No. _____

In The Supreme Court of the United States

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

Petitioners,

versus

HENRY LEONARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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May 17, 2012

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QUESTIONS PRESENTED FOR REVIEW

In *Turner v. Safley,* 482 U.S. 78 (1987), this Court articulated a reasonable-accommodation standard by which prison free exercise claims are to be analyzed. Three years later, this Court announced a major shift in free exercise jurisprudence in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which set forth a neutrality standard for the analysis of free exercise claims. Applying the *Smith* neutrality standard, a burden on religious practice incidentally caused by a generally applicable law would, by definition, not constitute a free exercise violation. However, this Court has never definitively stated what effect *Smith* had on the *Turner* analysis, as *Smith* was not a prison case.

The questions presented are:

1. Should prisoner free exercise claims continue to be analyzed under the rationality standard set forth in *Turner v. Safley,* 482 U.S. 78 or, as other courts have recently held, under the neutrality standard set forth in *Employment Division v. Smith,* 494 U.S. 872?

2. If prisoner free exercise claims are to be analyzed under the rationality standard set forth in *Turner,* does that analysis include the strict scrutiny requirement fostered in pre-*Turner* jurisprudence?

QUESTIONS PRESENTED FOR REVIEW – Continued

The Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1 forbids federally-funded state prisons from "substantially" burdening a prisoner's religious exercise unless imposing that burden is the least restrictive means of furthering a compelling interest.

The questions presented are:

3. Does a prisoner's receipt of a newsletter published by a religious organization constitute a "religious exercise" as contemplated by RLUIPA and its progeny?

4. Is a prisoner's religious exercise "substantially burdened" where the ban on a newsletter did not curtail access to other materials or otherwise impact his religious practice?

5. Is a complete ban on a racially-inflammatory newsletter the least restrictive means of furthering the compelling government interest of ensuring security and order within a correctional facility?

LIST OF PARTIES

Petitioners: The State of Louisiana through the Department of Corrections; Richard Stalder in his official capacity as Secretary of the Department of Public Safety and Corrections;[1] Venetia Michael in her official capacity as Warden of the David Wade Correctional Center and Jackie Hamil in his official capacity as a corrections officer at the David Wade Correctional Center.

Parent Companies and Subsidiaries: Not applicable.

Respondent: Henry Leonard, an inmate incarcerated at David Wade Correctional Center in Claiborne Parish, Louisiana, serving a life sentence.

[1] Richard Stalder no longer holds the office of Secretary of the Department of Public Safety and Corrections; that office is presently held by James M. LeBlanc. Similarly, Venetia Michael is no longer the Warden of David Wade Correctional Center; that position is currently occupied by Jerry Goodwin.

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PETITION FOR WRIT OF CERTIORARI

Comes now Petitioners, the State of Louisiana on behalf of the Department of Public Safety and Corrections; Richard Stalder in his official capacity as Secretary of the Department of Public Safety and Corrections; Venetia Michael, in her official capacity as Warden of the David Wade Correctional Center; and Jackie Hamil in his official capacity as a corrections officer at the David Wade Correctional Center, by and through their undersigned counsel, and respectfully requests the Court grant their petition for a writ of certiorari to review a final judgment of the United States Court of Appeals for the Fifth Circuit (entered February 17, 2012) affirming the district court's order granting summary judgment in favor of Respondent, Henry Leonard.

OPINIONS BELOW

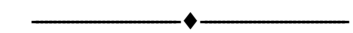
The opinion of the United States Court of Appeals for the Fifth Circuit (Reavley, Garza and Graves, JJ.) is not reported and is included in the Appendix. (App., infra at 1). The order of the United States Court of Appeals for the Fifth Circuit, denying a Petition for Rehearing En Banc, dated February 17, 2012, is not reported and is included in the Appendix. (App., infra at 40).

The U.S. District Court for the Western District of Louisiana (Walter, D.J.) rendered a Memorandum Ruling on March 31, 2010, granting, in part,

Respondent's motion for summary judgment, and denying Petitioners' motion for summary judgment. The Memorandum Ruling is not reported and is included in the Appendix. (App., infra at 10).

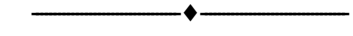
The district court rendered a Judgment on September 20, 2010, granting in part and denying in part plaintiff's motion for summary judgment. This judgment is not reported and is included in the Appendix. (App., infra at 8).

The next day, on September 21, 2010, the District Court rendered an Amended Judgment, awarding costs to Respondent. The Amended Judgment is not reported and is included in the Appendix. (App., infra at 5).



STATEMENT OF JURISDICTION

The judgment of the U.S. Court of Appeals for the Fifth Circuit was entered on November 10, 2011. *See* App., infra, at 1. On February 17, 2012, the Fifth Circuit entered a judgment denying rehearing. *See* App., infra, at 40. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. I provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, . . .

42 U.S.C. § 2000cc-1 provides, in relevant part:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

STATEMENT OF THE CASE

Respondent, Henry Leonard, is an inmate at David Wade Correctional Center (DWCC), located in Claiborne Parish, Louisiana, serving a life sentence. DWCC is a division of the Department of Public Safety and Corrections (DOC). For the last twenty-five years – since before he was incarcerated – Leonard has been a member of the Nation of Islam (NOI), a

variety of Islam that embraces black superiority and supremacy as fundamental tenets.

The only affirmative limitation that DOC has ever imposed on Leonard's religious practice is its statewide rejection of *The Final Call*, a weekly newsletter published by the NOI. Reprinted on the back cover of each issue is "The Muslim Program," a statement of beliefs that sets forth the "national platform of the Nation of Islam." Leonard was initially permitted to receive *The Final Call* in DWCC, but in 2005 the DOC implemented a statewide ban on the periodical based on each issue's inclusion of "The Muslim Program," which the DOC deemed to violate Department Regulation C-02-009, which, as revised in 2007, permits the refusal of printed materials containing "racially inflammatory material or materials that could cause a threat to the inmate population, staff and security of the facility." *The Final Call,* along with publications of white supremacist, anarchist, and white nationalist groups – was placed in "Category 2" of publications that are to be reviewed on a case-by-case basis for compliance with the regulation. This decision implements a statewide prison management policy designed to minimize polarizing influences that may create tensions among inmates. DOC, however, attempted to avoid a permanent ban on *The Final Call*, when Warden Burl Cain, warden of Louisiana State Penitentiary, sent a request to NOI

headquarters seeking a "corrections version"[2] of the newsletter that omitted "The Muslim Program." But the NOI did not respond. Thus, lacking any other practical means to bring *The Final Call* into conformance with its regulations, DOC has continued to reject each issue.

On May 9, 2006, Leonard filed suit in the United State District Court for the Western District of Louisiana seeking an injunction forcing DOC to resume distribution of *The Final Call*. Leonard alleged that the prison's restriction of the publication violated the Free Exercise Clause of the First Amendment of the United States Constitution and the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1 (RLUIPA). The court partially granted defendants' motion to dismiss, dismissing Leonard's claims for punitive and compensatory damages, RLUIPA claims against defendants in their individual capacities, and his claims against Secretary Stalder in his individual capacity, leaving only Leonard's claim for injunctive relief against the defendants in their official capacities.

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[2] Warden Cain had requested a "corrections version" of *The Final Call* – a version of the newsletter in which "The Muslim Program" would be redacted and would therefore be suitable for distribution in correctional facilities. Throughout this litigation, Leonard's counsel and the courts have erroneously referred to this requested version as a "*corrected* version" as opposed to a "*corrections* version."

The parties subsequently filed cross-motions for summary judgment. The court denied defendants' motion, and granted Leonard's motion, in part. Specifically, the court granted Leonard's request for prospective injunctive relief, ordering DWCC to deliver future issues of *The Final Call* and requested briefing on the issue of liability of Defendant, both individually and officially, and whether damages and/or attorney's fees are appropriate in this case.

The court subsequently entered a final judgment on September 20, 2010 granting summary judgment and awarding attorney fees to Leonard; the following day it issued an amended judgment awarding him costs. Defendants timely appealed to the United States Court of Appeals for the Fifth Circuit. The court relied primarily on *Walker v. Blackwell,* 411 F.2d 23 (5th Cir. 1969), concluding that the "The Muslim Program" is not racially inflammatory. The court then applied the balancing test from *Turner v. Safley*, 482 U.S. 78 (1987), concluding that the defendants had violated Leonard's free exercise rights. As for the RLUIPA claim, the court relied on *Sutton v. Rasheed,* 323 F.3d 236 (3d Cir. 2003), for its finding that receipt of *The Final Call* is an essential part of the Nation of Islam (NOI) faith. The court then reasoned that DOC's rejection of the publication substantially burdened Leonard's religious practice because it was "the only source from which Plaintiff can order religious texts and periodicals, which amounts to a denial of NOI religious literature which is distinct from orthodox Islam." (App. 37). The Court then

found that the ban was "an exaggerated response to DWCC's (David Wade Correctional Center) concerns about racially inflammatory material," and therefore was not the least restrictive means of achieving the interests of order and security. (App. 38).

The Fifth Circuit affirmed, agreeing that banning *The Final Call* in its entirety is not justified because it regularly includes "The Muslim Program." In so doing, however, the Fifth Circuit distanced itself from the district court's finding, stating that "we do not agree that 'The Muslim Program' is not free of racially inflammatory language." (App. 4). Nonetheless, the Fifth Circuit stated that the record does not justify the ban "where an objectionable page could be deleted." (App. 4). The Fifth Circuit denied rehearing on February 17, 2012.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Ruling Affirming the District Court's Analysis of Leonard's Free Exercise Claims Applying the Rationality Standard of *Turner v. Safley*, 482 U.S. 78 (1987) Contradicts This Court's Application of the Neutrality Standard in *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).

In *Turner v. Safley*, 482 U.S. 78 (1987), this Court articulated a reasonable-accommodation test for

analyzing prison free exercise claims. However, *Turner* is no longer the appropriate standard. To be sure, just three years after its decision in *Turner*, this Court announced a sea change in free exercise jurisprudence, in *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), articulating a neutrality standard by which free exercise claims would henceforth be governed whereby a burden on religious practice, incidentally caused by a generally applicable law would, by definition, not constitute a free exercise violation.

Since *Smith* did not contemplate religious practices within the prison context, this Court did not address what effect its holding in *Smith* would have on the *Turner* analysis. In the wake of this standard and no guidance from this Court on *Smith*'s applicability in prisoner cases, it has been incumbent on the several circuits to determine the relevance, if any, of the *Turner* factors in light of *Smith.* This void has permitted diverse treatment of *Smith,* resulting in a schism among the several circuits.

Three circuits – the Fourth, Seventh and D.C. Circuits – have expressly rejected the *Turner* factors in the context of prisoner free exercise claims in favor of *Smith*'s neutrality standard.[3] Four circuits,

[3] *See, e.g., Smith v. Ozmint*, 578 F.3d 246, 251 (4th Cir. 2009) (explaining in a prisoner case "that if [burdening] the exercise of religion . . . is not the object of [a provision] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment [Free Exercise Clause] has not been offended") (quoting *Smith*, 494 U.S. at 878); *Kaemmerling*

(Continued on following page)

including the Second, Third, Tenth and Eleventh, while not directly addressing this issue, have signaled that *Smith*'s neutrality principle has replaced the *Turner* factors.[4] The Sixth, Eighth, and Ninth Circuits, in contrast, have stated that *Smith* does not replace *Turner*.[5]

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v. Lappin, 553 F.3d 669, 677 (D.C. Cir. 2008) (rejecting prisoner's free exercise challenge to prison DNA harvesting policy, because the regulation was neutral and generally applicable under *Smith*); *Borzych v. Frank*, 439 F.3d 388, 390 (7th Cir. 2006) (explaining that free exercise "does not require the accommodation of religious practice: states may enforce neutral rules" (citing *Smith* and *O'Lone v. Estate of Shabazz,* 482 U.S. 342 (1987)).

[4] *See Kay v. Bemis*, 500 F.3d 1214, 1219 n.3 (10th Cir. 2007) (suggesting "unresolved tension" between *Turner* and *Smith* but declining to address issue because it was not raised by government); *Boles v. Neet*, 486 F.3d 1177, 1181 (10th Cir. 2007) (suggesting *Turner* is "sharply at odds with the test formulated three years later in [*Smith*]" but declining to address issue for same reason); *Salahuddin v. Goord*, 467 F.3d 263, 274 n.3 (2d Cir. 2006) (declining to explore "what effect the Supreme Court's decision in [*Smith*] has on the *O'Lone* standards for judging prisoner free exercise claims because neither party argues that *Smith* changes the analysis"); *Fraise v. Terhune*, 283 F.3d 506, 515 n.5 (3d Cir. 2002) ("It is not clear that *Turner* factors should be considered before determining whether a contested prison regulation would violate the constitutional right that the inmate invokes if the regulation were applied to persons not in prison."); *Hakim v. Hicks*, 223 F.3d 1244, 1247 n.3 (11th Cir. 2000) (declining to decide whether *Smith* "requires application of a different standard" because government did not raise issue).

[5] *See Flagner v. Wilkinson*, 241 F.3d 475, 481 (6th Cir. 2001); *Ward v. Walsh*, 1 F.3d 873, 877 (9th Cir. 1993); *Salaam v. Lockhart*, 905 F.2d 1168, 1171 n.7 (8th Cir. 1990) (each holding that *Smith* did not affect *Turner* analysis).

The Fifth Circuit, however, has not yet directly determined *Turner*'s relevance in light of *Smith*. As a result, the various district courts within the Fifth Circuit have rendered inconsistent, and often conflicting, rulings in their respective determinations of free exercise claims in prisoner cases.[6] Even within individual districts, the courts' rulings have applied *Smith* inconsistently, sometimes opting for *Smith*'s neutrality test, while at other times reverting back to the *Turner* factors. This lack of uniformity among the district courts of the Fifth Circuit alone requires

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[6] The Western District of Louisiana has applied *Smith, Turner*, and a combination of both *Smith* and *Turner* to free exercise claims in prisoner cases. *See Omar v. Casterline,* 414 F. Supp. 2d 582 (W.D.La. 2006) (applied *Smith*'s neutrality test to free exercise claim); *Combs v. Correction Corp. of America*, 977 F. Supp. 799 (W.D.La. 1997) (specifically finding that the Supreme Court "abolished the compelling government interest test in free exercise cases where a law is neutral and of general applicability."); *Hill v. Pylant*, 07-218, 2008 WL 544251 (W.D.La. 2008) (applied *Smith* to Religious Freedom Restoration Act of 1993 ("RFRA") claims and applied *Turner* factors to free exercise claims). The Eastern District of Louisiana has applied *Smith* to free exercise claims in prisoner cases: *Doe v. Louisiana Supreme Court,* 91-1635, 1992 WL 373566 (E.D.La. 1992) (applied *Smith* to free exercise claim, without addressing *Turner*). Neither the Middle District of Louisiana nor any district court in Mississippi have considered free exercise claims in prisoner cases since the Supreme Court's decision in *Smith* in 1990. Eastern District of Texas: *Lewis v. Scott*, 910 F. Supp. 282 (E.D.Tex. 1995) (applied *Smith* neutrality test to free exercise claim); *Thunderhorse v. Pierce*, 418 F. Supp. 2d 875 (E.D.Tex. 2006) (applied *Turner* factors to free exercise claim): *Massingill v. Livingston*, 1:05-CV-785, 2006 WL 2571366 (E.D.Tex. 2006) (relied on pre-*Smith* Fifth Circuit ruling, which applied *Turner* factors).

clarification by this Court. The instant case presents this Court the prime opportunity to define its position on this issue and thereby resolve the question of the proper standard by which free exercise claims should be evaluated in the context of prison cases.

Accordingly, this Court's consideration is necessary in this matter, so as to definitively settle this legal question thus obviating further ambiguities in the application of *Smith* and ensure uniform and consistent application of the proper legal standard among the district and appellate courts.

II. The Fifth Circuit's Ruling Affirming the District Court's Application of Pre-*Turner* Strict Scrutiny in Requiring Prison Officials to Link *The Final Call* to Violence Contradicts This Court's Holding in *Turner.*

Even if *Turner* is the proper standard by which free exercise claims in prisoner cases are to be analyzed, the Fifth Circuit's decision, by virtue of its affirmation of the district court's ruling, conflicts with the factors set forth by this Court in *Turner,* thus warranting the granting of writs in this matter. Although the Fifth Circuit's opinion ruling does not expressly address the district court's *Turner* analysis, its failure to correct the district court's gross misapplication of *Turner* factors in itself constitutes error that places this matter in direct conflict with precedent of the Fifth Circuit as well as that of this Court. Additionally, the Fifth Circuit's questioning at oral

argument of this matter incorrectly focused on factors that not only predate but were also overturned by *Turner*.

In its *Turner* analysis, the district court erroneously reverted to the strict scrutiny test from pre-*Turner* case law, specifically *Walker v. Blackwell,* 411 F.2d 23 (5th Cir. 1969), wherein the Fifth Circuit applied strict scrutiny to a prison restriction on racially inflammatory literature. The Fifth Circuit in *Walker* required a "compelling and substantial public interest requiring the subjugation of the right," 411 F.2d at 25, requiring that prohibited material "directly incite" physical violence, 411 F.2d at 28-29. However, in *Turner,* this Court subsequently rejected strict scrutiny in the prison context and promulgated a reasonableness test. *See Thornburgh v. Abbott*, 490 U.S. 401, 417 (1989) (clarifying that materials need not be " 'likely to lead to violence' provided they pose an 'intolerable risk' of disorder").

Nevertheless, in its analysis of the first of the four *Turner* factors, the district court incorrectly applied strict scrutiny in requiring a direct link of violence to the prohibited material when it stated that "Defendants were unable during briefing or oral argument to provide an example of an instance of violence or unrest in an institutional setting that could be attributed to *The Final Call*." (App. 30). The district court required a direct link to physical violence, which simply is not the appropriate test. The Fifth Circuit, on appeal, did not even address whether the district court applied the correct standard, despite

the fact that that very issue was presented as an assignment of error and both sides of the argument were briefed extensively by appellants and appellee, as well as in an *amicus* brief.[7]

This misapplication of the pre-*Turner* standard was not remedied on appeal by the Fifth Circuit, but rather compounded by the Fifth Circuit's questioning during oral argument. Throughout oral argument of this matter, the Fifth Circuit's pointed questions focused on the existence of evidence of violence or discord resulting from *The Final Call*, despite counsel's response that this Court in *Thornburgh* previously stated that materials need not be "'likely to lead to violence,' provided they do not pose an 'intolerable risk' of disorder." 490 U.S. at 417. Nonetheless, the Fifth Circuit continued with its line of questioning as to evidence of a link to violence, coupled with its affirmation of the district court's ruling, making clear that both courts incorrectly applied an obsolete pre-*Turner* standard. As such, the Fifth Circuit's erroneous decision, as well as its misguided questioning at oral argument, only compounds the errors of the court below, as they directly contradict decisions of the Fifth Circuit and this Court. Without guidance from this Court, the Fifth Circuit's decision will create further inconsistencies within free exercise caselaw and foster an improper extrapolation of the

[7] An *amicus* brief was submitted to the Fifth Circuit by the Becket Fund for Religious Liberty on behalf of Leonard.

strict scrutiny requirement into the *Turner* rationality standard.

III. The Fifth Circuit's Ruling Affirming the District Court's Analysis of RLUIPA Claims Contradicts the Holdings of the Fifth Circuit, Other Circuits and This Court.

The Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1 forbids federally-funded state prisons from "substantially" burdening a prisoner's religious exercise unless imposing that burden is the least restrictive means of furthering a compelling interest. 42 U.S.C. § 2000cc-1. The Fifth Circuit recently articulated how claims asserted pursuant to Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (RLUIPA) are to be analyzed. *Mayfield v. Tex. Dep't of Crim. Justice,* 529 F.3d 599, 612-13 (5th Cir. 2008). The first question is whether the burdened activity is "religious exercise;" the second is whether the burden on it is "substantial," which requires a case-by-case fact-specific inquiry. *Id.* (quoting *Adkins v. Kaspar,* 393 F.3d 559, 570-71 (5th Cir. 2004)). If the prisoner demonstrates a substantial burden, the government must then show that "its action was supported by a compelling interest and that the regulation is the least restrictive means of carrying out that interest." *Mayfield,* 529 F.3d at 613.

The Fifth Circuit upheld the district court's inaccurate reasoning that (1) "receipt of *The Final Call*

is an essential part of the NOI faith" (App. 36); (2) restricting *The Final Call* substantially burdens Leonard's exercise because it "amounts to a denial of NOI religious literature" (App. 37); and (3) although the government has an "obviously compelling" interest in preventing race-based prison disorder, banning *The Final Call* for including "The Muslim Program" is an "exaggerated response" and therefore not the least restrictive means of furthering the interest. The district court found that the literature restriction, as applied, violated RLUIPA. In affirming the district court's misapplication of RLUIPA, the Fifth Circuit's decision conflicts with the holdings of this Court, other U.S. Courts of Appeals and its own prior rulings.

1. "Religious Exercise"

The Fifth Circuit's decision is devoid of any language suggestive of a review of the district court's erroneous analysis of Leonard's RLUIPA claim. In declining to even address the district court's flawed application, the Fifth Circuit has endorsed an improper expansion of the criteria used in the RLUIPA analysis that is inconsistent with the precedent set by that Circuit as well as other circuits. RLUIPA defines "religious exercise" 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). The district court characterized the relevant religious exercise as "the *receipt* of *The Final Call*." (App. 36, emphasis added). However, nothing in the record

supports the court's conclusion that the actual receipt of the publication constitutes a religious exercise.

Nothing in the record indicated that the actual receipt of *The Final Call* is part and parcel of Leonard's "religious exercise." For instance, NOI is distinguishable from the "Pan-Afrikan" religion at issue in *Washington v. Klem,* 497 F.3d 272 (3d Cir. 2007), which required the ritual reading of four Pan-Afrikan texts daily. *See id*. ("the books are in essence the religion itself") (quotes omitted), *id.* at 275 ("his books and his religion are one and the same"), *id.* at 282. Unlike *Klem,* Leonard has never asserted that the physical receipt or reading of *The Final Call* is indistinguishable from the exercise of NOI. Rather, he urges only that *The Final Call* contains important theological content (principally, "The Muslim Program") and that the newsletter is a source for obtaining *other* NOI materials.

If, on the other hand (and as the record indicates), *The Final Call* is but a means of obtaining information about NOI religious beliefs, standards, and exercises, then at most, *The Final Call* merely facilitates the exercise of NOI by reiterating its theological basis in "The Muslim Program." Indeed, the erroneous characterization of Leonard's religious exercise as "receipt of *The Final Call*" skewed the district court's RLUIPA analysis. (App. 36). The district court's improper expansion of the term "religious exercise" to include the mere receipt of this newsletter – and the Fifth Circuit's endorsement thereof – is inconsistent with the Fifth Circuit's prior rulings.

2. "Substantial Burden"

The Fifth Circuit's ruling additionally fails to recognize or reverse the district court's departure from the Fifth Circuit's careful instructions about how to apply the "substantial burden" test, resulting in additional disparities with that Circuit's own precedent. A burden on a religious exercise is "substantial" if the government regulation "truly pressures the adherent to significantly modify his religious behavior and significantly violates his religious beliefs. . . ." *Mayfield,* 529 F.3d at 613 (quoting *Adkins*, 393 F.3d at 570). The district court did not analyze the substantial burden in these terms, but relied on its *Turner* conclusion, incorrectly finding that "*The Final Call* remains the only source from which Plaintiff can order religious texts and periodicals, which amounts to a denial of NOI religious literature which is distinct from orthodox Islam." (App. 37). Rather than apply the *Turner* standard, the lower court should have properly examined whether restriction of Leonard's access to *The Final Call* truly pressured him to significantly modify his religious behavior such that it significantly violates his religious beliefs. The Fifth Circuit has recently stated that *Turner* does not present the standard of review for a RLUIPA claim. *Odneal v. Pierce*, 324 F. Appx. 297, 300 (5th Cir. 2009). Thus, in permitting the District Court to inject the *Turner* standard into its RLUIPA analysis, the Fifth Circuit's ruling has allowed inconsistencies with its own precedent, that of other circuits as well as this Court's prior rulings. (*See Sossamon v. Texas*, 131

S.Ct. 1651, 1791 L.Ed.2d 700 (2011); *Cutter v. Wilkinson,* 544 U.S. 709, 125 S.Ct. 2113 (2005)).

Even if the Fifth Circuit considered the receipt of NOI material as the religious exercise, the record includes Respondent's own admission that the restriction of *The Final Call* does not entirely prevent him from accessing other NOI texts, as he has other means of accessing NOI literature. While the restriction on *The Final Call* may be an inconvenience, it does not present a "substantial burden" on Leonard's NOI practice, as previously contemplated by the Fifth Circuit. To be sure, the Fifth Circuit failed to even recognize that the district court did not require Leonard to demonstrate a link between *The Final Call* and any pressure, whether real or perceived, to alter or violate his NOI beliefs in any manner whatsoever. The Fifth Circuit further erred in permitting the district court's ruling to stand when Leonard failed to carry his burden of proof, falling short of demonstrating either a religious exercise or substantial burden. The Fifth Circuit's silence on this issue, and general affirmation of the district court's ruling, stands in stark contrast to the jurisprudential holdings of the Fifth Circuit and this Court.

Moreover, the Fifth Circuit allowed the district court's misapplication of the precedential holding of another circuit to go unchecked when it did not reverse the district court's improper reliance on *Sutton v. Rasheed*, 323 F.3d 236 (3d Cir. 2003). The district court, citing *Sutton, id.,* found that receipt of *The Final Call* is an essential part of the NOI faith. The

Fifth Circuit's ruling fails to recognize that *Sutton, id.,* did not specifically address a restriction on *The Final Call* newsletter, but focused on the deprivation of the entire NOI canon.

3. Compelling Interest/Least Restrictive Means

Even if Leonard had successfully established that the restriction on *The Final Call* substantially burdened his exercise of NOI, the restriction would still be valid under RLUIPA since it is the "least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000cc-1(a). Neither the Fifth Circuit nor the district court disputed that the governmental interest behind the regulation is anything but compelling, as "[t]he highest priority of a prison is to maintain order and security." (App. 37). This Court has warned that RLUIPA must be applied "with particular sensitivity to security concerns," and that it does not "elevate accommodation of religious observances over an institution's need to maintain order and safety." *Cutter v. Wilkinson*, 544 U.S. 709, 722, 125 S.Ct. 2113 (2005). This Court further advised that courts must "recognize the government's countervailing compelling interest in not facilitating inflammatory racist activity that could imperil prison security and order." *Id.* at 723. This Court has previously opined that "publications can present a security threat . . . which, even if they did not lead directly to violence, would exacerbate tensions and lead indirectly to disorder." *Thornburgh,* 490 U.S. at 416.

The inquiry then turns to whether Regulation C-02-009, as applied to *The Final Call,* is the least restrictive means of furthering that compelling interest. The district court and the Fifth Circuit do not appear to have recognized that a state actor need only consider those "less restrictive alternatives [that] would be at least as effective in achieving [its] legitimate purpose." *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 665 (2004) (emphasis added). Nevertheless, the district court reasoned that the complete banning of the publication because of the inclusion of "The Muslim Program" is an "exaggerated response to DWCC's concerns about racially inflammatory material" and concluded that the regulation violates RLUIPA "because its implementation is not the least restrictive means." (App. 38). Neither Leonard nor the district court identified any alternatives to the complete ban.

The Fifth Circuit's finding seemingly disregards the DWCC's countervailing compelling interest of ensuring security and order within its facility. So too did the Fifth Circuit discount the express holdings of this Court in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), as well as those of its sister circuits that have characterized publications as security threats, however indirect.

The Fifth Circuit's ruling, however, did include a suggestion that the "objectionable page could be deleted." (App. 4). Nevertheless, this recommendation also conflicts with this Court's ruling in *Thornburgh*, 490 U.S. at 418-19, upholding an "all-or-nothing"

literature policy because redaction could cause prisoner discontent and unnecessary burden on staff. Moreover, other circuits have also rejected redaction policies as being unreasonable. *See Borzych v. Frank*, 439 F.3d 388, 391 (7th Cir. 2006).

The Fifth Circuit's flawed reasoning was met directly at oral argument, during which the Fifth Circuit's questioning turned to the feasibility of redacting offending portions of the publication without a complete ban. It was explained that such a policy was not feasible as manpower would not permit redaction of the weekly newsletter. For this reason, the Fifth Circuit's finding that regulation is not the least restrictive means in achieving DWCC's compelling governmental interest stands in contradiction to both Fifth Circuit and Supreme Court rulings and this Court should grant certiorari in this matter.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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**Counsel of Record*

Attorneys for Petitioners

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 10-30982

D.C. Docket No. 5:07-CV-813

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 Corrections & Public Safety; VENETIA MICHAEL, individually and in her offical [sic] capacity as Warden of David Wade Correctional Center; JACKIE HAMIL, individually and in his official capacity as a correctional officer at David Wade Correctional Center,

Defendants-Appellants

Appeal from the United States District Court
for the Western District of Louisiana, Shreveport

Before REAVLEY, GARZA, and GRAVES, Circuit Judges.

JUDGMENT

(Filed Nov. 10, 2011)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-30982

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 Corrections & Public Safety; 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 correctional officer at David Wade Correctional Center,

Defendants-Appellants

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 5:07-CV-813

(Filed Nov. 10, 2011)

Before REAVLEY, GARZA, and GRAVES, Circuit Judges.

PER CURIAM:*

The judgment of the district court is affirmed for the following reason:

The Final Call is objectionable to the prison officials only because it regularly includes "The Muslim Program." We agree with the district court that banning the entire newspaper is not justified for that reason. While we do not agree that "The Muslim Program" is free of racially inflammatory language, the record here does not justify this order under circumstances where an objectionable page could be deleted and where this page has been included in all prior issues of the newspaper and is and always has been available to appellee.

AFFIRMED.

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* Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

HENRY LEONARD	CIVIL ACTION NO: 07-0813
VERSUS	JUDGE DONALD E. WALTER
STATE OF LOUISIANA, ET AL.	MAGISTRATE JUDGE HORNSBY

AMENDED JUDGMENT

(Filed Sep. 21, 2010)

Plaintiff's Motion for Summary Judgment [Doc. #47] is hereby **GRANTED IN PART** and **DENIED IN PART**.

This Court held in a previous order that the denial of access to *The Final Call* based solely on the inclusion of "The Muslim Program" is a violation of the First Amendment and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Therefore, Plaintiff's RLUIPA and 42 U.S.C. § 1983 claims against the Secretary of the Louisiana Department of Corrections, James M. LeBlanc (substituted for previous Secretary, Richard Stalder), Warden Venetia Michael, and Lt. Col. Jackie Hamil, in their official capacities, are hereby **GRANTED**.

Plaintiff's claims for nominal damages against Lt. Col. Hamil and Warden Michael, in their individual capacities, for violating his First Amendment

rights pursuant to 42 U.S.C. § 1983 are **GRANTED**. Lt. Col. Jackie Hamil is **ORDERED** to pay Plaintiff the amount of one dollar and zero cents ($1.00). Warden Venetia Michael is **ORDERED** to pay Plaintiff the amount of one dollar and zero cents ($1.00).

Plaintiff's claim for punitive damages against Warden Michael in her individual capacity pursuant to 42 U.S.C. § 1983 is **DENIED**.

Having found that Plaintiff's rights under the First Amendment and RLUIPA were violated, the Court hereby awards attorney's fees pursuant to the provisions of 42 U.S.C. § 1997e(d). The Louisiana Department of Corrections and Secretary James M. LeBlanc are hereby **ORDERED** to pay attorney's fees to Nelson W. Cameron in the amount of eleven thousand five hundred ninety eight dollars and four cents ($11,598.04). The Louisiana Department of Corrections and Secretary James M. LeBlanc are hereby **ORDERED** to pay attorney's fees to Katie M. Schwartzmann in the amount of seventy three thousand eight hundred seventy eight dollars and eighteen cents ($73,878.18).

It is **ORDERED** that Plaintiff, the prevailing party, is awarded costs in an amount to be determined by the Clerk for the Western District of Louisiana.

THUS DONE AND SIGNED, this 21 day of September, 2010.

/s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

HENRY LEONARD	CIVIL ACTION NO: 07-0813
VERSUS	JUDGE DONALD E. WALTER
STATE OF LOUISIANA, ET AL.	MAGISTRATE JUDGE HORNSBY

JUDGMENT

(Filed Sep. 20, 2010)

Plaintiff's Motion for Summary Judgment [Doc. #47] is hereby **GRANTED IN PART** and **DENIED IN PART**.

This Court held in a previous order that the denial of access to *The Final Call* based solely on the inclusion of "The Muslim Program" is a violation of the First Amendment and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Therefore, Plaintiff's RLUIPA and 42 U.S.C. § 1983 claims against the Secretary of the Louisiana Department of Corrections, James M. LeBlanc (substituted for previous Secretary, Richard Stalder), Warden Venetia Michael, and Lt. Col. Jackie Hamil, in their official capacities, are hereby **GRANTED**.

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THUS DONE AND SIGNED, this 20 day of September, 2010.

/s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

HENRY LEONARD	CIVIL ACTION NO: 07-0813
VERSUS	JUDGE DONALD E. WALTER
STATE OF LOUISIANA, ET AL.	MAGISTRATE HORNSBY

MEMORANDUM RULING

(Filed Mar. 31, 2010)

Before the Court are cross motions for summary judgment filed by the Plaintiff [Doc. #47] and the Defendants [Doc. #45]. For the reasons assigned herein, Plaintiff's motion [Doc. #47] is hereby **GRANTED IN PART**; Defendants' Motion for Summary Judgment [Doc. #45] is **DENIED**; Plaintiff's Motion for Leave to file Motion to Strike [Doc. # 52] is **DENIED AS MOOT**.

STATEMENT OF THE CASE

Henry Leonard ("Plaintiff") is a prisoner housed at the David Wade Correctional Center ("DWCC"). Plaintiff alleges that he has been a member of the Nation of Islam ("NOI") since 1985. Plaintiff subscribed to *The Final Call,* a publication of the NOI, but DWCC denied him access to and receipt of the publication beginning May 16, 2006. Prison officials

allegedly banned *The Final Call* asserting that the publication interferes with rehabilitation of inmates and/or the maintenance of internal security. Plaintiff maintains that there are no other NOI materials available in the DWCC library or chapel, and that *The Final Call* is the only available source to acquire additional materials related to his religion. Plaintiff denies that the publication poses any threat to order or safety at DWCC.

Plaintiff names as Defendants the State of Louisiana, through the Department of Public Safety and Corrections ("DOC"); Secretary Richard Stalder; DWCC Warden Venetia Michael; and Lt. Col. Jackie Hamil, a corrections officer at DWCC. The complaint asserts a claim under 42 U.S.C. §1983 on the grounds that denial of *The Final Call* violates Plaintiff's right to free exercise of his religion guaranteed under the First and Fourteenth Amendments. Plaintiff asserts a second claim under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). Additionally, Plaintiff seeks injunctive relief and damages.

I. Procedural Background

Defendants filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). [Doc. #13]. This Court adopted the Report and Recommendation of Magistrate Hornsby, which granted in part and denied in part Defendants' Motion to Dismiss. [See Docs. #21 and 23]. Plaintiff's claims

against the Defendants in their official capacities were limited to prospective injunctive relief. [Doc. #23]. Plaintiff's RLUIPA claims against Stalder, Michael, and Hamil in their individual capacities were dismissed. *Id.* Plaintiff's claims for compensatory damages were dismissed with prejudice pursuant to 42 U.S.C. §1997e(e). *Id.* Finally, Plaintiff's section 1983 claims against Stalder in his individual capacity were dismissed based on qualified immunity. *Id.*

Plaintiff's remaining claims consist of the following: (a) RLUIPA claims against the State of Louisiana, as well as Stalder, Michael and Hamil in their official capacities only; (b) a 42 U.S.C. §1983 claim against the state of Louisiana, Stalder in his official capacity only, and Michael and Hamil in their official and individual capacities; (c) injunctive relief; (d) nominal and punitive damages and (e) attorney's fees.

The parties agreed with the Court that this matter only involves issues of law and could be decided based on the pending cross-motions for summary judgment and evidence therein. [Doc. #58]. The Court heard oral arguments from both parties. [Doc. #62].

II. Factual Background

Plaintiff is a prisoner housed at DWCC since the beginning of July 2004. [Doc. #47-2, Plaintiff's Uncontested Material Issues of Fact]. He is a former Baton Rouge police officer who is incarcerated for the murder of his estranged wife's boyfriend. [Doc. #47, Ex. 1 at 13-15, 19]. Because he is a former member

of law enforcement, Plaintiff is housed in the N-5 protective work unit, separate and apart from the general population. [Doc. #45-2, Defendant's Statement of Uncontested Facts; Doc. #42-2, Plaintiff's Uncontested Material Facts]. The N-5 dormitory is located in a separate building from the general population, and is reserved for prisoners who need protection or are high profile. [Doc. #42-2, Plaintiff's Uncontested Material Facts]. The N-5 dormitory consists of only single one man cells, such that Plaintiff does not share a cell with a fellow inmate. [Doc. #42-2, Plaintiff's Uncontested Material Facts].

Plaintiff has been a member of the NOI church since 1985. [Doc. #47, Ex. 1 at 19]. The NOI is a recognized religion and is a sect of the Islamic faith. [Doc. #42-2, Plaintiff's Statement of Uncontested Facts]. NOI members are believers of Islam who adhere to the teachings of the Quran. [Doc. #47, Ex. 2 Muhammad at 11-13]. However, NOI members hold additional beliefs. Specifically, NOI members believe that in the 1930s Allah came to earth in the form of a person named W. Fard Muhammed, who then provided inspired teachings to the Most Honorable Elijah Muhammed. [Doc. #47, Ex. 2 Muhammad at 11-13]. NOI members believe that Allah appeared with a mission to raise "the mentally and spiritually dead," those being the black communities of America, "who for all intents and purposes are dead" due to slavery and its aftermath. [Doc. #47, Ex. 2 Muhammad at 20, 22]. Plaintiff maintains that the teachings of W. Fard Muhammed and Elijah Muhammed are the "cardinal

principle" of NOI and a distinguishing mantra from orthodox Islam, which rejects as blasphemy the idea that Allah appeared in the form of W. Fard Muhammad. [Doc. #47, Ex. 3 Abdullah at 17-18].

The NOI publishes a weekly periodical entitled *The Final Call,* which contains articles related to the faith. [Doc. #47-2, Plaintiff's Statement of Uncontested Facts]. *The Final Call* is the exclusive outlet for the Plaintiff to order additional NOI religious materials. [Doc. #47-2, Ex. 1, Leonard at 116-118]. It has also been described by a NOI Minister as "the organ that consistently provides the member with [repetition and reiteration of] our theological base. . . . it is the source through which members [ ] get reading material and have access to CDs, DVDs, and other materials. . . . it is our primary organ to propagate our religion." [Doc. #47-2, Ex. 2, Muhammad at 166-168].

Neither DWCC nor any other Louisiana Department of Corrections facility offer NOI services. [Doc. #47, Ex. 1 Leonard at 99]. Additionally, DWCC does not have NOI religious materials on hand, only traditional Islam study materials. [Doc. #47, Ex. Leonard at 73]. DWCC has made efforts to accommodate the traditional Muslim faith. DWCC has hired Iman Wali of the Al-Islam sect to provide Islamic services to the Muslim community housed at DWCC. [Doc. #45, Ex. 1 at 72-77]. Muslim prisoners are allowed to possess prayer rugs, religious materials, and the Quran in their housing units. [Doc. #45, Ex. 1 at 72-77]. DWCC also provides weekly Jum'mah services, daily Taleem or Ars Salant study programs,

non-pork diet accommodations, and fasting accommodations during Ramadan. [Doc. #45, Ex. 1 at 1 at 72-77]. Although all of these services are available to Plaintiff, he maintains NOI doctrine is distinct from Islam and that traditional Islam services are insufficient.

Plaintiff subscribed to *The Final Call,* and first began receiving it at DWCC in October 2005. [Doc. #47-2, Plaintiff's Statement of Uncontested Facts]. He continued to receive *The Final Call* until he received a Notice of Refusal, dated June 14, 2006, and signed by Officer Jackie Hamil. [Doc. #47-2, Plaintiff's Statement of Uncontested Facts]. Plaintiff received a second Notice of Refusal signed by Officer Hamil dated August 17, 2006. [Doc. #47-2, Plaintiff's Statement of Uncontested Facts]. Since that time Plaintiff has not received any additional issues of *The Final Call*. [Doc. #47-2, Plaintiff's Statement of Uncontested Facts].

DWCC maintains *The Final Call* was rejected because of security concerns created by some of the articles contained in the periodical, which DWCC views as racially discriminatory, provocative, and a concern for security. Specifically, DWCC cites to numerous sources as support that the NOI is a black separatist and/or supremacist group, and that certain articles contained in *The Final Call* are racially inflammatory. [Doc. #45-3 at 4, Ex. 10]. Most concerning to DWCC is the final page included in all issues of *The Final Call,* which is entitled "The Muslim Program". [Court Ex. 1]. It includes statements about

"What Muslims Want" and "What Muslims Believe". "The Muslim Program" was written by Elijah Muhammad in the 1960s and has appeared in every issue of the newspaper since that time. It is this single page which DWCC cites as the primary reason for not allowing the delivery of *The Final Call*. That page reads as follows:

What The Muslims Want

This is the question asked most frequently by both the whites and the blacks. The answers to this question I shall state as simply as possible.

1. We want freedom. We want a full and complete freedom.

2. We want justice. Equal justice under the law. We want justice applied equally to all, regardless of creed or class or color.

3. We want equality of opportunity. We want equal membership in society with the best in civilized society.

4. We want our people in America whose parents or grandparents were descendants from slaves, to be allowed to establish a separate state or territory of their own – either on this continent or elsewhere. We believe that our former slave masters are obligated to provide such land and that the area must be fertile and minerally rich. We believe that our former slave masters are obligated to maintain and supply our needs in this

separate territory for the next 20 to 25 years – until we are able to produce and supply our own needs.

Since we cannot get along with them in peace and equality, after giving them 400 years of our sweat and blood and receiving in return some of the worst treatment human beings have ever experienced, we believe our contributions to this land and the suffering forced upon us by white America, justifies our demand for complete separation in a state or territory of our own.

5. We want freedom for all Believers of Islam now held in federal prisons. We want freedom for all black men and women now under death sentence in innumerable prisons in the North as well as the South. We want every black man and woman to have the freedom to accept or reject being separated from the slave master's children and establish a land of their own.

   We know that the above plan for the solution of the black and white conflict is the best and only answer to the problem between two people.

6. We want an immediate end to the police brutality and mob attacks against the so-called Negro throughout the United States. We believe that the Federal government should intercede to see that black men and women tried in white

courts receive justice in accordance with the laws of the land – or allow us to build a new nation for ourselves, dedicated to justice, freedom and liberty.

7. 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!

   We do not believe that after 400 years of free or nearly free labor, sweat and blood, which has helped America become rich and powerful, so many thousands of black people should have to subsist on relief or charity or live in poor houses.

8. We want the government of the United States to exempt our people from ALL taxation as long as we are deprived of equal justice under the laws of the land.

9. We want equal education – but separate schools up to 16 for boys and 18 for girls on the condition that the girls be sent to women's colleges and universities. We want all black children educated, taught and trained by their own teachers. Under such schooling system we believe we will make a better nation of people. The United States government should provide, free, all necessary text books and equipment, schools and college buildings. The Muslim teachers shall be left free to teach and train their people in

the way of righteousness, decency and self respect.

10. We believe that intermarriage or race mixing should be prohibited. We want the religion of Islam taught without hindrance or suppression.

What The Muslims Believe

1. WE BELIEVE In the One God whose proper Name is Allah.
2. WE BELIEVE in the Holy Qur'an and in the Scriptures of all the Prophets of God.
3. WE BELIEVE in the truth of the Bible, but we believe that it has been tampered with and must be reinterpreted so that mankind will not be snared by the falsehoods that have been added to it.
4. WE BELIEVE in Allah's Prophets and the Scriptures they brought to the people.
5. WE BELIEVE in the resurrection of the dead – not in physical resurrection – but in mental resurrection. We believe that the so-called Negroes are most in need of mental resurrection; therefore they will be resurrected first. Furthermore, we believe we are the people of God's choice, as it has been written, that God would choose the rejected and the despised. We can find no other persons fitting this description in these last days more than

the so-called Negroes in America. We believe in the resurrection of the righteous.

6. WE BELIEVE in the judgment; we believe this first judgment will take place as God revealed, in America . . .

7. WE BELIEVE this is the time in history for the separation of the so-called Negroes and the so-called white Americans. We believe the black man should be freed in name as well as in fact. By this we mean that he should be freed from the names imposed upon him by his former slave masters. Names which identified him as being the slave master's slave. We believe that if we are free indeed, we should go in our own people's names – the black people of the Earth.

8. WE BELIEVE in justice for all, whether in God or not; we believe as others, that we are due equal justice as human beings. We believe in equality – as a nation – of equals. We do not believe that we are equal with our slave masters in the status of "freed slaves."

   We recognize and respect American citizens as independent peoples and we respect their laws which govern this nation.

9. WE BELIEVE that the offer of integration is hypocritical and is made by those who are trying to deceive the black peoples into believing that their 400-year-old open enemies of freedom, justice and

equality are, all of a sudden, their "friends." Furthermore, we believe that such deception is intended to prevent black people from realizing that the time in history has arrived for the separation from the whites of this nation.

If the white people are truthful about their professed friendship toward the so-called Negro, they can prove it by dividing up America with their slaves. We do not believe that America will ever be able to furnish enough jobs for her own millions of unemployed, in addition to jobs for the 20,000,000 black people as well.

10. WE BELIEVE that we who declare ourselves to be righteous Muslims, should not participate in wars which take the lives of humans. We do not believe this nation should force us to take part in such wars, for we have nothing to gain from it unless America agrees to give us the necessary territory wherein we may have something to fight for.

11. WE BELIEVE our women should be respected and protected as the women of other nationalities are respected and protected.

12. WE BELIEVE that Allah (God) appeared in the Person of Master W. Fard Muhammad, July, 1930; the long-awaited "Messiah" of the Christians and the "Mahdi" of the Muslims.

> We believe further and lastly that Allah is God and besides HIM there is no god and He will bring about a universal government of peace wherein we all can live in peace together.

[Court Exhibit #1].

The Final Call was originally rejected because it was found to be in violation of DOC Regulation NO: C-02-009. The regulation states that a publication may be rejected under the following circumstances:

> **Refusal of Publications:** Printed material shall only be refused if it interferes with legitimate penological objectives (including but not limited to deterrence of crime, rehabilitation of inmates, maintenance of internal/external security of an institution or maintenance of an environment free of sexual harassment) or if the refusal is necessary to prevent the commission of a crime or to protect the interest of crime victims. This would include but not be limited to the following described categories:
>
> The printed matter contains material which, reasonably construed, is written for the purpose of communicating information which could promote the breakdown of order through inmate disruption, such as strikes or riots or instigation of inmate unrest for racial or other reasons.

[Doc. #45-3, Ex. 12.] After this litigation commenced, DOC amended its regulations and policies regarding

inmate publications. Effective January 5, 2007, DOC Regulation NO: C-02-009 allows for the refusal of an publication as follows:

> [ ] "prohibit any publication 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."

[Doc. #45-3, Ex. 14]. DWCC maintains that *The Final Call* is properly rejected under the previous and revised regulation because it contains racially inflammatory material which is a threat to security. [Doc. #45-3, Ex. 12].

The revision to DOC Regulation NO: C-02-009 also introduced a classification system of regularly received publications. [Doc. #45-3, Ex. 14, effective January 5, 2007]. Publications are divided into three categories: Category 1 includes publications that are presumptively rejected; Category 2 includes publications that require each issue to be reviewed for compliance with the DOC Regulation; and Category 3 includes publications that are presumptively accepted for distribution to the inmates. [Doc. #45-3, Ex. 14]. *The Final Call* is classified as a Category 2 publication, primarily because of the inclusion of "The Muslim Program." [Doc. #45, Ex. 14, Attachments E, F, and G of Exhibit 13].

Prison mail at DWCC is screened in the following manner. Every piece of inmate mail is screened by mailroom personnel. [Doc. #45, Ex. 24]. An initial reviewing officer is required to bring a publication to the Mailroom Supervisor's attention if he feels that a publication violates DOC Regulation No: C-02-009. [Doc. #45, Depositions of Cain, Goodwin, and LeBlanc.] If the Mailroom Supervisor concurs, the publication is sent to the Warden for review. *Id.* If the Warden concurs, the publication is sent to the Regional Wardens for review. *Id.* If all Regional Wardens unanimously agree, the publication is rejected. *Id.*

As stated *supra,* DWCC rejected *The Final Call* primarily because of the inclusion of "The Muslim Program" found on the last page of each issue. Warden Michael stated in her deposition that DWCC would reject the periodical as long as "The Muslim Program" was included. [Doc. #45-3, Michael at 64]. DWCC made attempts to accommodate the Plaintiff. Warden Burl Cain indicated in his deposition that he tried to contact the NOI to request a modified prison version of *The Final Call* which excluded "The Muslim Program" which could then be allowed into the prison under the regulation. [Doc. #45-3, Cain at 56]. The Nation of Islam did not respond to this request.

SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(c), summary judgment "shall be rendered forthwith 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 judgment as a matter of law." A fact is "material" if it may affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is "genuine" if there is sufficient evidence so that a reasonable jury could return a verdict for either party. *Id.* The court must "review the facts drawing all inferences most favorable to the party opposing the motion." *Reid v. State Farm Mutual Auto Insurance Co.,* 784 F.2d 577, 578 (5th Cir. 1986).

The moving party bears the initial responsibility of informing the court of the basis for its motion, and identifying those parts of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Lawrence v. Univ. of Tex. Med. Branch at Galveston,* 163 F.3d 309 (5th Cir. 1999). The moving party need not produce evidence to negate the elements of the non-moving party's case, but need only point out the absence of evidence supporting the non-moving party's case. *Celotex Corp.,* 477 U.S. at 325; *Lawrence,* 163 F.3d at 311.

Once the moving party carries its initial burden, the burden then falls upon the non-moving party to demonstrate the existence of a genuine issue of material fact. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348,

1355-56 (1986). This burden is not satisfied with some metaphysical doubt as to the material facts, by conclusory or unsubstantiated allegations, or by a mere scintilla of evidence. *Little v. Liquid Air. Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994) (citations omitted). The non-moving party "must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial." *Wallace v. Texas Tech. Univ.,* 80 F.3d 1042, 1047 (5th Cir. 1996) (citations omitted).

Pursuant to Local Rule 56.1, the moving party shall file a short and concise statement of the material facts as to which it contends there is no genuine issue to be tried. Local Rule 56.2 requires that a party opposing the motion for summary judgment set forth a "short and concise statement of the material facts as to which there exists a genuine issue to be tried." All material facts set forth in the statement required to be served by the moving party "will be deemed admitted, for purposes of the motion, unless controverted as required by this rule." Local Rule 56.2.

LAW AND ANALYSIS

Plaintiff's Complaint asserts a claim under 42 U.S.C. §1983 on the grounds that the denial of access to *The Final Call* violates his right to free exercise of religion guaranteed under the First and Fourteenth Amendments. Additionally, Plaintiff argues that the denial of access violates the Religious Land Use and Institutionalized Persons Act, or "RLUIPA."

I. First Amendment[1]

Prisoners retain protections afforded by the First Amendment, including its directive that no law shall prohibit the free exercise of religion. *O'Lone v. Estate of Shabazz,* 107 S.Ct. 2400, 2404 (1987); citing *Cruz v. Beto,* 92 S.Ct. 1079 (1972). Incarceration, however, brings about the necessary withdrawal or limitation of these rights. *Id.* "The constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large." *Shaw v. Murphy,* 121 S.Ct. 1475.

At the outset of the First Amendment analysis, the Court recognizes that the Fifth Circuit considered a very similar fact pattern in a 1969 case prior to the U.S. Supreme Court's holding in *Turner v. Safley,* 482 U.S. 78 (1987). *See infra.* It is the opinion of the Court that *Walker v. Blackwell,* 411 F.2d 23 (5th Cir. 1969), although forty years old, has not been overruled. The Plaintiffs in *Walker* were NOI inmates at the Atlanta Federal Penitentiary. *Id.* at 24. They filed suit for numerous constitutional violations, including a violation of the First Amendment based on the withholding of issues of *Muhammad Speaks,* the predecessor of what is now entitled *The Final Call. Id.* at

[1] Defendants devote a large portion of their Motion for Summary Judgment to whether the Court should grant a possible new claim by Plaintiff for all-inclusive Islamic services. It does not appear that Plaintiff is making claim for DWCC to provide NOI specific services. Therefore, the Court will not address the issue.

28. "The Muslim Program", which DWCC officials consider inflammatory, has appeared in both *Muhammad Speaks* and *The Final Call* since 1965.

The District Court in *Walker* agreed with the Warden that *Muhammad Speaks* included racially inflammatory information, and that therefore, the exclusion of the newspaper was within the discretion of the Warden as a reasonable disciplinary measure. *Id.* at 28. The Fifth Circuit reversed. The issues of *Muhammad Speaks* that were reviewed contain content which is much more inflammatory than "The Muslim Program" as printed in *The Final Call*. The District Court in *Walker* cited four instances of inflammatory content that supported the rejection of *Muhammad Speaks,* including: (1) a cartoon entitled in part 'Integration Means Hell', showing a line of blindfolded African Americans marching into a pit containing white men with clubs, guns and pistols attacking them; (2) an editorial by Elijah Muhammad referring to the white race as 'devils'; (3) a large cartoon showing an African American sitting prostrate in a chair under a bright light surrounded by police officers with broken clubs, a hammer and a mall, and with the man showing every indication of having been severely beaten by the police officers; and (4) a cartoon of an African American prostrate on the sidewalk being severely beaten by police officers with Uncle Sam standing nearby smiling and saying 'Listen, they are playing our song'. *Id.* at 28.

The Fifth Circuit found that despite this content, the newspapers were for the most part filled with

news and editorial comment, with a substantial portion encouraging NOI members to improve their material and spiritual condition of life by labor and study. *Id.* Further, the Court noted that nowhere in the newspaper was there a direct incitement to engage in physical violence. *Id.* at 29. Accordingly, the Fifth Circuit reversed the District Court and remanded the case for an order to direct the Warden to allow the use of the newspaper by the NOI members in the same manner as other newspapers are allowed to other inmates. *Id.* The Court noted that the Warden could appropriately take necessary steps to avoid prison violence if the newspaper were to develop an inflammatory effect on the prisoners. *Id.*

Because this content, which is arguably much more controversial than "The Muslim Program" was found in 1969 by the Fifth Circuit to not be racially inflammatory, this Court must find that "The Muslim Program" is not racially inflammatory.

The U.S. Supreme Court set forth the general test of prison restrictions on an inmate's First Amendment rights in the case of *Turner v. Safley,* 482 U.S. 78 (1987). *Turner* provides that a restriction is valid "if it is reasonably related to legitimate penological interests." *Id.* at 89. In making a determination as to whether the impingement meets the penological interest standard, the Court must employ the four factor test set forth in *Thornton v. Abbott,* 490 U.S. 401 (1989). The factors are as follows: (1) Whether the penological objective underlying the regulation at issue is legitimate and neutral, and that

the regulation is rationally related to the objective; (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. *Id.* at 414.

As to the first factor, it is the finding of the Court that the penological objective underlying the regulation is both legitimate and neutral, and is rationally related to the objective. The regulation allows for the rejection of a publication which is found to contain racially inflammatory material or materials that could cause a threat to inmate population, staff and security of the facility. [Doc. #45-3, Ex.14]. DWCC has a legitimate objective in trying to decrease racial tensions among prisoners, which can lead to numerous problems up to and including violence. The regulation itself does not violate the constitution, rather, it is the implementation of the regulation which is in conflict with the First Amendment. In this instance, DWCC has prohibited the distribution of *The Final Call* because officials believe "The Muslim Program" is racially inflammatory and could cause a threat to the inmate population, staff and security of the facility. However, the Defendants were unable during briefing or oral argument to provide an example of an instance of violence or unrest in an institutional setting that could be attributed to *The Final Call*.

The wholesale prohibition of the publication is simply too broad when balanced with the Plaintiff's right to the free exercise of his religion. This is not to say that prison officials cannot prohibit the distribution of *The Final Call* if upon review it is determined that articles have the intent to incite violence or if *The Final Call* ever develops a substantially inflammatory effect on the inmates. Such actions would be rationally related to the penological objective of preventing security threats to the inmates, staff and the facility.

Additionally, the Court is concerned as to the neutrality of the application of the regulation. Defendants cite to numerous studies in their Motion for Summary Judgment which touch on the radicalization of prison Islamic groups as a potential source of homegrown terrorists. [Doc. #45-3 at 14]. Although the DOC does not consider NOI to be such a radicalized group, it claims that it has a valid penological goal in limiting the number of Islamic sects allowed in state prisons.

As to the second factor, the Plaintiff has no alternative means to practice his religion without receipt of *The Final Call.* While it is true that NOI is built upon the tenements of traditional Islam, and that traditional Islam materials and services are offered at DWCC, there are profound and distinct differences between the two. As discussed *supra,* NOI members believe that in the 1930s Allah came to earth in the form of a person named W. Fard Muhammed, who then provided inspired teachings to the Most Honorable Elijah Muhammed. [Doc. #47,

Ex. 2 Muhammad at 11-13]. The teachings of W. Fard Muhammed and Elijah Muhammed are central to the NOI and are distinguishable from the mantra of orthodox Islam, which rejects as blasphemy the idea that Allah appeared in the form of W. Fard Muhammad. [Doc. #47, Ex. 3 Abdullah at 17-18].

The Final Call is the only vehicle from which Plaintiff may order additional religious materials from the NOI such as readings, cassette tapes, and featured excerpts. [Doc. #47-2, Ex. 1.] Plaintiff stated in his deposition that he needs to acquire additional religious materials from *The Final Call* to continue growing in his faith. *Id.* At least one circuit has found NOI books, of which *The Final Call* would qualify, to be a necessary element of an inmate's free exercise of the NOI faith. *See Sutton v. Rasheed,* 323 F.3d 236, 255-256 (3d Cir. 2003). The deprivation of NOI texts was found in *Sutton* to deprive the inmate of the ability to practice his religion, and was compared to restricting a Christian's religious readings to the Old Testament, or withholding a copy of *The Book of Mormon* from a member of the Church of Jesus Christ of Later [sic] Day Saints. *Id.* at 257.

The third factor, which requires the Court to consider the impact the accommodation will have on others (guards and inmates) in the prison, also weighs in favor of the Plaintiff. Plaintiff has provided evidence that *The Final Call* has been received at DWCC and other DOC facilities without any incidents of violence. [Doc. #47-2, Ex. 1, Leonard at 246-248; Abdullah at 42]. Further, Plaintiff testified that

even after the amended policy became effective he retained back issues of *The Final Call* in his possession until September of 2008. [Doc. #47-2, Ex. 9, Goodwin at 44; Ex. 5, Hamil at 41; Ex. 4, Cain at 118]. There is no evidence in the record that the previous copies of *The Final Call* had a negative impact on the security of the prison, the inmates or the guards. As such, it appears that accommodating the Plaintiff with access to *The Final Call* will have a minimal impact.

The fourth factor weighs in favor of the Plaintiff This factor requires the Court to consider whether there are ready alternatives that fully accommodate the prisoner's rights at *de minimis* cost to valid penological interests. From the record it appears that the alternative is contained within the regulation itself, but is not being applied. Currently, there is little cost or thought associated with the decision to preclude the distribution of *The Final Call.* If an issue arrives at DWCC, the mailroom screener need only briefly look at the last page to determine if it contains "The Muslim Program". If it does, it is rejected. This method appears to be overly broad and potentially an exaggerated response.

The Court is aware that there will be a slight additional administrative burden on DWCC officials by declaring that *The Final Call* cannot be rejected solely because of the inclusion of "The Muslim Program". However, *The Final Call,* is already placed in DOC's Category 2 for publication screening. This category requires that each issue be reviewed for

compliance with DOC Regulation NO: C-02-009. Prison officials are already charged under the regulation with screening each issue for racially inflammatory material. This ruling will require the mailroom screener to look through the entire periodical as contemplated by the regulation, which is not an enormous administrative burden when compared with the Plaintiff's ability to practice and grow in his religion of choice.

Because the Defendants are unable to meet the standard set forth in *Turner v. Safley,* it is the finding of this Court that the regulation, as currently applied, is an unconstitutional restriction of Plaintiff's First Amendment right to the free exercise of his religion.

II. RLUIPA

Plaintiff also asserts a claim under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which was passed by Congress in 2000 to provide for "a broad protection of religious exercise, to the maximum extent permitted by the terms of [the] Act and the Constitution." 42 U.S.C. §2000cc-3(g).[2]

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[2] Defendants did not address Plaintiff's RLUIPA claims in their Motion for Summary Judgment or Opposition to Plaintiff's Motion for Summary Judgment. Rather, Defendants maintain that all of Plaintiff's RLUIPA claims have been dismissed. Defendants are mistaken. While it is true that this Court dismissed Plaintiff's RULIPA claims against Richard Stalder,

(Continued on following page)

The relevant portion of RLUIPA states: 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 the 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.

The standard under RLUIPA "poses a far greater challenge than does *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).

The Plaintiff must demonstrate that the government practice complained of imposes a "substantial burden" on his religious exercise. *Adkins v. Kaspar,* 393 F.3d 559, 567 (5th Cir. 2004). This requires the Court to answer two questions: (1) Is the burdened activity a "religious exercise," and if so (2) is the burden "substantial"? *Id.* The plaintiff has the burden of persuasion on these two elements. *Id.*; citing to 42 U.S.C. §2000cc-s; 146 Cong. Rec. S7776 (July 27, 2000). The government then has the burden of

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Venetia Michael and Jackie Hamil in their individual capacities only, Plaintiff's claims against the Louisiana Department of Corrections and the Defendants in their official capacities remain viable. [Doc. #23].

persuasion that the application of its substantially burdensome practice is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. *Id.*

RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Atkins,* 393 F.3d at 567. Plaintiff argues that *The Final Call* is an important element of the free exercise of his religion. As noted *supra,* other Courts have acknowledged that NOI is a legitimate religion, and that *The Final Call* is "an essential religious text for the Nation of Islam." *See Sutton v. Rasheed,* 323 F.3d 236 (3d Cir. 2003). This Court agrees that receipt of *The Final Call* is an essential part of the NOI faith.

Whether the denial of *The Final Call* is a substantial burden is determined as follows:

> For purposes of applying 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 effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs.

> On the opposite end of the spectrum, however, a government action or regulation does not rise to the level of a substantial burden [ ] if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed.

Adkins, 393 F.3d at 569-570.

Plaintiff asserts that the denial of *The Final Call* amounts to a "substantial burden" because it modifies his religious behavior. Specifically, Plaintiff argues that he cannot sufficiently practice his religion by merely praying in his cell. As discussed *supra, The Final Call* remains the only source from which Plaintiff can order religious texts and periodicals, which amounts to a denial of NOI religious literature which is distinct from orthodox Islam. The Court finds that Plaintiff has met his burden of persuasion that the denial of access to *The Final Call* solely because of the inclusion of "The Muslim Program" is a substantial burden on the Plaintiff's free exercise of his religion.

Defendants have the burden or [sic] proving that the application of its substantially burdensome practice is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. The governmental interest behind the regulation at issue is obviously compelling. The highest priority of a prison is to maintain order and security. However, the question is whether the banning of *The Final Call* is the least restrictive means of

achieving that interest. Again, this Court is concerned that the complete banning of the publication because of the inclusion of "The Muslim Program" is an exaggerated response to DWCC's concerns about racially inflammatory material. Prior to the decision in May 2006 to reject *The Final Call,* the same material had been consistently allowed into the prison, apparently without incident.

The Court finds that the regulation, as currently applied, is in violation of RLUIPA because its implementation is not by the least restrictive means. DWCC may continue to screen incoming issues of *The Final Call* in accordance with Regulation No: C-02-009, Category 2 screening protocol for racially inflammatory material other than "The Muslim Program".

CONCLUSION

Based on the foregoing, Plaintiff's Motion for Summary Judgment [Doc. #47] is hereby **GRANTED IN PART**. This Court finds that the denial of access to *The Final Call* based solely on the inclusion of "The Muslim Program" is a violation of the First Amendment and the Religious Land Use and Institutionalized Persons Act. Prospective injunctive relief is **GRANTED**. DWCC is ordered to deliver future issues of *The Final Call* to the Plaintiff, subject to Department of Corrections Regulation No: C-02-009, and the findings of this Court. Defendants' Motion for Summary Judgment [Doc. #45] is **DENIED**;

Plaintiff's Motion for Leave to file Motion to Strike [Doc. # 52] is **DENIED AS MOOT**.

Plaintiff is ordered to file a supplemental brief with the Court within thirty days regarding the liability of the Defendants, both officially and individually, and as to whether damages and/or attorneys fees are appropriate in this case. Thereafter, Defendants shall have twenty-one days to file an opposition.

THUS DONE AND SIGNED, this 31 day of March, 2010.

/s/ Donald E. Walter
DONALD E. WALTER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 10-30982

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 Corrections & Public Safety; VENETIA MICHAEL, individually and in her offical [sic] capacity as Warden of David Wade Correctional Center; JACKIE HAMIL, individually and in his official capacity as a correctional officer at David Wade Correctional Center,

Defendants-Appellants

Appeal from the United States District Court
for the Western District of Louisiana, Shreveport

ON PETITION FOR REHEARING EN BANC

(Filed Feb. 17, 2012)

(Opinion 11/10/11, 5 Cir., ___, ____, F.3d ___)

Before REAVLEY, GARZA, and GRAVES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge