every issue of the newspaper since that time. Rec. Doc. 47-11 at 172.

The Final Call has been admitted to Louisiana correctional facilities for many years, Rec. Doc. 47-12 at 42, and no witness for any party is able to state a single instance of unrest or violence related indirectly or directly to *The Final Call*, in a correctional setting or elsewhere. Indeed, Defendants' imam witness unequivocally testified that the Nation of Islam does not "tolerate violence." Rec. Doc. 47-12 at 39. This aside, in May of 2006 the Defendants decided to reject *The Final Call* because of material contained in The Muslim Program. Rec. Doc. 47-13 at 55-56, 108-109, 52, 125, 129. Because The Muslim Program appears as the last page in every issue of *The Final Call*, this decision operates as a ban upon *The Final Call* in the Louisiana prison system; not a single issue has been accepted since May of 2006. Rec. Doc. 47-14 at 40; Rec. Doc. 47-15 at 37.

Defendants have stated that but for The Muslim Program, *The Final Call* would be acceptable at Louisiana correctional facilities. Rec. Doc. 47-13 at 55-56. Despite the broad facts provided in Defendants' brief, this case is about a very narrow issue: whether The Muslim Program contained on the last page of every *Final Call* justifies a permanent ban on the entire publication. App. Br. 15. All parties and the district court agree that if a particular article in *The Final Call* contains other material that is actually a threat to security at an institution, it can be

rejected, Rec. Doc. 68 at 15, and the narrow issue in this case is exclusively the constitutionality of banning it based upon The Muslim Program. The Program must be read in its entirety, and is located in Appellants' Record Excerpts, Ex. C, p. 5; ROA 2195-2199.

The applicable Department regulation being applied in this case prohibits anything that "interferes with legitimate penological objectives," including, "racially inflammatory material or material that could cause a threat to the inmate population, staff and security of the facility" and "writings which advocate violence or which create a danger within the context of a correctional facility." Rec. Doc. 47-24, Ex. 37. As Leonard's expert witness testified, this policy is problematic, because it allows for the rejection of racially inflammatory material *or* material that causes a threat to the security of the institution. Rec. Doc. 49-2 at 25-27. That is, a publication deemed "racially inflammatory" may be banned, without regard to whether it actually poses a security threat. This case involves just such a rejection; *The Final Call* has been banned without being linked to any security threat.

The Nation of Islam does talk about race, which seems to be the sticking point for the Defendants. The Defendants' testimony indicates that they would ban almost any mention of race, or slavery. Warden Cain explained that he was against anything that "polarizes," explaining, "I don't want to talk about color." Rec. Doc.

47-13 at 27. "It causes people to be leery and to be resentful and bring attention to a past we all wish we could forget. Just let it go, it brings it all back to us and we don't want that here." Rec. Doc. 47-13 at 84. "That's why I don't want to bring up slavery. I don't think it matters, that's the past." Rec. Doc. 47-13 at 120.

Similarly, Defendant Goodwin, Defendants' 30(b)(6) representative for security, would exclude The Muslim Program for containing even the words, "we want justice," because it implies that black people are not receiving justice:

> Q. Going to The Muslim Program, do you have that in front of you?
> A. Yes.
>
> Q. The top part where it says, What the Muslims Want, item number 4, is that the one that you have the biggest problem with?
> A. I think the whole article can be taken out of context by your inmate population or some of your members of your inmate population. It's implying that they don't have justice. It's implying that they don't have equal justice under the law. It's implying a lot of things in this particular article that -- you know, 1, 2 and 3 isn't that great either in terms of promoting a smooth, non-hatred environment, because it makes the implications that they don't -- that if you're black, you don't have equal justice; if you're black, you don't have equal opportunity or equal membership in society. I think the whole thing can be taken to be a threat to the institution.
>
> Q. Well, doesn't number 2 -- under number 2 don't the words "equal justice under the law" appear on the front of the United States Supreme Court?
> A. That's a right that every citizen of the United States is entitled to. And the implication is that they don't have that. That's what the Honorable Elijah Muhammad is preaching there, that black people do not have equal justice.
>
> Q. Doesn't everybody want justice?
> A. I'm sure they do.

Rec. Doc. 47-17 at 36.

SUMMARY OF THE ARGUMENT

While the wardens may be attempting to move beyond race, the Defendants simply cannot prohibit any mention of slavery or race in Louisiana prisons. Because there is no linkage between The Muslim Program and any threat to the security of Louisiana penal institutions, banning the publication is violative of the First Amendment and also violates Leonard's rights pursuant to the Religious Land Use and Institutionalized Persons' Act (RLUIPA). The Defendants have not produced a single piece of evidence indicating that *The Final Call* is a threat to the security of Louisiana's penal institutions.

Extensive discovery has been conducted in this case, due to the large number of witnesses listed by the Defendants. Leonard deposed the current and former mailroom supervisors at David Wade Correctional Center, as well as a mailroom worker of 30 years. He deposed all wardens involved in the decision-making process, including Wardens Michael, Cooper, Goodwin and Cain, as well as Secretary LeBlanc. He also deposed Defendants' imam Yusuf Abdullah, the Department's Chief of Security Eric Sivula, and the current and former "incident investigators" for David Wade Correctional Center, Jackie Hamil and Antonio Turner. None of these deponents could list a single instance of violence or disruption on the part of a member of the Nation of Islam, or any violence attributable to *The Final Call*, much less any disruption attributable to The Muslim

Program.[1] Despite being unable to cite any concrete threat, all contend that, in some way or another, the publication is detrimental to security. It is undisputed that deference is to be afforded to prison officials in administration of their duties. However, "[d]eference does not imply abandonment or abdication of judicial review." Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

In 1969, this Court had occasion to review this exact material, when it considered restrictions on the religious practices of Nation of Islam adherents in Georgia prisons. Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969). One of the issues in that case was whether adherents should be afforded access to a newspaper called *Muhammad Speaks*. *Muhammad Speaks* was the predecessor newspaper to *The Final Call*. The *Muhammad Speaks* issues reviewed by the Fifth Circuit contained "The Muslim Program" that is the subject of the instant case, as well as items that were arguably significantly more inflammatory than The Muslim Program, as the district court noted. Rec. Doc. 64 at 13; Rec. Doc. 47-9 at 74; Rec. Doc. 47-11 at 172.

[1]Rec. Doc. 47-18 at 26-27, 28-29; Rec. Doc. 47-13 at 113; Rec. Doc. 47-12 at 32; Rec. Doc. 47-20 at 25; Rec. Doc. 47-21 at 21-22; Rec. Doc. 47-15 at 54; Rec. Doc. 47-17 at 24, 43, 59; Rec. Doc. 47-16 at 54. Note: Defendant Hamil said that he thought the Nation of Islam participated in the Attica riots, (Rec. Doc. 47-14 at 53) but this is expressly false based upon the NIJ report provided by the Defendants, which found that the Muslim prisoners protected the guards during the Attica riots. Rec. Doc. 47-25 at 17.

In 1969, a time at which race relations were undeniably more tense than they are now,[2] the Fifth Circuit held,

> Although this court has examined the same issues of the newspaper which the trial court examined, we have reached a different conclusion. First, taken as a whole, the newspapers are filled with news and editorial comment, a substantial portion of which generally encourages the Black Muslim to improve his material and spiritual condition of life by labor and study. Nowhere, including the supposedly inflammatory portions described by the court below, does there appear any direct incitement to the Black Muslims to engage in any physical violence. Therefore, we conclude that the trial court's holding that the copies submitted to the court were inflammatory, was clearly erroneous.
>
> For this reason, we reverse the trial court as to the newspaper, 'Muhammad Speaks', and remand for an order directing Warden Blackwell to allow its use to the Black Muslim inmates in the same manner that other newspapers are allowed to other inmates.

Walker, 411 F.2d at 28.

If, in the political and racial context of 1969, the Fifth Circuit found a trial court's determination as to the threat imposed by these words to be clearly erroneous, it is unclear how Defendants justify banning these words in 2011, without any additional evidence of a negative impact on security. Leonard has scoured the record and Defendants' brief; there still is not one shred of evidence that *The Final Call* is a detriment to the security of Louisiana's penal institutions. There is no citation to any study, publication, or personal experience that supports banning Leonard's religious material. It is noteworthy that citations to the record are sparse in Defendants' brief filed with this Court, precisely because there is

[2] Rec. Doc. 47-11 at 172.

simply no evidence supporting their position in this case. Pursuant to Walker *The Final Call* has been admitted to correctional facilities in this Circuit for over 40 years, without incident. Indeed, *The Final Call* continues to be admitted to facilities around the country, without incident. Defendants could not name any other jurisdiction in the nation that has banned the publication, though they stated that some were "considering it." Rec. Doc. 47-2 ¶ 29; Rec. Doc. 49-2 ¶ 1; Rec. Doc. 47-12; Rec. Doc. 47-7 at 246-248.

Although Leonard argued that the district court should simply accept the analysis in Walker, it did not do so, contrary to Defendants' assertions. Instead, it proceeded through the additional First Amendment analysis required by Turner v. Safely, as well as the statutory analysis required by the RLUIPA. Based on the record, the district court found that the ban on *The Final Call* was a substantial burden on Leonard's religious exercise. Also based on the record, it found that Defendants failed to produce any evidence indicating that *The Final Call* was a threat to security. It therefore concluded that Leonard was entitled to summary judgment on both his RLUIPA and First Amendment claims. This Court should affirm.

STANDARD OF REVIEW

This court reviews the grant of a summary judgment motion de novo. Hanks v. Transcontinental Gas Pipe Lines Corp., 953 F.2d 996, 997 (5th Cir. 1992).

Under Federal Rule of Civil Procedure 56(c), summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the movant meets the burden of showing that there is no evidence to support the opponent's case, the "nonmovant must go beyond the pleadings and designate specific facts . . . in the record establishing that there is a genuine issue of material fact for trial." Littlefield v. Forney Indep. Sch. Dist., 108 F. Supp. 2d 681, 688-689 (N.D. Tex. 2000) (*citing* Stewart v. Murphy, 174 F.3d 530, 533 (5th Cir. 1999)). "The conclusory allegation of the nonmovant that a factual dispute exists between the parties will not defeat a movant's otherwise properly supported motion for summary judgment." Hanks at 997.

"The mere existence of a scintilla of evidence in support of the nonmovant's position is insufficient to preclude a grant of summary judgment." Rather, the nonmovant must supply evidence "sufficient to support a resolution of the factual issue in his favor." Littlefield at 688-689. In the specific context of prison restrictions based upon security concerns, "to prevail on summary judgment, [prison officials] must do more than merely assert a security concern." Spratt v. Wall, 482 F.3d 33, 39 (1st Cir. 2007) (quoting Murphy v. Missouri Dep't of

Corrections, 372 F.3d 979, 988 (8th Cir. 2004)). "We do not think that an affidavit that contains only conclusory statements about the need to protect inmate security is sufficient to meet [prison officials'] burden under RLUIPA." Id. at n.10.

ARGUMENT

I. DEFENDANTS HAVE WAIVED THE RIGHT TO APPEAL THE JUDGMENT FOR LEONARD ON HIS RLUIPA CLAIM

Congress enacted the "Religious Land Use and Institutionalized Persons Act," or "RLUIPA," in an explicit attempt to protect religious liberty, providing "(t)his Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution."[3] The mandate to the courts could not be any clearer: protect religious liberty. Accordingly, "(the) RLUIPA standard poses a far greater challenge than does

[3] 42 U.S.C. 2000cc-3(g); "The RLUIPA was adopted by Congress in response to the Supreme Court's decisions in Employment Division, Department of Human Resources v. Smith and City of Boerne v. Flores. Prior to Smith, the Supreme Court had employed a "compelling state interest" standard for testing the constitutional validity of laws of general applicability that affect religious practices. Government actions that substantially burdened a religious practice had to be justified by a compelling governmental interest. In Smith, the Court changed course when it ruled that laws of general applicability that only incidentally burden religious conduct do not violate the First Amendment. Congress sought to reinstate the pre- Smith standard by enacting the Religious Freedom Restoration Act ("RFRA"). In City of Boerne, however, the Supreme Court invalidated the RFRA as it applied to states and localities, holding that the statute exceeded Congress's remedial powers under Section 5 of the Fourteenth Amendment. Congress responded to City of Boerne by enacting the RLUIPA in September 2000. The RLUIPA is similar to the provisions of the RFRA, but its scope is limited to laws and regulations that govern (1) land use and (2) institutions such as prisons that receive federal funds." Adkins v. Kaspar, 393 F.3d 559, 566 (5th Cir. 2004).

Turner to prison regulations that impinge on inmates' free exercise of religion." Freeman v. Texas Dept. of Criminal Justice, 369 F.3d 854, 858 n.1 (5th Cir. 2004).

Although briefed extensively by Leonard on summary judgment, Defendants did not respond to the RLUIPA arguments, instead arguing that Leonard's RLUIPA claim was dismissed. Rec. Doc. 49 at 1. This was incorrect. At the motion to dismiss stage of the proceedings, the district court dismissed Leonard's RLUIPA claims against individual capacity defendants, but stated explicitly that he retained his RLUIPA claims against the official capacity defendants. Rec. Doc. 64 n. 2, citing Rec. Doc. 23; Rec. Doc. 21 at 10.[4] It was clear to the district court, and to Leonard, that he retained the injunctive component of his RLUIPA claims.

Defendants failed to brief RLUIPA on summary judgment even after Leonard briefed it extensively, both in his principal brief and his reply brief. Rec. Doc. 51-2 at 1. Because of this failure, they cannot now raise the issue on appeal, because they have waived their right to do so. "It is a well-established rule that a party who fails to raise an issue at trial generally waives the right to raise that issue on appeal." Gillespie v. Washington, 395 A.2d 18 (D.C. Cir. 1978); Williams v. REP Corp., 302 F.3d 660, 665-66 (7th Cir. 2002); Hillis v. Heineman, 626 F.3d

[4] At the time, the issue of whether there was individual liability under RLUIPA was unanswered in this circuit. After considering conflicting jurisprudence on the issue, the district court followed the Eleventh Circuit's ruling in Smith v. Allen, 502 F.3d 1255 (11th Cir. 2007). This Court has since adopted the same rule. Sossamon v. Lone Star State of Texas, 560 F.3d 316, 327 (5th Cir. 2009), *cert granted* 130 S.Ct. 3319 (2010); DeMoss v. Crain, 2011 WL 893733 at 3 (5th Cir., March 2, 2011).

1014, 1019 (9th Cir. 2010); Boykin v. Dist. of Columbia, 484 A.2d 560, 566 n.3 (D.C. Cir. 1984); Satcher v. Univ. of Arkansas at Pine Bluff Bd. Of Trustees, 558 F.3d 731, 734 (8th Cir. 2009) (failure to oppose a basis for summary judgment constitutes waiver of that argument).

II. THE REJECTION OF THE FINAL CALL VIOLATES THE RLUIPA

If this Court concludes that Defendants have not waived the right to appeal summary judgment on Leonard's RLUIPA claim, Leonard should still prevail on the merits of that claim. The relevant section of the RLUIPA states:

> (a) General rule
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution ... 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.

42 U.S.C. §2000cc-1.

A. The Rejection of *The Final Call* is a Substantial Burden on Leonard's Religious Exercise

Under the RLUIPA, "the plaintiff has the burden of persuasion on whether the challenged government practice substantially burdens the plaintiff's exercise of religion. Once the plaintiff establishes this, the government bears the burden of persuasion that application of its substantially burdensome practice is in

furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest." Adkins v. Kaspar, 393 F.3d 559, 567 n.32 (5th Cir. 2004)(citing 42 U.S.C. § 2000cc-2; 146 Cong. Rec. S7776 (July 27, 2000)).

1. Access to *The Final Call* is a "religious exercise"

The Fifth Circuit has noted that the RLUIPA intentionally defines "religious exercise" broadly, to include: "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7). "This broad definition evinces Congress's intent to expand the concept of religious exercise that was used by courts in identifying "exercise of religion" in RFRA cases." Adkins v. Kaspar, 393 F.3d 559, 567 (5th Cir. 2004). Accordingly, "no test for the presence of a 'substantial burden' in the RLUIPA context may require that the religious exercise that is claimed to be thus burdened be central to the adherent's religious belief system." Id. at 570. *See also*, Odneal v. Pierce, 324 Fed.Appx. 297, 301 (5th Cir. 2009); McAlister v. Livingston, 348 Fed.Appx. 923, 936 (5th Cir. 2009). "The practice burdened need not be central to the adherent's belief system, but the adherent must have an honest belief that the practice is important to his free exercise of religion." Sossamon v. Lone Star State of Texas, 560 F.3d 316, 332 (5th Cir. 2009).

Defendants now argue that receipt of *The Final Call* is not a "religious exercise" within the meaning of the RLUIPA. They argue that because "practicing

NOI" does not "consist of" reading *The Final Call*, it is not a "religious exercise," as "practicing NOI" consists of a variety of rituals. App. Br. at 56.

This is not the law. Courts have consistently held that receipt of religious publications is "religious exercise."[5] Every issue of *The Final Call* contains a message from Minister Farrakhan and the Honorable Elijah Muhammad. Rec. Doc. 47-10 at 138, 140. It also contains informative articles, which are grounded in the NOI's theological base. Id. *The Final Call* reprints important religious study guides for NOI members, which are otherwise unavailable to people in prison. Rec. Doc. 47-8 at 32. Important announcements about the faith are made through *The Final Call*. Rec. Doc. 47-10 at 101-102. It includes access to the NOI prison ministry, which is a program about "dietary laws, conduct, and above all the theology." Rec. Doc. 47-10 at 105-106. The *Final Call* is itself theologically important, and also serves as a conduit to other information:

> Q: So let's say I'm in prison and I don't have access to the Internet. Is *The Final Call* the only way I can get communications from the Nation of Islam?

[5] Neal v. Lucas, 75 Fed.Appx. 960, 1 (5th Cir. 2003); Washington v. Klem, 497 F.3d 272, 282 (3d Cir. 2007); Johnson v. Boyd, 676 F.Supp.2d 800, 809 (E.D.Ark. 2009), citing Roddy v. Banks, 2005 WL 433404 (8th Cir. 2005) (holding that a prisoner stated a valid free exercise of religion claim where he alleged that prison officials refused to allow him to receive certain religious books); Williams v. Brimeyer, 116 F.3d 351, 354-55 (8th Cir.1997) (same); Weir v. Nix, 114 F.3d 817, 821-22 (8th Cir.1997) (noting that a prisoner stated a viable, but ultimately unsuccessful, free exercise of religion claim where he alleged prison officials unreasonably limited the number of religious books he could keep in his cell and prevented him from taking a Bible into the prison yard).

> A: It's the only way you're going to stay up-to-date and in tune, not only by being fed fresh information from that which you have accepted as your belief; but, for example, earlier when we were talking about Ramadan and Mr. Leonard's lack of knowledge that we now follow the Ramadan as is practiced in the overall Muslim world, that type of information is contained in *The Final Call*—announcement of events, Minister Farrakhan's travels and whereabouts as the leader of the Nation.
> The culmination of events for the Nation of Islam is Saviors Day, which takes place every February 26th, where all the members of the Nation gather. …All of the information concerning Saviors Day, the events surrounding it, the major speech delivered by the leader of the Nation, Minister Louis Farrakhan, excerpts from that speech, and the way to get recordings of that speech are in *The Final Call* newspaper.
>
> Q: Are they available through any other publication?
>
> A: No.

Rec. Doc. 47-11 at 168.

In this way, the record supports Leonard's contention that the religious practice at issue is receipt of *The Final Call*, because this is what is important to him for the exercise of his religion. Rec. Doc. 47-10 at 104; Rec. Doc. 47-6 at 116-117. Defendants do not contest that the Nation of Islam is a religion, or that *The Final Call* is its publication, which contains both its own theological content, and serves as a conduit to other theological materials. Defendants do not dispute the sincerity of Leonard's beliefs. App. Br. p. 55. They did not introduce any evidence to controvert Leonard's claim, which was substantiated by an expert witness from the Nation of Islam, that receipt of *The Final Call* is in fact central to his ability to

practice his religion. The district court was correct to conclude that receipt of *The Final Call* is a religious exercise protected by the RLUIPA.

2. The rejection of *The Final Call* is a "substantial burden"

"Substantial burden" was defined for the first time by the Fifth Circuit in Adkins v. Kaspar, 393 F.3d 559, 570 (5th Cir. 2004), which held that "for purposes of applying the RLUIPA in this circuit, a government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs." The Court explained that this is not a "bright line rule" and that it will require "case by case, fact specific inquiry." Id. at 571.

Defendants' assertions that Leonard's exercise is not substantially burdened because he can practice his faith alone in his cell, or because he has access to orthodox Islam services, is without merit. First, as noted above, denial of *The Final Call* operates to cut Leonard off from information from his religious leaders, and he cannot obtain that information elsewhere. Second, Defendants are not best-situated to determine what practices are important to Leonard. This Court recently rejected a similar argument.

> No summary judgment evidence contradicts [plaintiff's] claim that these religious practices are important to *his* practice of Christianity. Prison chaplains are not arbiters of the measure of religious devotion that prisoners may enjoy or the discrete way that they may practice their religion. Texas nevertheless contends that by making alternative venues available to [plaintiff], he cannot claim that denying him access to the chapel and its Christian symbols substantially burdens

> his religious exercise. This ignores the fact that the rituals which [plaintiff] claims are important *to him*--without apparent contradiction--are now completely forbidden by Texas.

Sossamon v. Lone Star State of Texas, 560 F.3d 316, 333 (5th 2009). As stated above, where a belief is sincerely held, this Court cannot inquire into the centrality of that belief to determine whether there is a substantial burden. McAlister v. Livingston, 348 Fed.Appx. 923, 936-937, n.7 (5th Cir. 2009).[6]

There can be no question but that the denial of *The Final Call* is a substantial burden. Courts have consistently held that denial of access to religious literature constitutes a "substantial burden" on the exercise of faith, premised on the understanding that one must read and learn to grow in one's faith and understanding of God.[7] The Third Circuit found that denial of NOI materials in

[6] *See also*, Employment Division v. Smith, 494 U.S. 872, 886-87 (1990) ("[I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds. Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.") (plurality opinion) (citation omitted); Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 715-16 (1981) ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.... [I]t is not within the judicial function and judicial competence to inquire [who has] more correctly perceived the commands of their common faith."); United States v. Seeger, 380 U.S. 163, 184-185 (1965) (government agencies and courts "are not free to reject beliefs because they consider them 'incomprehensible.' Their task is whether the beliefs professed by [an individual] are sincerely held and whether they are, in his own scheme of things, religious."); DeHart v. Horn, 227 F.3d 47, 55-56 (3rd Cir. 2000) (noting that government may not inquire whether "sincerely held religious belief is sufficiently 'orthodox' to deserve recognition," and explaining that "[i]t would be inconsistent with a long line of Supreme Court precedent to accord less respect to a sincerely held religious belief solely because it is not held by others").

[7] Cruz v. Beto, 405 U.S. 319 ,323, 92 S.Ct. 1079 (1972) (Burger, C.J. concurring) (while there is no obligation of prisons to provide materials for every religion and sect practice in this diverse country, neither can materials be denied if someone offers to supply them); Borzych v. Frank,

particular was a burden on the ability to practice this religion.[8] Leonard's faith simply cannot be satisfied exclusively through the practices of orthodox Islam. Defendants introduced no testimony—from themselves or from an expert witness—controverting his claim that he needs *The Final Call* in particular.

Leonard, conversely, did introduce evidence that *The Final Call* is a necessary part of his religious exercise. Defendants now assert that the district court mischaracterized the record as to *The Final Call*, and, that "nothing in the record indicates that the actual receipt of *The Final Call* is part and parcel of Leonard's exercise." App. Br. at 55. This is simply inaccurate. Leonard explained that reading religious material is necessary because "religious reading materials serve to educate, form and reform the human being, instills confidence, comfort, a sense of belonging and purposes, religious reading material also serves as a moral compass and guide." Rec. Doc. 47-6 at 129-130.

> I'm not an expert in Islam. I'm a common believer just like you would have a Christian who is a common believer and that Christian would need to defer to his pastor or his minister, and since I'm a common believer I would need to defer to my Imam or my minister to many of the questions you ask because I'm just a

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340 F.Supp.2d 955, 968 (W.D. Wis. 2004) (denying Odinist literature is a substantial burden); Marria v. Broaddus, 200 F.Supp.2d 280, 298 (S.D.N.Y. 2002) (denying Five Percenter literature may constitute substantial burden.)

[8] Finding it not sufficient for a Nation of Islam adherent to pray in his cell, have access to the Qu'ran, and be allowed to observe Ramadan where "they were deprived of texts which provide critical religious instruction and without which they could not practice their religion generally." Sutton v. Rasheed, 323 F.3d 236, 255 (3rd Cir. 2003). "Because they teach adherents the proper way to pray and are viewed as divinely inspired, however, deprivation of the Nation of Islam texts in question here implicates not just the right to read those particular texts, but the prisoners' ability to practice their religion in general." Id. at 257.

> common believer. I'm not an expert in Islam. I'm still a person that's trying to read, trying to gather information, trying to grow and trying to evolve into my faith because I don't know everything, and I need the material from "The Final Call" administration and the other material in order to grow into Islam.

Rec. Doc. 47-6 at 114. A Minister from the Nation of Islam explained that *The Final Call* is important because

> in addition to being a newspaper that helps reflect our perception of world events, it is, number one, the organ that consistently provides the member with repeating and reiterating our theological base, which also is our history as well as our program; and it also is the source through which members and people who are interested in learning more get the reading material and have access to the CDs, DVDs, and other materials that would help them know and understand these teachings. It is our primary organ to propagate our religion.

Rec. Doc. 47-11 at 166-168.

Again, as outlined above, *The Final Call* is important to Leonard both because of its theological content, and because it is a conduit to other information. Significantly, Defendants did not dispute this point below. In his "statement of undisputed facts," Leonard stated, "*The Final Call* is the only means by which an incarcerated member of the Nation of Islam can gain access to publications, audio lectures, and timely information pertaining to his religion." Rec. Doc. 47-2 ¶ 37. In Defendants' reply "statement of disputed facts," this point was not disputed. Rec. Doc. 49-2. By operation of W.D. LA. Loc. R. 56.2, it is a stipulated fact that *The Final Call* is the only source from which Leonard can obtain information pertaining to his religion. *See*, Smith v. Brenoettsy, 158 F.3d 908, 910 n.2 (5th Cir. 1998).

Defendants' argument that the rejection of *The Final Call* does not substantially burden Leonard's religion because he has access to other Nation of Islam texts is factually incorrect and is not supported by the record. Defendants cite to a portion of Leonard's deposition in which he says that he was able to receive other NOI books and publications after *The Final Call* was banned. App. Br. at 43. However, this excerpt distorts the record. What happened is that even after *The Final Call* was rejected, prison officials failed to come collect the back issues of *The Final Call* that Leonard already possessed. He therefore retained 15-20 copies of *The Final Call* in his cell, even after it was determined a threat to security; they were not designated as contraband.[9] Rec. Doc. 50-2, Ex. 2. He maintained these materials from 2006-2008. During that time, he was able to order materials from Final Call Publishing, because he had the back issues of *The Final Call* in his cell from which to order the materials. He could not, of course, receive any new NOI materials, because he was not receiving new copies of *The Final Call,* which is the only way a prisoner knows of new materials from the Nation of Islam, as outlined above.

In 2008, Leonard was transferred to lockdown. His books and materials were all seized and not returned. He lost the back issues of *The Final Call* that he

[9] It should be noted that in this two year period in which Defendants left The Final Call back issues in Leonard's cell, there was no disruption or unrest that resulted from their presence, just as there was no disruption in the years that the publication freely entered Louisiana prisons prior to the 2006 decision to ban it.

possessed. Rec. Doc. 47-7 at 251-252; Rec. Doc. 50-2, Ex. 2. Because since 2008 he has had no access to *The Final Call*, Mr. Leonard has been unable to order any books or publications from Final Call Publishing Company, or from the Nation of Islam, whatsoever, due to the banning of *The Final Call*, because the way those materials are advertised and ordered is through *The Final Call*. Rec. Doc. 47-7 at 195; Rec. Doc. 47-11 at 166-168. Defendants are simply incorrect that Leonard has access to other NOI materials; their assertion is not supported by the record. He did in the past, but does no more. He is presently completely cut off from every material relating to his faith due to the ban on *The Final Call*, which is itself an important religious publication, and is also the only source to order other NOI materials.

The Defendants additionally argue that the denial of *The Final Call* is not a substantial burden on Leonard's religious practice because he has access to more broadly engage in Islamic practices. They state that the district court "overlooked" the range of practices that Leonard can and does participate in. App. Br. at 47. This is inaccurate. The district court specifically found that Defendants provide orthodox Muslim services and accommodations. Rec. Doc. 64 at 4. It found, however, based upon the record, that these services did not negate Leonard's need for *The Final Call*.

As Minister Muhammad testified, although they overlap in some respects, orthodox Islam is actively contrary to the Nation of Islam, in that they consider the "cardinal principle" of the Nation of Islam to be blasphemy. Rec. Doc. 47-9 at 96; Rec. Doc. 47-11 at 160. Therefore, Leonard does not receive full spiritual fulfillment by attending an orthodox Islam service because believers of orthodox Islam reject the person he believes to be "the messenger." Saying that an adherent to the Nation of Islam should receive all spiritual fulfillment from attending orthodox Islam services is like saying that a Christian should obtain all spiritual fulfillment from attending Jewish services, even though the Jewish faith rejects Christ as the Son of God. This point is not to advocate for separate services, but rather to show that Leonard has a very concrete need for *The Final Call.* Just as a Christian who was only offered Jewish services would need additional materials to supplement his faith, so Mr. Leonard needs *The Final Call*.

This rationale likewise applies to all of the time Defendants devote to discussing Mr. Leonard's access to the five pillars of faith; these aspects of his faith are necessary, but they are not sufficient, just as the Old Testament would be necessary to a Christian, but not sufficient religious material without also having access to the New Testament. This Court has expressly recognized that "[A] substantial burden to free exercise rights may exist when a prisoner's sole opportunity for group worship arises under the guidance of someone whose beliefs

are significantly different from his own." Sossamon v. Lone Star State of Texas, 560 F.3d 316, 333 n. 64 (5th Cir. 2009), *citing* Murphy v. Missouri Dept. of Corrections, 372 F.3d 979, 989 (8th Cir. 2004).[10] In their Statement of Undisputed Facts, Defendants flatly declare, "the type of Islamic faith practiced at David Wade Correctional Center is al-Islam." Rec. Doc. 45-2 ¶ 8. This concession places this case squarely within the ambit of Sossaman. Without *The Final Call*, Leonard is not able to practice his faith.

As indicated by Minister Muhammad,

> In order for any follower of the Honorable Elijah Muhammad to get a full and complete source for his or her faith, it would have to be through material that upholds Master Fard Muhammad as Allah in person- in his person and recognizes the Honorable Elijah Muhammad as messenger of Allah." Rec. Doc. 47-10 at 104. "[T]hat particular point is crucial to our system of belief. And in the so-called al-Islam [orthodox Muslim] group that belief is rejected. It would not only be absent from the service, it is openly rejected.

Rec. Doc. 47-11 at 160. As in Sossamon, Defendants' evidence about the availability of orthodox Islam services does not defeat Leonard's claim that the rejection of *The Final Call* substantially burdens his religious exercise. In response to a similar argument by the State of Texas, this Court explained, "this misses the point" because the test is not whether a religion is banned entirely. Sossamon, 560

[10] There actually is a fact dispute was to whether Leonard does have access to orthodox Islam services. Two witnesses testified that Mr. Leonard has expressly been forbidden to attend orthodox Islamic services by the chaplain at D.W.C.C. Rec. Doc. 47-5 at 100, 101; Rec. Doc. 47-19 at 37-38. However, because this case is not about availability of NOI services, but is about access to *The Final Call*, and because the availability of services not his own is immaterial to that analysis, Plaintiff does not believe this genuine dispute of fact to be material to this appeal.

F.3d at 334. Other than introducing evidence about services that they do provide—which are necessary, but not sufficient for Leonard's religious practice—Defendants did not otherwise offer proof that *The Final Call* is not important to Leonard. Indeed, all evidence pointed the other way. Therefore, the district court was correct to conclude that denial of *The Final Call* was a substantial burden on Leonard's religious exercise.

Once Leonard has shown that denying him access to *The Final Call* constitutes a substantial burden on his religious exercise, the burden of proof moves to the Defendants to show that the rejection is in furtherance of a compelling state interest, and that the rejection is narrowly tailored to achieve that interest. Adkins v. Kaspar, 393 F.3d 559, 567 (5th Cir. 2004).

B. The Rejection is Not in Furtherance of Defendants' Interest in Security, or Narrowly Tailored to Achieve that End

There is no doubt that maintaining institutional order and security is a compelling governmental interest. The question in this case is whether the banning of *The Final Call* is the "least restrictive means" "in furtherance of" that interest. As will be argued later in this brief, Leonard thinks it not even "rationally related," much less the "least restrictive means."

"The phrase 'least restrictive means' has its plain meaning." Id. "A governmental body that imposes a 'substantial' burden on a religious practice must

demonstrate, and not just assert, that the rule at issue is the least restrictive means of achieving a compelling governmental interest." O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003) (emphasis in original). To be clear, Leonard is not arguing that the Defendants must wait for an incident of violence before they can act to prevent it. However, for RLUIPA protection to mean anything, the Defendants must be required to provide support for their actions beyond the bald assertions advanced in the instant case. Murphy v. Missouri Dept. of Corrections, 372 F.3d 979, 989 (8th Cir. 2004). ("We do not require evidence that racial violence has in fact occurred in the form of a riot, but we do require some evidence that MDOC's decision was the least restrictive means necessary to preserve its security interest.")

This Court has held that it is not permissible for correctional facilities to conflate "racist" material with material that poses a threat; an analysis of the particular security threat must be done. In Thompson v. Solomon, 995 F.2d 221 (5th Cir. 1993)[11] the plaintiff challenged a correctional policy of only providing Ramadan during the month celebrated by orthodox Islam, and also denial of *The Final Call* to prisoners in administrative segregation.[12] The Court reversed a

[11] Although unpublished, Thompson has precedential value and may be cited. U.S. Ct. of App. 5th Cir. R. 47.5.3.

[12] Note that in Thompson, the prison only provided prisoners in administrative segregation with the Bible or the Qu'ran. The plaintiff was challenging denial of *The Final Call* in administrative

dismissal by the district court, based not on RLUIPA, but on the more relaxed First Amendment Turner standard, holding:

> The court similarly erred in dismissing as frivolous Thompson's objection to the denial of books except the Bible and the Koran in solitary, and the classification of Farrakhan's book as "racist". In dismissing these claims, the magistrate applied the Turner standard and correctly noted that distinctions between publications solely on the basis of their potential implications for prison security are "neutral" under Turner. See, Thornburgh v. Abbott, 490 U.S. 401, 109 S.Ct. 1874 (1989); however, there is no basis in the record for concluding that the restrictions were based on concerns for prison security. That a committee labeled Farrakhan's book "racist", standing alone, does not sufficiently justify its prohibition. We cannot infer that the relevant authorities concluded that the book's "racist" content threatened prison security. See Thornburgh v. Abbott, 490 U.S. 399 (1989) (distinguishing prohibitions on writings that express "inflammatory political, racial, religious, or other views" from those that are found to threaten prison security).

Id.

In the immediate case, no witness for the defense could articulate a single objective reason why *The Final Call* is a threat to security. There is no evidence that any other correctional system in the United States rejects *The Final Call*. Rec. Doc. 45-1; Rec. Doc. 53-2. There was testimony that other correctional institutions do allow *The Final Call* to be received and read by prisoners. Rec. Doc. 47-11 at 172; Rec. Doc. 47-18 at 32.[13] It certainly has been received in facilities within this

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segregation, indicating that *The Final Call* was admitted into general population as were other publications, again showing that it is admitted in other correctional facilities.

[13] Other cases indicate this as well. Cromer v. Carberry, 2010 WL 3431654 *2 (W.D.Mich., 2010)(suit against chaplain for refusing to make copies of a NOI document. Defense was that the materials were available to prisoners via *The Final Call* and they could buy them); Muhammad v. City of New York Dept. of Corrections, 904 F.Supp. 161, 168, 187 (S.D.N.Y., 1995) (Claim for failure to allow NOI services, noting the "writings that are 'critical' to NOI believers are those of their leaders, *i.e.,* Elijah Muhammad and Louis Farrakhan. The *Final Call* newspaper, the book *Message to the Black Man in America* by Elijah Muhammad and various study guides and lessons are among the publications read by followers of the NOI… Both the Bureau and

Circuit since 1969, when this Court found that banning it violated the First Amendment. Walker v. Blackwell, 411 F.2d 23, 28 (5th Cir. 1969). As the Ninth Circuit has noted, "the failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means." Warsoldier v. Woodford, 418 F.3d 989, 1000 (9th Circuit 2005). *See also*, Spratt v. Rhode Island Dep.t of Corrections, 482 F.3d 33, 42 (1st Cir. 2007). Here, it is not just one other facility that could accommodate the religious practice, it is seemingly every facility in the United States other than those in Louisiana. "While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction." Procunier v. Martinez, 416 U.S. 396, 414 n. 14 (1974).

Even more significantly, all signs point the other way, and instead indicate that the Nation of Islam is a positive force in the lives of prisoners. One of the major components of the Nation of Islam is to operate a prison ministry that introduces prisoners "to the tenets of Islam which teach peace, but at the same time teaches strength and teaches individual responsibility." The Nation of Islam has

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DOC allow inmates to have access to NOI literature. For example, the Bureau **permits and supports** the *Final Call* newspaper.")

chosen this emphasis in part because of the "crisis" of the high number of black men in prison, and works to instill values that will rebuild those lives and families. Rec. Doc. 47-11 at 164.

Even the materials provided by the Defendants reflect the Nation of Islam as a positive, rather than negative, force in prisons. For example, on Mr. Leonard's classification annual review in 2006, it was advised that he "continue in Muslim," thereby indicating that the Defendants feel his faith is good for him; unfortunately, that same month he was denied *The Final Call*. Rec. Doc. 47-6 at 119, Rec. Doc. 47-24 at Ex. 26. More significantly, there was a report to the National Institute of Justice produced by the Defendants. That report classified the Nation of Islam as one of the "mainstream sects" of Islam, and found that the Nation of Islam was a positive force in prisons, instilling discipline amongst its members.[14]

"No tobacco. No smoking. No drugs. No alcohol. No weapons. We are not allowed to possess or carry weapons of any kind, not even a pen knife. No guns. No knives. Nothing. You are stripped of any tool designed or that even could serve as something to do harm to others because God did not put you on this earth to injure people. He put you on this earth to reach your ultimate human potential, to contribute to society." Rec. Doc. 47-8 at 23. "There's just no record that we know

[14] Rec. Docs. 47-25 at pp.17-26, 47-26. This report ultimately concludes that prison administrations may face a risk by radical prisoners, and that the way to combat that is to hire chaplains and encourage the more mainstream sects of Islam such as The Nation of Islam.

of where anyone has ever been motivated to engage in any acts of disorder or disruptive behavior based on the language that we employ. Our language can often be harsh. It is hard to hear, but that doesn't make it either false or inciteful." Rec. Doc. 47-10 at 114.

The evidence is uncontroverted that no one can point to any unrest or violence attributable to *The Final Call*, either by NOI members or others. If the Defendants' concern is that *The Final Call* will find its way into the possession of other prisoners and cause unrest, they must provide some basis for this opinion. They have not. It has been admitted for at least 40 years without any incident that anyone can point to. Leonard testified that when he arrived at David Wade, there were copies lying out in the common areas. Even after it was rejected, Leonard retained back issues, again without incident, for two years. Leonard's expert witness, former general counsel for Texas Department of Criminal Justice, who had specific responsibility for publication regulations for the Texas Department of Corrections, testified that *The Final Call* is not a threat to security. Rec. Doc. 47-23; Rec. Doc. 49-2.

It is true that Defendants need not wait for the outbreak of violence before rejecting a publication, but they must demonstrate, with evidence, that the ban is in furtherance of their interest in security, *and* that it is the least restrictive means of achieving that end. They have produced none. All they have produced is

speculation, and their speculation is controverted by the evidence that actually is in the record. Due to Defendants' failure to carry their burden, Leonard is entitled to summary judgment on his RLUIPA claim.

III. THE REJECTION OF *THE FINAL CALL* VIOLATES THE FIRST AMENDMENT

In addition to violating Leonard's rights pursuant to the RLUIPA, Defendants' restriction violates Leonard's rights arising under the First Amendment.

A. Turner applies

Outside of the prison context, the banning of religious literature would be subject to a strict scrutiny analysis.[15] However, because incarceration necessarily carries with it a curtailment of rights, restrictions on prisoners' First Amendment rights are governed by a more relaxed standard, set forth in Turner v. Safley. Johnson v. Boyd, 676 F.Supp.2d 800, 808 (E.D.Ark. 2009). Turner provides that a restriction is valid "if it is reasonably related to legitimate penological interests." 482 U.S. 78, 89 (1987). To determine whether regulations meet the penological interest standard, courts employ a four factor test, asking:

1. Whether the penological objective underlying the regulations at issue is legitimate and neutral, and that the regulations are rationally related to that objective;

[15] This is because speech is presumed protected unless it falls into one of the narrowly drawn categories of "lesser protected speech" delineated by the Supreme Court. ACLU v Pittsburgh, 586 F. Supp 417 (D.C. PA 1984); American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014 (6th Cir. 1975); Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

2. Whether there are alternative means of exercising the rights that remain open to inmates;
3. What impact the accommodation of the asserted constitutional right will have on others (guards and inmates) in the prison, and;
4. Whether there are ready alternatives that fully accommodate the prisoner's rights at de minimis cost to valid penological interests."

Thornburgh v. Abbott, 490 U.S. 401 (1989). Defendants argue, for the first time on appeal, that the test announced in Turner does not apply in this case, and, rather, that the "neutrality" standard announced in Employment Division v. Smith, 494 U.S. 872 (1990), applies. Turner is the proper test, for two reasons.

1. Defendant cannot raise a new standard on appeal

At the district court level, both parties agreed that Turner v. Safley was the applicable test. In Defendants' briefing of their Motion for Summary Judgment, they stated, "Leonard's right to exercise freedom of religion claims, therefore, should be evaluated under the Turner v. Safely factors explained in Chriceol and Thornburgh v. Abbott, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989)." Rec. Doc. 45-3 at 11. The district court proceeded with its analysis pursuant to this standard. Defendants cannot now argue that a new standard applies on appeal. Topalian v. Ehrman, 954 F.2d 1125, 1132 n. 10 (5th Cir. 1992). While it is true that an appellate court has discretion to take up an argument for the first time on appeal, courts are hesitant to do so, unless "the proper resolution [of the question] is beyond any doubt… or where injustice might otherwise result." Singleton v. Wulff, 428 U.S. 106, 121 (1976). The Fifth Circuit has followed this careful

approach, holding "if a litigant desires to preserve an argument for appeal, the litigant must press and not merely intimate the argument during the proceedings before the district court. If an argument is not raised to such a degree that the district court has an opportunity to rule on it, we will not address it on appeal." F.D.I.C. v. Mijalis, 15 F.3d 1314, 1327 (5th Cir. 1994). See also, City of Dallas v. Hall, 562 F.3d 712 (5th Cir. 2009).

The district court did not have an opportunity to rule on whether Smith overruled Turner because the parties both agreed that Turner was the proper standard. This is not a case in which this Court should take up a new issue on appeal. Resolution of this issue is far from certain, as will be discussed below. Additionally, Smith was decided in 1990, over 20 years ago. If this is the standard Defendants believed applied, such an argument should have been raised at the district court; this entire case has proceeded with the agreement that Turner is the applicable standard.

2. The jurisprudence easily establishes that Turner is the appropriate test

The position that Employment Division v. Smith, 494 U.S. 872 (1990) now applies to prison free exercise claims such as Leonard's is not supported by the jurisprudence, and it also defies logic. Defendants' argument is that because Smith came three years after Turner, it supplanted the Turner test, and that now Smith's

"neutrality" standard applies, instead of Turner's four-part analysis. Defendants argue that to continue to apply Turner would afford prisoners more rights than non-prisoners. This is incorrect as a matter of fact, is incorrect per Supreme Court jurisprudence, is not supported by the "circuit split" cases cited by the Defendants, and would defy common sense if applied.

First, this Court is bound to apply controlling Supreme Court precedent where the Supreme Court has not overruled itself. Although Smith was a sea change in Free Exercise cases generally, Turner is the case that controls in the prison context specifically, and that case remains good law. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/American Exp., Inc., 490 U.S. 477, 484, (1989); Agostini v. Felton, 521 U.S. 203, 237 (1997).

Not only has the Supreme Court not overruled Turner, but in the almost twenty years since Smith was decided, this Court has continued to apply Turner in prison cases, including very recent free exercise cases. See, *e.g.*, McAlister v. Livingston, 348 Fed. Appx. 923, 931 (5th Cir. 2009); Mayfield v. Texas Dept. of Criminal Justice, 529 F.3d 599, 607 (5th Cir. 2008); Baranowski v. Hart, 486 F.3d 112, 120 (5th Cir. 2007); Adkins v. Kaspar, 393 F.3d 559, 564 (5th Cir. 2004);

Freeman v. Texas Department of Criminal Justice, 369 F.3d 854, 860 (5th Cir. 2004); Sossamon v. Lone Star State of Texas, 560 F.3d 316, 335 (5th Cir. 2009). This application included a case involving the Nation of Islam in particular. Thompson v. Solomon, 995 F.2d 221 (5th Cir. 1993).

Defendants assert that there is a "circuit split" regarding whether Smith overruled Turner. However, only one of the cases cited by the Defendants as supporting their position involved publications, which is what is at issue in the present case, and it did not directly address the issue.[16] Moreover, the circuits that have directly considered and decided the issue have decided that Turner should still apply.[17] Even if some circuits have held that the Smith neutrality test should apply in prison cases regarding religious practice generally, the law is crystal clear that Turner applies to publications cases specifically, which this is.

[16] Smith v. Ozmint, 578 F.3d 246, 251 (4th Cir. 2009) involved a grooming policy. The court did not even address Turner, it simply noted that Smith was its pre-RLUIPA test. It does not hold that Smith overruled Turner. Kaemmerling v. Lappin, 553 F.3d 669, 677 (D.C. Cir. 2008) likewise nowhere mentioned Turner. That is a case in which a prisoner challenged DNA collection as a violation of his religious beliefs, and the court applied Smith, without referencing Turner. Likewise, Borzych v. Frank, 439 F.3d 388 (7th Cir. 2006) also does not mention Turner. In passing, that court states that a neutrality standard applied to the rejection of three Odinist books that actually advocated violence against persons of other races. The court did not hold what Defendants suggest, and conducted no analysis whatsoever as to the interplay between Turner and Smith. It bears noting that this case actually assists Leonard's position, as the court held that a ban on racist literature was overbroad without some linkage to violence.

[17] Ward v. Walsh, 1 F.3d 873, 876-877 (9th Cir. 1993), *cert. denied*, 510 U.S. 1192, 114 S.Ct. 1297 ("Inmates must rely on the prison system to provide them with the necessities of life. Determining to what extent prison officials must accommodate a prisoner's right to free exercise in fulfilling this obligation is wholly different from determining whether free citizens must obey criminal laws of general applicability."); Flager v. Wilkinson, 241 F.3d 475, 481 (6th Cir. 2001); Salaam v. Lockhart, 905 F.2d 1168, 1171 n. 7 (8th Cir. 1990).

The Turner test applies to all publications received in prison facilities, both religious and non-religious. See, Leachman v. Thomas, 229 F.3d 1148 (5th Cir. 2000); Thornburgh v. Abbott, 490 U.S. 401 (1989). To now hold that the Smith neutrality test applies to religious publications whereas the Turner test applies to non-religious publications would lead to the strange result that religious publications would actually be afforded less protection than non-religious publications. If this were to happen, it would place courts in the awkward position of determining whether a publication is religious or not, and publications like *Christian Science Monitor* would be difficult to categorize. It would also seem that plaintiffs could just skirt the problem by pleading the case as a First Amendment access to information case, rather than as a religious case, and again invoke the Turner analysis, because Turner did not differentiate between types of protected publications. However, this would be a very bizarre result.

There is similarly no merit to Defendants' argument that to continue to apply Turner to prison cases affords prisoners greater rights than non-prisoners, whose Free Exercise claims are governed by Smith. Although there may be good reason to afford additional protection to prisoners, because, by definition, they are unable to practice their religious beliefs without permission from the government, in this instance in particular, the denial of religious literature to a non-prisoner would be analyzed under the strict scrutiny standard. Johnson v. Boyd, 676 F.Supp.2d 800,

808 (E.D.Ark. 2009). Turner is a less protective standard that was crafted to protect the fundamental rights of persons whose rights are already otherwise significantly curtailed in the prison environment. A person outside of that environment would not have their rights already curtailed, such that Turner-analysis is not necessary.[18]

B. Under the Turner Standard, Leonard Prevails

1. There is no rational connection between the rejection of *The Final Call* and any legitimate penological interest

The first Turner factor is whether the governmental objective underlying the regulations at issue is legitimate and neutral, and that the regulations are rationally related to that objective. Leonard certainly agrees that institutional order and security are legitimate government interests. However, the regulations in question are not neutral, and neither are they rationally related to the objective of institutional security.

[18] A review of this Court's decisions under Turner shows that the vast majority of those cases involve access to religious services, access to particular items important to a religious belief, or challenges to grooming policies. Obviously, a non-prisoner would not need permission from the government to attend a religious service, to obtain an otherwise lawful item, or to wear his hair a certain way. In these instances, a non-prisoner would be protected against excessive government intrusion into his life by operation of the Due Process Clause, the First Amendment, or other limitations on government power, but prisoners are not, precisely because their rights are more curtailed than those of the general public. Turner, then, operates as a buffer to protect fundamental rights of prisoners, where they are not otherwise entitled to the protection of a non-prisoner, but seeks to strike a balance with the necessary curtailment that accompanies incarceration.

i. The Defendants' policy is not neutral because it calls for the substitution of the philosophy of the individual decision-maker

As one component of the *Turner* analysis, courts have required that rejection policies be "neutral." This means that the regulation "must further an important or substantial governmental interest unrelated to the suppression of expression." Thornburgh v. Abbott, 490 U.S. 401, 415 (1989). In Thornburgh, the Court upheld against a facial challenge a policy that allowed for rejection of a publication "only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." However, under the regulation in Thornburgh, the wardens were explicitly prohibited from rejecting a publication "solely because its content is religious, philosophical, political, social [,] sexual, or … unpopular or repugnant."

The Supreme Court noted that the safeguards found in the Thornburgh regulation saved it from a First Amendment challenge:

> In Martinez, the regulations barred writings that "unduly complain" or "magnify grievances," express "inflammatory political, racial, religious or other views," or are "defamatory" or "otherwise inappropriate." We found in Martinez that "[t]hese regulations fairly invited prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship," and that the purpose of the regulations had not been found "unrelated to the suppression of expression." The regulations at issue in Martinez, therefore, were decidedly not "neutral" in the relevant sense.

Id. at 415, *citing* Martinez v. Procunier, 416 U.S. 396, 415 (1974). The Fifth Circuit has likewise adopted the principle that a prison cannot maintain a standard

that "fairly invite(s) prison officials to apply their own personal prejudices and opinions as standards for prisoner censorship and do not appear to be unrelated to the suppression of expression." Leachman v. Thomas, 229 F.3d 1148 at * 6 (5th Cir. 2000). This Court has upheld a prison regulation banning material of a racist nature, where the regulation prohibited material "deemed an immediate and tangible threat" because "[t]he material advocates racial, religious, or national hatred in such a way so as to create a serious danger of violence in the facility." Chriceol v. Phillips, 169 F.3d 313, 314-315 (5th Cir. 1999). In so doing, the court noted that it is constitutionally impermissible to ban materials simply because they are "racial" in nature, but, rather, that there must be some linkage to violence or prison disruption; the materials must be "likely" to produce violence.[19] Such a linkage is simply missing in the immediate case.

In the immediate case, the policy allows for the exclusion of "racially inflammatory material" regardless of whether or not it constitutes a security threat. On the face of the regulation, then, it calls for prison authorities to make a decision as to what they find inflammatory, with no prohibition on discrimination based upon philosophy, and neither is there an explicit requirement that it be linked to

[19] See also Williams v. Brimeyer, 116 F.3d 351, 354 (8th Cir. 1997) (holding that prison violated prisoner's First Amendment rights by banning Church of Jesus Christ Christian publications that advocated racial separatism, affirming award of punitive damages, and stating, "[t]he incoming publications did not counsel violence, and there is no evidence that they have ever caused a disruption. Certainly the views expressed in the publications are racist and separatist, but religious literature may not be banned on that ground alone.")

any threatened disruption. This is exactly what the Court declared unconstitutional in Thornburgh. Indeed, discriminating upon the basis of philosophy appears to be exactly what the Defendants engaged in.

The strongest indication that the regulation is not neutral is the fact that each of the deponents in this case had a different opinion of why *The Final Call* could be rejected. The regulation obviously "fairly invite(s) prison officials to apply their own personal prejudices and opinions as standards for prisoner censorship" if each Defendant arrives at a different conclusion as to why *The Final Call* should be rejected. Warden Burl Cain, 30(b)(6) representative for the State of Louisiana, indicated in no uncertain terms that *The Final Call* was being rejected because of the material contained in The Muslim Program. Rec. Doc. 47-13 at 55-56; 52, 125, 129. Because Warden Cain is the 30(b)(6) representative for the Defendants, Leonard is taking that as the official word, and such is the subject of this litigation. Rec. Doc. 47-16 at 34, 66. However, each of the other defense deponents would reject *The Final Call* as "racially inflammatory" for other components. Warden Goodwin, the 30(b)(6) deponent for security, would exclude it for containing even, "we want justice," because it implies that black people are not receiving justice. Rec. Doc. 47-17 at 36. Conversely, Defendant Antonio Turner, current mailroom supervisor at David Wade Correctional Center, did not find "we want justice" to be prohibitable. He agreed with Warden Cain that number 4- the request for a separate

state or territory- was proscribable. Rec. Doc. 47-15 at 74. Unlike the Warden, however, he did not see the request for equal, separate education as a threat. Rec. Doc. 47-15 at 82. This confusion on the part of the Defendants indicates that the "standard" they are proceeding under is essentially no standard. Because the regulation in question does not require any objective, concrete or articulable risk of harm, it asks these men to substitute their personal philosophies, which results in disparate, and unconstitutional, results.

ii. The rejection of *The Final Call* is not "rationally related" to the legitimate government interest in security

Although the Turner standard is deferential to prison officials, "a reasonableness standard is not toothless." Thornburgh at 414. Prison officials may not "pil[e] conjecture upon conjecture" to justify their policies. Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988). Neither can they rely upon "reflexive, rote assertions." Armstrong v. Davis, 275 F.3d 849, 874 (9th Cir. 2001), *cert. denied* 537 U.S. 812 (2002). That is precisely what prison officials are doing in the immediate case, and it is what this Defendant has done in other cases.

In Boyd v. Stalder, Defendant Michael was sued for banning prisoner access to sexually suggestive materials. In her defense, Defendant Michael stated that the viewing of sexually explicit material undermines rehabilitation and "is a threat to

the security of the institution and the safety of inmates and staff;" the exact same rationale advanced in the immediate case. The district court held,

> While there is a valid, rational connection under Turner between these safety and rehabilitation concerns and a policy banning nudity and sexually explicit materials, Warden Michael has failed to reference any penological study, expert opinion, or specific personal experiences that supports a finding for a policy banning all general population inmates receiving African-American oriented magazines or publications with non-obscene matters such as pictures of women in bikinis or miniskirts. Counsel has not sought to qualify Warden Michael as an expert in penology. Her lay opinion, without more, is legally insufficient. She has not come forward with evidence of a valid rational connection and simply has not established the legality of such broad policies under the first Turner factor. Further, the Court questions whether such a broad ban may be an exaggerated response to the prison's concerns, the fourth Turner factor.

Boyd v. Stalder, 2008 WL 2977363 (W.D.La. 2008). Likewise, in the immediate case, the Defendants can cite to no study, expert opinion, or personal experiences that support banning *The Final Call*. Rec. Doc. 47-16 at 78. Such a citation—indeed, almost any citations to the record—are *completely absent* from their brief. If the First Amendment is to mean anything, it cannot be that prison officials can simply state that protected material is a threat. Leonard agrees that they need not wait until an outbreak of violence, but there must be something other than sheer conjecture. Even under the deferential Turner test, "[i]n order to warrant deference, prison officials *must present credible evidence* to support their stated penological goals." Beerheide v. Suthers, 286 F.3d 1179, 1189 (10th Cir. 2002) (emphasis in original).

A plain reading of The Muslim Program indicates that it does not raise any genuine threat to security. In 1969 the Fifth Circuit Court of Appeals read several issues of this paper and did not even mention The Muslim Program as remotely problematic. *See generally,* Walker, 411 F.2d 23 (5th Cir. 1969). It is true that the First Amendment standards have evolved since that decision, but Defendants produced no evidence of any factual distinction between this case and Walker.[20] Leonard's expert witness also concluded that The Muslim Program, and *The Final Call* generally, were not a threat to security. Rec. Doc. 47-23. One must evaluate the Program for what it is; answers to questions posed to Elijah Muhammad, written in the political context of the 1960s. Rec. Doc. 47-9 at 74. On its face, it is obviously intended as an alternative to racial conflict; it states as much repeatedly. Rec. Doc. 47-24 at Ex. 38. Under "What Muslims Want," points one through three are indisputably laudable goals, seeking freedom, justice and equality *for all*- not simply for those of one race. Point number four is offered as a solution if objectives one through three cannot be achieved, and provides that if the races

[20] Defendants mischaracterize the district court's application of Walker. They assert that the district court relied exclusively on Walker. This is incorrect. The court found that Walker had not been overturned, noted that in the racially charged context of 1969 this Court did not find *The Final Call* prohibitable, and said that this was instructive for its purposes of assessing whether *The Final Call* is racially inflammatory. However, it then went on to perform analysis pursuant to Turner and RLUIPA, and, based upon a detailed examination of the record, found an absence of evidence sufficient to defeat summary judgment on those two claims. The Defendants are incorrect that the district court only relied upon Walker. It acknowledged Walker, and also conducted its own analysis—independent of Walker-- under more recent jurisprudence.

cannot get along, Muslims want people who have descended from slaves to be allowed to establish a separate state or territory, either in the United States or elsewhere. Rec. Doc. 47-9 at 79.

This component- number four- is the "want" upon which Defendants focus most heavily. They are concerned that its focus on separatism is divisive. Warden Cain speculates that it may cause prisoners to seek racially segregated dorms, though despite his housing between 12-20 Nation of Islam adherents, no prisoner has ever requested that they be separated. Rec. Doc. 47-13 59, 61. This is because the separate state envisioned in number four is exactly that; a separate political entity. The Defendants' tortured reading of The Muslim Program flies in the face of the plain meaning of the words "state or territory." There is no indication that anyone other than the Defendants reads The Muslim Program to request an immediate and complete separation of the races. In fact, such a reading is rejected in the plain words of number seven, which expressly states, "As long as we are not allowed to establish a state or territory of our own, we demand not only equal justice under the laws of the United States, but equal employment opportunities-NOW!" Rec. Doc. 47-24 at Ex. 38.

The Defendants' position is simply not supported by the text of The Program, or by any objective evidence whatsoever. "The Nation of Islam was structured within the framework of respect for existing laws, then and now. . . . So

by no means should anybody read anything on this page that would lead them to engage in anything disruptive. It's a program. And it's clearly, in all of its language, speaking on a national level from one who is the head of the organization, essentially speaking to the authorities of the U.S. Government." Rec. Doc. 47-9 at 86-87. At base, the Defendants are really objecting to the political philosophy provided in *The Final Call*. This is exactly the sort of philosophical and political discrimination that is prohibited by Thornburgh.

Despite the deferential nature of the Turner analysis, the Defendants have not met it. "Courts must be sensitive to their expert judgment and mindful that the judiciary is ill-equipped to deal with the difficult and delicate problems of prison management. At the same time, our deference must be schooled, not absolute. The fact that initial responsibility for the prison is vested in prison administrators does not mean that constitutional rights are not to be scrupulously observed." Clarke v. Stalder, 121 F.3d 222, 228 (5th Cir. 1997). "Deference does not imply abandonment or abdication of judicial review." Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). Indeed, if courts are simply to accept a bald assertion of security concerns by prison officials, it would obviate the need for judicial review entirely. Defendants have not articulated any relationship between the banning of *The Final Call* and prison security other than their personal reactions to the material contained therein, which cannot be sufficient for First Amendment purposes.

C. The Rejection Policy Leaves Leonard With No Alternative Means Of Exercising His Faith

As catalogued extensively above in Section II(A)2, denying Mr. Leonard access to *The Final Call* operates to prevent him from exercising his religion. *The Final Call* is itself a religious document, and is the only Nation of Islam specific item that Leonard has access to at David Wade Correctional Center. Rec. Doc. 47-6 at 114; Rec. Doc. 47-11 at 166-168. It is exclusively through *The Final Call* that he is able to order sectarian materials such as readings and cassette tapes, and read featured excerpts and messages from the Minister, which help him grow in his faith. Defendants' intimations aside, there is simply no other source that Leonard is aware of from which he can obtain materials necessary to practice his faith. Rec. Doc. 47-6 at 116-118.

This Court has held that one of the reasons it is permissible to deny adherents of a particular faith access to some of the items of their faith is precisely because they have access to religious literature. Baranowski v. Hart, 486 F.3d 112, 121 (5th Cir. 2007) (denial of Jewish services permissible where adherents had access to religious material in cells and in the chapel); Adkins, 393 F.3d at 564. In this instance, the confluence of the absence of any other Nation of Islam-specific resources and the banning of *The Final Call* operate to cut Leonard off from his

faith entirely. Because this was discussed extensively above, it will not be recounted here.

D. Accommodating Mr. Leonard's Rights Would Not Adversely Impact the Prison, Guards or Staff

Mr. Leonard and other prisoners received *The Final Call* for years at David Wade Correctional Center and other facilities without incident. Rec. Doc. 47-7 at 246-248; Rec. Doc. 47-12 at 42. Even after *The Final Call* began to be rejected, the Defendants never bothered to issue a directive that all back copies be confiscated. Rec. Doc. 47-17 at 44; Rec. Doc. 47-14 at 41; Rec. Doc. 47-13 at 118. Leonard had issues of *The Final Call* in his possession until September of 2008, at which time he was transferred within the facility. He retained the issues overtly in his cell, in spite of the cell being subjected to routine searches in that time. This is not insignificant. Williams v. Brimeyer, 116 F.3d 351, 354 (8th Cir. 1997)(where prison officials are inconsistent in the rejection of material without ill effect, it indicates an exaggerated response). If *The Final Call* constituted a genuine security threat one would think that the Defendants would have seized back issues, as they would any item of contraband. The fact that it has been available in prison systems nationwide for years without incident, and that Leonard retained his copies even after it was banned, without incident, indicates that there is no burden on Defendants in allowing this material into the facilities.

E. The Rejection Policy Constitutes an Exaggerated Response of Prison Officials

Defendants are reacting against the content of *The Final Call* based upon personal reactions to the philosophy contained therein. "We don't like to be referred, that is white people don't like to be referred to as a slave master's children. That's a negative, derogatory comment to the white people right there in that paragraph. So, see it just the dog just don't hunt." Rec. Doc. 47-13 at 71.

Obviously, all references to slavery and racial conflict cannot be banned in Louisiana prisons. Indeed, there was extensive testimony that periodicals such as *Time*, *U.S. News & World Report*, and other newspapers and magazines are regularly accepted. Rec. Doc. 47-13 at 119; Rec. Doc. 47-14 at 46; Rec. Doc. 47-17, 37-40. It is undisputed that these materials often contain articles covering the state of racial conflict in America, police brutality, the "for profit" prison systems, and similar. All major newspapers covered the racist dragging death in Jasper, Texas, as well as the recent racial conflict in Jena, Louisiana. Closer to home, on the day Leonard conducted depositions at David Wade Correctional Center, the Homer newspaper ran a front page article about white police shooting a black man, and the NAACP's response. Prisoners routinely watch such matters on Direct TV, which is provided in the prison system. Id. Prisoners walk around with double swastika and confederate flags tattoos. Rec. Doc. 47-18 at 68.

Likewise, other religious texts, which are admitted to DOC facilities, include outright calls to violence. In the Book of Deuteronomy, Moses commands the Israelites that if a person has worshipped untrue gods, "then ye shall bring forth to your gates that man or woman who has done this evil thing and ye shall stone that man or woman to death with stones." Rec. Doc. 47-13 at 121- 122. The Qu'ran similarly provides:

> The punishment for those who wage war against Allah and his messenger and strive with might and main for mischief through the land is through execution or crucifixion or the cutting off of hands and feet from the opposite sides or exile from the land.

Rec. Doc. 47-12 at 46-47. Obviously, no one would argue that these materials should be banned, but the fact is, they contain actual calls to violence. *The Final Call*, on the other hand, contains what may be controversial positions, but absolutely condemns violence.

The Muslim Program was written in the 1960s and was intended as a proposed solution to the black-white conflict of the time. Rec. Doc. 47-9 at 62, 74, 76. The historical context was such that people were being lynched and murdered. Rec. Doc. 47-9 at 62. There was an enormous battle occurring regarding whether our nation could integrate, and The Muslim Program was written in that context, and deals with those issues. Just as we do not burn history books, neither should we censor the teachings of the Nation of Islam that arose during that time period,

unless there is an actual threat emanating from them. Here, the Nation of Islam material does not advocate racial hatred; indeed, there is not even an allegation that they advocate violence. As outlined above, conversations about race occur in a myriad of contexts within the prison system. There are religious texts that are readily available which *in fact* call adherents to violence. It is an exaggerated response to reject a publication such as *The Final Call* where there is no evidence that there is any discord within the Louisiana system, despite the presence of this information, and therefore, that rejection is unconstitutional.

CONCLUSION

The decision of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have filed the foregoing electronically this 4th day of April, 2011, using the Court's CM/ECF system, which will automatically provide service to counsel for the defendant, the Louisiana Department of Justice.

/s/ Katie M. Schwartzmann
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Attorney for Plaintiff/ Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5TH CIR.R.32.2.7(b)(3). THE BRIEF CONTAINS:

   A. 13,774 words.

2. THE BRIEF HAS BEEN PREPARED:

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3. THE UNDERSIGNED HAS PROVIDED THE COURT WITH A cd-rom DISK CONTAINING THE ELECTRONIC VERSION OF THE BRIEF.

4. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN 5th CIR. R. 32.2.7, MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

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