UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MAC S. HUDSON and DERICK TYLER, Plaintiffs, v. KATHLEEN DENNEHY, in her official capacity as Commissioner of the Massachusetts Department of Corrections, Defendant.	)	CIVIL ACTION NO. 01-12145-RGS

PLAINTIFFS' TRIAL BRIEF

Plaintiffs Mac Hudson and Derick Tyler hereby submit this Trial Brief to outline the legal framework applicable to the three aspects of their religious exercise for which they seek relief and address some of the evidentiary issues that are likely to be raised at trial.

I. PARTIES AND FACTUAL BACKGROUND

The Plaintiffs, Mac Hudson and Derick Tyler, are seeking declaratory and injunctive relief in this civil rights action against the defendant, Kathleen Dennehy, the Commissioner of the Massachusetts Department of Corrections (the "DOC"). Messrs. Hudson and Tyler are adherents to the Islamic Faith, followers of the Quran and members of the Nation of Islam. They are also prisoners incarcerated by the Defendant at MCI-Cedar Junction, a state prison.

As part of their religious practice, Messrs. Hudson and Tyler must observe a set of dietary laws prescribed by Islamic law. Islamic law requires every Muslim to eat only foods that are "Halal," which is an Arabic word that translates to "lawful" or "permissible." A Muslim must refrain from eating food that is "Haram," or forbidden, and any food which contains ingredients that are Haram or which contains unknown or questionable ingredients.

Another part of Islamic religious practice is prayer, one of the five pillars of Islam. Messrs. Hudson and Tyler must pray five times daily, using a prayer rug. The Friday afternoon prayer must be performed as part of a community of Muslims. This prayer service, called "Jum'ah," includes a "Khutbah," which is similar to a sermon, and must be delivered by an Imam.

The DOC prevents the Plaintiffs from practicing these three requirements of Islam. The DOC does not provide the Plaintiffs with Halal food, and prohibits the Plaintiffs from possessing prayer rugs in their cells. The DOC has prevented the Plaintiffs, while in a special management unit ("SMU"), from participating in Jum'ah services, either in person or by viewing a broadcast of Jum'ah services over the prison's closed-circuit television network. Inmates in other units are permitted to view such religious broadcasts.[1]

II. LEGAL FRAMEWORK

The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") provides the legal framework under which the Court should analyze the evidence presented at trial RLUIPA prohibits the DOC from:

> impos[ing] a substantial burden on the religious exercise of [the Plaintiffs], 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).

[1] While in general population, Plaintiffs are permitted to attend communal Jum'ah services. However, the DOC does not provide an Imam to perform these services each and every Friday, and Plaintiffs and other inmates are often without an Imam to give the Khutbah.

The question of whether the DOC's policies impose a substantial burden on the Plaintiffs' religious exercise depends primarily on what the Plaintiffs' sincerely held religious beliefs are. The Court will hear testimony from Messrs. Hudson and Tyler on this issue. Once the Plaintiffs establish that the DOC's policies impose a substantial burden on their religious exercise, the burden shifts to the DOC to prove that its policies are the least restrictive means of furthering a compelling governmental interest.

As this Court wrote in its July 23, 2004 Memorandum and Order, "[t]he issue in free exercise cases, however, is not whether an adherent has correctly divined the religious commands of his faith, but whether his understanding of what his religion requires, however unorthodox, is based on a sincerely held religious belief. *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 834 (1989)." July 23, 2004 Mem. & Order at 5 n.3; *accord Int'l Society for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981) ("Sincerity analysis seeks to determine the subjective good faith of an adherent."). "Intrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses . . . The guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Gordon v. Pepe*, No. 00-10453-RWZ, 2004 U.S. Dist. LEXIS 16807, at *7–*8 (D. Mass. Aug. 24, 2004) (quoting *Thomas v. Review Bd. of Indiana Employment Sec.*, 450 U.S. 707, 715–16 (1981), ellipses in original).

"The term 'religious exercise' includes any exercise of religion, *whether or not compelled by, or central to*, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (emphasis added). The Plaintiffs contend, and the DOC appears to agree, that the DOC has imposed a substantial burden on the Plaintiffs' religious exercise if a DOC "policy has a tendency to coerce

the [Plaintiffs] into acting contrary to [their] religious beliefs." *See* Defendant's Mem. in Support of Motion for Summary Judgment at 7.

The plain text of the statute mandates that the Court apply strict scrutiny to any DOC policy that imposes a substantial burden on the Plaintiffs' religious exercise. *See Eagle Ins. Co v. Bankvest Capital Corp. (In re Bankvest Capital Corp.)*, 360 F.3d 291, 297 (1st Cir. 2004) ("[I]n any statutory interpretation case, we start with the text of the statute"). The language Congress chose—"compelling governmental interest" and "least restrictive means"—are terms of art that have well-established meanings in the law.

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Morrisette v. United States, 342 U.S. 246, 263 (1952).

If the text of the statute leaves any doubt as to whether this Court should apply strict scrutiny, the Court must resolve that doubt in favor of the Plaintiffs. RLUIPA provides that it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g). Finally, other courts have recognized that RLUIPA means what it says, stating that "RLUIPA applies strict scrutiny to government actions that substantially burden the religious exercise of institutionalized persons." *Benning v. Ga.*, 391 F.3d 1299, 1304 (11th Cir. 2004).[2] Compelling

[2] *See also Warsoldier v. Woodford*, 418 F.3d 989, 1001 n.13 (9th Cir. 2005) ("[U]nder RLUIPA, CDC's regulations must survive strict scrutiny analysis."); *Ragland v. Angelone*, No. 7:02-cv-00786, 2006 U.S. Dist. LEXIS 10277, at *6 (W.D. Va. March 15, 2006) ("RLUIPA returns the strict scrutiny test to prison litigation."); *cf. Grace United Methodist Church v. City of Cheyenne*,

governmental interests in the prison context are "discipline, order, safety, and security." *Cutter*, 544 U.S. at 723. Cost is not a compelling governmental interest.

A. The DOC's Failure to Provide Halal Meals to the Plaintiffs Violates RLUIPA

The DOC's refusal to provide Muslim inmates with Halal meals is exactly the sort of unjustified burden on religious exercise that Congress sought to outlaw when enacting RLUIPA. In *Cutter v. Wilkinson*, 544 U.S. 709, 716 n.5 (2005), the Supreme Court quoted the following excerpt from a Congressional hearing: "A State Prison in Ohio refused to provide Moslems with Hallal food, even though it provided Kosher food. It claimed Kosher food was available and Hallal food was not . . . . But, in fact, one firm produces TV dinners religiously acceptable to both Jews and Moslems. Had there been a way to force consideration of this product, the result in the case should have been different." (citing Hearing on Protecting Religious Freedom After *Boerne* v. *Flores*, before the Subcommittee on the Constitution of the House Committee on the Judiciary [hereinafter, "Protecting Religious Freedom"], 105th Cong., 2d Sess., pt. 3, p. 11, n. 1 (1998)).

The DOC marshals two arguments in support of its refusal to provide Halal meals. Neither is persuasive. First, the DOC contends that the alternative/vegetarian diet provided by the DOC should be acceptable to Muslims because it is meat-free. The evidence will show, however, that the Plaintiffs do not believe that the alternative/vegetarian diet is Halal under Islamic law, and that the DOC has failed to obtain Halal certification for its food supplies, kitchens, and meal preparation process. Moreover, the Plaintiffs will present expert testimony from a leading scholar in the area of Islamic dietary law, providing the Court with the context in

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427 F.3d 775, 794 (10th Cir. 2005) (holding that parallel provisions relating to land use in 42 U.S.C. § 2000cc(a) established strict scrutiny test).

which the Plaintiffs formed their religious beliefs regarding Islamic dietary law. This expert testimony will demonstrate that the DOC's repeated claims about what Muslims may and may not eat are borne of willful ignorance. Second, the DOC asserts that security and logistical concerns prevent it from providing the Plaintiffs with Halal meals. These concerns are directly at odds with the fact that the DOC provides other inmates with Kosher meals and other prison systems, including the Federal Bureau of Prisons, provide inmates with Halal meals. As noted in RLUIPA's legislative history, "while one still encounters claims by prison officials that they cannot possibly run a secure prison system and provide religiously acceptable diets, it is strange that a variety of other prison systems manage just that." Protecting Religious Freedom, 105th Cong., 2d Sess., pt. 3, p. 11. The evidence will demonstrate that the DOC's claimed security concerns are a pretext for the real reason it does not provide Halal meals: they are more expensive than the meals that the DOC serves.

B. The DOC's Ban on Inmates Possessing Prayer Rugs in Their Cells Violates RLUIPA

At some point in the 1990s, the DOC changed its policy so that any inmate who did not yet have a prayer rug in his cell would not be permitted to obtain one. Prayer rugs are an important part of a Muslim's daily prayers, and have been a part of Islamic tradition from the time of Muhammad. The DOC's change in policy places a substantial burden on the Plaintiffs, as it prevents them from performing their five daily prayers in accordance with Islamic religious practice.

The DOC attempts to minimize this aspect of Islamic religious practice by suggesting that all that is required for prayer is a clean surface. This argument misses the mark in view of the expansive definition of "religious exercise" that Congress and the President adopted in enacting RLUIPA. "The term 'religious exercise' includes any exercise of religion, *whether or*

not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (emphasis added). Thus, the use of prayer rugs is a religious exercise, and the burden that the DOC places on the Plaintiffs' use of prayer rugs is more than substantial: it is total. DOC staff enforce the DOC prayer rug ban, backed up by the power to impose disciplinary sanctions on the Plaintiffs, in the most coercive environment imaginable.[3]

The DOC cannot meet its burden of demonstrating that a policy preventing inmates from possessing prayer rugs in their cells is the least restrictive means of furthering a compelling governmental interest. The Bureau of Prisons allows inmates to possess prayer rugs. One of the DOC's vendors, the Keefe Group, provides a ready source of prayer rugs for sale to inmates. Any alleged security concerns can be addressed by the thorough procedures that the DOC has in place for searching inmate property, including items that are significantly larger and/or bulkier than prayer rugs, including blankets, mattresses, bathrobes and winter coats. In fact, the DOC's own witnesses will testify that any contraband hidden in a prayer rug could be discovered by careful searches.

C. The DOC's Failure to Provide Inmates Assigned to Segregated Units an Opportunity to Participate in Jum'ah Services Violates RLUIPA

The DOC does not appear to dispute that the Plaintiffs sincerely believe that, as Muslims, they must participate in Jum'ah services as a community every Friday afternoon. Nor does the DOC dispute that, when the Plaintiffs were confined to the Special Management Unit at Cedar Junction (the "SMU" or "Ten Block"), the Plaintiffs were unable to participate in Jum'ah services.

[3] The Defendant has filed a motion in limine relating to the Plaintiffs' claims for access to prayer rugs. For the reasons described in the Plaintiffs' Opposition to that motion, the Plaintiffs are not subject to any form of collateral estoppel relating to this issue.

For the reasons set forth in the Plaintiffs' Motion in Limine Regarding Jum'ah Services, the DOC is estopped from taking the position that denying Muslim inmates access to weekly Jum'ah services does not constitute a substantial burden on their free exercise of religion. The DOC has litigated, and lost, this exact issue in another case. Thus, the only genuine dispute with respect to the Plaintiffs' access to Jum'ah services is whether the DOC's policy is the least restrictive means of furthering a compelling governmental interest. However, the DOC's policies governing the Departmental Disciplinary Unit (the "DDU") and the DOC's past policies for the SMU reveal that the DOC's policy is not the least restrictive one possible.

Initially, the DOC attempted to justify its policy by submitting an affidavit from Sherry Elliot claiming that "10 Block is not wired for access to the prison's closed circuit television system." Second Affidavit of Sherry Elliot, ¶ 3. This evidence at trial, including the testimony of the Deputy Superintendent in charge of the SMU at MCI-Cedar Junction, will confirm that this statement is not true. In fact, when the DOC was forced to shut the DDU for repairs and housed some DDU inmates in the Ten Block building, those inmates were able to have televisions in their cells.

The DOC's new justification is that "[b]ecause SMU custody is designed to be short term and inmates may only possess limited amounts of personal property in their cells, SMU inmates are not permitted to have televisions." Def.'s Mem. in Support of Motion for Summary Judgment at 20. This justification cannot stand in view of the DOC's policy for the DDU, which permits inmates to possess televisions after a period of good behavior. Like the SMU, the DDU is not intended to serve as permanent housing for inmates, but rather for temporary terms of confinement between three months and ten years. Mitchell Aff. ¶ 4.

In response to the Plaintiffs' discovery requests, the DOC produced a report giving basic information, including date of discharge if applicable, for the 1,178 times that the DOC sent an inmate to the DDU for the period from April 1, 1992 to the time that the report was generated. *See* Departmental Disciplinary Unit Commitments and Releases, Marked Item I.[4] Of the 950 DDU commitments that had resulted in discharges at the time the DOC generated the report, 115 inmates (12.1%) left the DDU in fewer than 90 days, 310 inmates (32.6%) left the DDU in fewer than 180 days and 573 inmates (60.3%) left in less than one year. The DOC was unable to generate a comparable report for the SMU. However, the evidence will show that the average length of time that an inmate is confined to the SMU is approximately ninety days and that a number of inmates, including both of the Plaintiffs, were confined to the SMU for periods well in excess of 180 days.

Thus, there is no legitimate basis for the DOC's decision to allow televisions in the DDU, but not the SMU. Moreover, inmates in the SMU were permitted in the past to have televisions. In view of the past policy for the SMU and the current policy for the DDU, the Court should find that the DOC's policy is not the least restrictive means of furthering a compelling governmental interest.

III. TESTIMONY OF RANDY MUHAMMAD

The Plaintiffs have filed a motion in limine seeking to preclude the Defendant from calling Randy Muhammad as a witness. The Defendant has filed an opposition.

[4] The Defendant has objected to the admission of this document, arguing that it is irrelevant. For the reasons set forth in this paragraph, the document is relevant, and the Court should admit it as evidence.

IV. EVIDENTIARY ISSUES

A. Documents Concerning Requests from Other Inmates Are Relevant to the Claims in This Case

Marked Items J through Q are relevant to two issues before the Court. First, they are relevant to show that the Plaintiffs' believe that, as Muslims, they must observe Islamic dietary law and consume only Halal food and that the alternative/vegetarian diet is not Halal. Second, they are relevant to show that the DOC's purported security concerns are insubstantial and are a pretext for the real reason that the DOC refuses to provide Halal meals: cost.

These eight Marked Items contain 141 separate documents detailing the religious services requests of inmates other than the Plaintiffs.[5] All but one of these requests seeks a Halal diet.[6]

The Defendant has repeatedly argued that the DOC's alternative/vegetarian meals are adequate according to Islamic practices and suggested that the Plaintiffs' requests for Halal meals are somehow outside the mainstream of Islam. The sheer volume of requests by other Muslim inmates, however, suggests otherwise. Since RLUIPA was enacted, at least forty separate Muslim prisoners within the DOC have requested Halal meals, expressing their belief that the current meals offered by the DOC do not meet their religious needs. These requests are directly relevant to the Plaintiffs' position that: (a) Halal meals are required by Islam; (b) the alternative/vegetarian meals are not Halal, and (c) the DOC regularly denies requests for Halal meals.

[5] With one exception, the Defendant has stipulated to the authenticity of these documents and is willing to stipulate that they are records kept by the DOC in the ordinary course of its business. The Defendant has reserved objections as to authenticity and hearsay only with respect Marked Item L, which is a group of five documents that are not Department of Corrections forms or memoranda, but rather are letters from inmates making requests for Halal meals.

[6] One request is for Jum'ah services.

Moreover these documents also show that, in each case, the inmate's request was denied by the Commissioner, but often for reasons that contradict the Defendant's assertions to the Court. For example, one DOC form has a space for the requesting inmate's Superintendent to recommend whether to approve or deny the inmate's religious services request and to state the security reasons behind the recommendation. *See* Superintendent Recommendation Forms, Marked Item J. Multiple Superintendents have made recommendations to deny Halal meals but either: (a) stated that security concerns were "N/A" or not applicable, (b) left the security concerns section blank, or (c) stated that the request for Halal meals should be denied because the meals are "not cost effective." *See id.* Even more revealing is the fact that the Superintendent of MCI-Norfolk repeatedly recommended that the RSRC *approve* Halal meals because there are "no security concerns" associated with the request. *See id.* Thus, the eighteen forms that make up Marked Item J are highly probative of the DOC's motivation for denying Halal meals and directly contradict the Defendant's claimed rationale of security concerns.

Marked Item M contains additional documents showing that, for some requests for Halal meals, the Superintendent of MCI-Norfolk recommended approval and saw "no security concerns," but the RSRC ultimately denied those requests. *See* Marked Item M. Another document indicates that the reason for denying requests for Halal meals is that the "department provides a pork-free diet that is supported by case law." *See id.* This demonstrates that: (a) the DOC has remained willfully ignorant of the fact that "Halal" is not the same as "pork-free" and (b) the DOC is relying on pre-RLUIPA case law to make its decisions about religious requests. Likewise, Marked Items O through Q indicate that the DOC denied requests for Halal meals because the DOC decision-makers believe that *both* the pork-free main-line meal and the alternative/vegetarian meal meet the dietary needs of Muslims.

The DOC's willful blindness to the requirements of Islam, as expressed to them by numerous practitioners of the religion, is directly relevant to the Defendant's claim that its policy of refusing to provide Halal meals is the least restrictive means of achieving a safe and secure prison environment. Marked Items J through Q illustrate this willful blindness, and are therefore relevant and admissible.

B. The Bureau of Prisons Program Statements Are Admissible

Counsel for the Defendant has stated that the Defendant will stipulate to the authenticity of Marked Items G and H, which counsel for the Plaintiffs obtained from the Bureau of Prisons web site (http://www.bop.gov/). However, the Defendant contends that these program statements are inadmissible as hearsay and, in any event, irrelevant. The Defendant is incorrect.

A Bureau of Prisons ("BOP") program statement is admissible to prove what the BOP's policies and programs are. It is a public record, admissible under Federal Rule of Evidence 803(8)(A), which provides, in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . . (8) . . . statements . . . of public offices or agencies, setting forth (A) the activities of the office or agency . . . .

A cursory review of the BOP program statements reveals that they set forth the activities of the BOP, a public agency.

The BOP's policies and programs are directly relevant to whether the DOC's policies and programs are the least restrictive means of furthering a compelling governmental interest. The fact that the BOP is able to run a safe, secure system of prisons while feeding inmates Halal food and permitting inmates to possess prayer rugs under its "less restrictive" personal property policy is strong evidence that the DOC's policy is not the *least* restrictive means of furthering the DOC's interest in a safe and secure system of prisons. *Cf. Cutter*, 544 U.S. at 725–26 (noting

that BOP policies burdening religious exercise have been subject to strict scrutiny for years without compromising safety and security).

Respectfully Submitted,

MAC S. HUDSON and
DERICK TYLER,

By their attorneys,

/s/ Benjamin A. Goldberger
Michael Kendall (BBO#544866)
Benjamin A. Goldberger (BBO#654357)
Neal E. Minahan (BBO#661371)
McDermott Will & Emery LLP
28 State Street
Boston, MA 02109-1775
(617) 535-4000

Dated: January 7, 2007

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system and all attachments will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on January 8, 2006.

/s/ Benjamin A. Goldberger
Benjamin A. Goldberger

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