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No. CF-1111054

Dept. No. Z

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE  
STATE OF NEVADA IN AND FOR  
THE COUNTY OF WHITE PINE

Electronically Filed  
Oct 08 2014 03:48 p.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

GILBERT JAY PALIOTTA

Petitioner/Plaintiff,

v.

THE STATE OF NEVADA, et al.,

Respondent/Defendant.

LINDA F. BILLY  
WHITE PINE COUNTY CLERK

24 OCT -6 PM 1:10

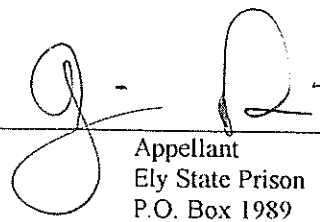
FILED

#### NOTICE OF APPEAL

Notice is hereby given that Gilbert Jay Paliotta, Petitioner/Defendant above named,  
hereby appeals to the Supreme Court of Nevada from the final judgment/order  
DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND ORDER GRANTING  
(DEFENDANTS' MOTION FOR SUMMARY JUDGMENT)

entered in this action on the 30 day of September, 2014.

Dated this Z day of October, 2014.

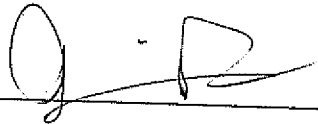
  
Appellant  
Ely State Prison  
P.O. Box 1989  
Ely, Nevada 89301-1989

**CERTIFICATE OF SERVICE BY MAIL**

I, Gilbert Jay Palotta, hereby certify pursuant to Rule 5(b) of the NRCP, that on this 2 day of October, 2014, I served a true and correct copy of the above-entitled NOTICE OF APPEAL postage prepaid and addressed as follows:

Office of the A.G.  
100 N. Carson St.  
Carson City, NV 89701-4717

Signature



Print Name

GILBERT JAY PALOTTA

Ely State Prison

P.O. Box 1989

Ely, Nevada 89301-1989

**AFFIRMATION PURSUANT TO: N.R.S. 239B.010**

I, HEREBY CERTIFY THAT I AM THE UNDERSIGNED  
INDIVIDUAL AND THAT THE ATTACHED DOCUMENT  
THAT IS ENTITLED: NOTICE OF APPEAL

\_\_\_\_\_, DOES NOT  
CONTAIN THE SOCIAL SECURITY NUMBER OF ANY  
PERSON, UNDER THE PAINS AND PENALTIES OF  
PERJURY, THIS, 2, DAY OF, October, 2014.

SIGNATURE: \_\_\_\_\_

INMATE NAME PRINTED: GILBERT JAY PALLOTTA

INMATE NUMBER: 46244

ADDRESS: ELY STATE PRISON, P.O. BOX 1989, ELY, NV 89301

FILED

2014 OCT -7 PM 12: 01

Case No: CF-1111054

Dept: 2

LINDA F. BURLING  
WHITE PINE COUNTY CLERK  
BY

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF  
NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

GILBERT JAY PALIOTTA,  
Plaintiff/Appellant,

-vs-

**Case Appeal Statement**

THE STATE OF NEVADA IN RELATION  
TO THE NEVADA DEPARTMENT OF  
CORRECTIONS, RENEE BAKER, ET AL.,  
Defendants/Respondents.

\_\_\_\_\_ /

1. GILBERT JAY PALIOTTA, Plaintiff/Appellant.
2. GARY D. FAIRMAN, District Court Judge.
3. GILBERT JAY PALIOTTA, Plaintiff/Appellant, resides at Ely State Prison, BAK# 46244, P.O. Box 1989, Ely, NV 89301.
4. THE STATE OF NEVADA DEPARTMENT OF CORRECTIONS AND RENEE BAKER, ET AL., was represented in District Court by Nathan Hastings, Esq., Deputy Attorney General, 100 N. Carson Street, Carson City, NV 89701. It is unknown if Mr. Hastings is representing the Defendants/Respondents on appeal.
5. Nathan Hastings, Esq. is licensed to practice law in the State of Nevada by way of his BAR# 11593.
6. GILBERT JAY PALIOTTA, Plaintiff/Appellant, was not represented in District Court by counsel.
7. GILBERT JAY PALIOTTA, Plaintiff/Appellant, is not represented by counsel on appeal.
8. Leave to Proceed in Forma Pauperis was granted in District Court on November 23, 2011.
9. Proceedings commenced on November 28, 2011 in District Court.
10. Plaintiff/Appellant requested that the Ely State Prison serve him a traditional Egyptian diet, or a kosher diet, to keep in line with his faith, which is the Thelema religion. Plaintiff/Appellant alleges that the prison chaplain at the time encouraged him to pursue

this diet. The meal request was denied by the Ely State Prison staff and gave the reason that the Thelema religion did not mandate any dietary restrictions or requirements. Plaintiff/Appellant argued that the prison provides kosher meals to a variety of people, including non-Jews and further alleges that this denial is a violation of his first, eighth, and fourteenth amendment rights. The Defendant/Respondent purported that the Plaintiff/Appellant's allegations lack sincerity and are not protected by the Free Exercise Clause. The District Court granted summary judgment to the Defendants/Respondents.

11. This case has previously been on appeal in the Supreme Court under docket number 63205.
12. This case does not involve child custody or visitation.
13. There is no possibility of settlement in this matter.

Dated this 7TH day of October 2014.

Case #: CF-1111054

Judge: FAIRMAN, GARY D.

Date Filed: 11/08/11      Department: 02

Case Type: CF CIVIL FEDERAL RIGHTS

Title/Caption: GILBERT JAY PALIOTTA,  
Petitioner,  
v  
THE STATE OF NEVADA IN RELATION TO  
THE NEVADA DEPARTMENT OF CORRECTIONS;  
RENEE BAKER, ET AL.,  
Defendants.

Comments: \*\*\*SUPREME COURT DOCKET # 63205\*\*\*

Defendant(s)	Attorney(s)
BAKER, RENEE	No "Attorney 1" Listed

Plaintiff(s)	Attorney(s)
PALIOTTA, GILBERT JAY # 46244	No "Attorney 1" Listed

Disp/Judgment: SMJD Date: 09/30/14

Filings:

Date	Pty Filing	Fees
11/08/11	MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS	
11/08/11	AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS	
11/08/11	FINANCIAL CERTIFICATE	
11/08/11	CERTIFICATE OF MAILING	
11/23/11	ORDER TO PROCEED IN FORMA PAUPERIS	
11/23/11	CERTIFICATE OF SERVICE	
11/28/11	CIVIL RIGHTS COMPLAINT PURSUANT TO 42 USC 1983 (JURY TRIAL DEMANDED)	
11/28/11	ISSUED 2 SUMMONS	
11/28/11	CERTIFICATE OF MAILING	
12/27/11	ISSUED 3 SUMMONS	
12/27/11	CERTIFICATE OF MAILING	
3/05/12	ISSUED 2 SUMMONS	
3/06/12	CERTIFICATE OF MAILING	
4/02/12	ANSWER TO COMPLAINT	
4/05/12	AFFIDAVIT OF SERVICE-SUMMONS RETURNED SERVED FOR: CLAUDE WILLIS, RENEE BAKER, TASHEENA SANDOVAL, D. MCNEELY. SUMMONS RETURNED NOT SERVED FOR JOHN DOE-GRIEVANCE RESPONDER	
4/05/12	CERTIFICATE OF MAILING	
4/10/12	MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION	
4/10/12	MOTION TO DISPENSE WITH THE REQUIREMENT OF SECURITY	
4/10/12	CERTIFICATE OF MAILING	
4/23/12	DEFENDANTS NOTICE OF MOTION/MOTION FOR ENLARGEMENT OF TIME TO OPPOSE PLAINTIFFS MOTION FOR TRO/PRELIMINARY INJUNCTION	
4/25/12	ORDER GRANTING DEFENDANTS MOTION FOR ENLARGEMENT OF TIME TO OPPOSE PLAINTIFFS MOTION FOR TRO/PRELIMINARY INJUNCTION	
4/27/12	OPPOSITION TO DEFENDANTS' MOTION FOR ENLARGEMENT OF TIME TO OPPOSE PLAINTIFF'S MOTION FOR TRO/PRELIMINARY INJUNCTION	

4/27/12	CERTIFICATE OF MAILING
5/23/12	DEFENDANTS OPPOSITION TO PLAINTIFFS MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION
6/04/12	MOITON TO STRIKE DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION
6/18/12	DEFENDANTS OPPOSITION TO PLAINTIFFS MOTION TO STRIKE DEFENDANTS OPPOSITION TO PLAINTIFFS MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION
6/22/12	REPLY IN SUPPORT OF PLATINFFS' MOTION TO STRIKE DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION
6/22/12	CERTIFICATE OF MAILING
9/12/12	PLAINTIFFS NOTICE OF IN CHAMBERS SUBMISSION
9/12/12	CERTIFICATE OF MAILING
9/17/12	JOINT RULE 16.1 CASE CONFERENCE REPORT
9/24/12	MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT TO CURE DEFICIENCIES
9/24/12	CERTIFICATE IF MAILING
11/16/12	MOTION FOR EXTENSION OF TIME
11/19/12	ORDER GRANTING MOTION FOR EXTENSION OF TIME
11/19/12	CERTIFICATE OF SERVICE
11/26/12	OPPOSITION TO DEFENDANTS MOTION FOR EXTENSION OF TIME
11/26/12	REQUEST FOR SUBMISSION OF MOTION
11/26/12	CERTIFICATE OF MAILING
1/18/13	MOTION TO DISMISS AS TO PURPORTED DEFENDANT MCNEELY
1/24/13	PLAINTIFF'S AFFIDAVIT IN ATTEMPT TO HAVE SUMMONS AND COMPLAINT SERVED UPON DEFENDANT/AND MOTION IDENTIFYING THE UNSERVED DEFENDANT REQUESTING ISSUANCE OF SUMMONS FOR UNSERVED DEFENDANT
1/24/13	CERTIFICATE OF MAILING
1/28/13	OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AS TO PURPORTED DEFENDANT MCNEELY
1/28/13	CERTIFICATE OF MAILING
2/05/13	DEFENDANTS' OPPOSITION TO PLAINTIFF'S AFFIDAVIT AND MOTION REQUESTING ISSUANCE OF SUMMONS FOR UNSERVED DEFENDANT
2/06/13	REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS AS TO PURPORTED DEFENDANT MCNEELY
2/12/13	REPLY IN SUPPORT OF PLAINTIFF'S MOTION REQUESTING ISSUANCE OF SUMMONS FOR UNSERVED DEFENDANT
2/12/13	CERTIFICATE OF MAILING
2/13/13	REPLY IN SUPPORT OF PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS AS TO DEFENDANT MCNEELY
2/13/13	CERTIFICATE OF MAILING
2/21/13	MOTION FOR AN ORDER COMPELLING DISCOVERY
2/21/13	REQUEST FOR SUBMISSION OF MOTION
2/21/13	CERTIFICATE OF MAILING
2/28/13	REQUEST FOR SUBMISSION
3/07/13	MOTION FOR ENLARGEMENT OF TIME
3/07/13	REQUEST FOR SUBMISSION OF MOTION
3/08/13	CERTIFICATE OF MAILING
3/14/13	PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
3/14/13	CERTIFICATE OF MAILING
3/21/13	S. FOSTER'S ANSWER TO AMENDED COMPLAINT
3/21/13	DEFENDANT'S LIMITED OPPOSITION TO PLAINTIFF'S MOTION FOR ENLARGEMENT OF TIME
3/29/13	PLAITNIFFS REPLY IN SUPPORT OF ENLARGEMENT OF TIME

3/29/13	CERTIFICATE OF MAILING
3/29/13	DEFENDANTS OPPOSITION TO PLAINTIFFS MOTION FOR PARTIAL SUMMARY JUDGMENT
4/10/13	REPLY IN SUPPORT OF PLAINTIFFS MOTION FOR SUMMARY JUDGMENT
4/10/13	CERTIFICATE OF MAILING
4/16/13	ORDER
4/16/13	CERTIFICATE OF SERVICE
4/19/13	OBJECTION TO DISTRICT COURT ORDER (16 APRIL, 2013), AND/OR MOTION TO RECONSIDER
4/19/13	CERTIFICATE OF MAILING
5/08/13	ORDER
5/08/13	CERTIFICATE OF SERVICE
5/14/13	NOTICE OF APPEAL
5/14/13	CASE APPEAL STATEMENT
5/14/13	CERTIFICATE OF MAILING
5/17/13	RECEIPT FOR DOCUMENTS
5/17/13	NOTICE OF ENTRY OF ORDER
5/28/13	REQUEST FOR SUBMISSION OF MOTION
5/28/13	MOTION TO EXTEND PRISON COPYWORK LIMIT
6/19/13	CERTIFICATE OF MAILING
6/26/13	ORDER DENYING MOTION TO EXTEND PRISON COPYWORK LIMIT
6/26/13	CERTIFICATE OF SERVICE
7/17/13	ORDER DISMISSING APPEAL
8/12/13	ORDER DISMISSING APPEAL
8/12/13	CLERKS CERTIFICATE
8/12/13	REMITITTUR
8/22/13	DEFENDANTS NOTICE OF MOTION AND MOTION FOR ENLARGEMENT OF TIME TO FILE DISPOSITIVE MOTION (FIRST REQUEST)
9/20/13	ORDER GRANTING DEFENDANTS MOTION FOR ENLARGMENT OF TIME TO FILE THEIR DISPOSITIVE MOTION
9/24/13	ORDER GRANTING MOTION FOR ENLARGEMENT OF TIME
9/24/13	CERTIFICATE OF SERVICE
11/19/13	DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
12/06/13	PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
12/06/13	CERTIFICATE OF MAILING
12/20/13	DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
1/17/14	REQUEST FOR SUBMISSION
8/12/14	REQUEST FOR SUBMISSION OF MOTION
8/13/14	CERTIFICATE OF MAILING
8/19/14	REQUEST FOR SUBMISSION OF MOTION
8/19/14	CERTIFICATE OF MAILING
9/30/14	ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
9/30/14	CERTIFICATE OF SERVICE
10/06/14	NOTICE OF APPEAL
10/07/14	CERTIFICATE OF MAILING
10/07/14	CASE APPEAL STATEMENT



RECEIVED

SEP 30 2014

SEVENTH JUDICIAL DISTRICT COURT  
GARY D. FAIRMAN  
DISTRICT JUDGE  
DEPARTMENT 2  
WHITE PINE, LINCOLN AND EUREKA COUNTIES  
STATE OF NEVADA



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Case No. CF-1111054

Dept. No. 2

FILED

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LINDA F. L. L. L. L.  
WHITE PINE COUNTY CLERK  
BY [Signature]  
DEPUTY

IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF  
NEVADA, IN AND FOR THE COUNTY OF WHITE PINE

\*\*\*\*\*

Gilbert Jay Paliotta,  
  
Plaintiff,  
  
vs.  
  
The State of Nevada, et al.,  
  
Defendants.

ORDER DENYING PLAINTIFF'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT AND ORDER GRANTING  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT

FACTUAL AND PROCEDURAL HISTORY

Gilbert Jay Paliotta (plaintiff) is an inmate in the Nevada Department of Corrections (NDOC), presently housed at Ely State Prison (ESP). On November 28, 2011, plaintiff filed a civil rights complaint pursuant to 42 USC 1983 and demand for a jury trial. On April 2, 2012 defendants filed their answer. Since then the parties have traded motions seeking to dismiss parties, compel discovery, and for injunctive relief. Plaintiff filed a motion for partial summary judgment on March 15, 2013. On March 16, 2013, this Court issued an order dismissing a purported defendant. Plaintiff served notice of his appeal of this order on May 14, 2013. Plaintiff's appeal was dismissed and remitted because a final judgment



1 on his case had not been rendered. On March 29, 2013, defendants filed their oppositor  
2 to plaintiff's motion for partial summary judgment. On April 10, 2013, plaintiff filed a reply  
3 in support of his motion for partial summary judgment. On November 19, 2013, defendants  
4 filed a motion for summary judgment. On December 6, 2013, plaintiff filed an opposition  
5 to defendant's motion for summary judgment. Defendants filed their reply to plaintiff's  
6 opposition to defendant's motion for summary judgment on December 20, 2013.  
7 Defendants then filed a request for submission on January 17, 2014.

8 Plaintiff's complaint alleges that, starting on or about March 27, 2011, plaintiff  
9 requested he be served a traditional Egyptian diet, or barring that, a kosher diet in keeping  
10 with what he asserts is a diet mandated by his faith.<sup>1</sup> Plaintiff's faith is Thelema, a religion  
11 which he claims is based on the writings of Aleister Crowley and which is closely related  
12 to the Egyptian religion.<sup>2</sup> Plaintiff bases his request for a kosher diet on his assertion that  
13 authors and Jewish scholars have seen stronger connections between Egyptian mysticism  
14 and Hebrew traditions than had previously been thought to exist.<sup>3</sup> Plaintiff alleges the  
15 prison chaplain at the time encouraged plaintiff to pursue a kosher diet, since his faith and  
16 the Jewish faith share "strong ties."<sup>4</sup> Plaintiff's request for the kosher meal was denied by  
17 prison staff, who stated as their reason for denying the request that Thelema doesn't  
18 mandate any dietary restrictions or requirements.<sup>5</sup> Plaintiff points out that the prison  
19 affords kosher diets to "Jewish, non-Jewish, Black, and Muslim inmates when they cannot  
20  
21

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22 <sup>1</sup> Pl's. Compl.

23 <sup>2</sup> Id. at 7.

24 <sup>3</sup> Id.

25 <sup>4</sup> Id.

26 <sup>5</sup> Id.



1 demonstrate a hereditary or even a social connection to the religious practice of Judaism."<sup>6</sup>  
2 Plaintiff alleges this refusal violates his First Amendment, Eighth Amendment, and  
3 Fourteenth Amendment rights under the United States Constitution and seeks declaratory  
4 relief, injunctive relief, nominal damages, and punitive damages under 42 U.S.C. §1983  
5 and the Religious Land Use of Institutionalized Persons Act (RLUIPA).<sup>7</sup>

6 Upon reviewing the file, the Court finds additional briefing or argument is not  
7 necessary.

## 8 DISCUSSION

### 9 I. SUMMARY JUDGMENT

10 The Nevada Supreme Court has laid out the circumstances when summary  
11 judgment is appropriate. In Wood v. Safeway Inc., it explained that

12 "[s]ummary judgment is appropriate under NRCP 56 when the  
13 pleadings, depositions, answers to interrogatories, admissions, and  
14 affidavits, if any, that are properly before the court demonstrate that  
15 no genuine issue of material fact exists, and the moving party is  
16 entitled to judgment as a matter of law. The substantive law controls  
17 which factual disputes are material and will preclude summary  
18 judgment; other factual disputes are irrelevant. A factual dispute is  
19 genuine when the evidence is such that a rational trier of fact could  
20 return a verdict for the nonmoving party."<sup>8</sup>

21 In deciding whether summary judgment is appropriate, the evidence must be viewed in the  
22 light most favorable to the nonmoving party and that party's factual allegations must be  
23 presumed to be correct.<sup>9</sup> Accordingly, all of the nonmoving party's statements must be

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24 <sup>6</sup> Id. at 7.

25 <sup>7</sup> Id. at 1.

26 <sup>8</sup> Wood v. Safeway, Inc., 121 Nev. 724, 731, 121 P.3d 1026, 1030-1031, (2005).

<sup>9</sup> Pacific Pools Constr. Co. v. McClain's Concrete, 101 Nev. 557, 559, 706 P.2d 849, 851 (1985).



1 accepted as true and the Court may not pass on the credibility of affidavits.<sup>10</sup> However,  
2 the nonmoving party "is not entitled to build a case on the gossamer threads of whimsy,  
3 speculation, and conjecture."<sup>11</sup> "The nonmoving party 'must, by affidavit or otherwise, set  
4 forth specific facts demonstrating the existence of a genuine issue for trial or have  
5 summary judgment entered against him."<sup>12</sup>

6 II. RLUIPA

7 The Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibits  
8 governments from imposing "... a substantial burden on the religious exercise of a person  
9 residing in or confined to an institution... even if the burden results from a rule of general  
10 applicability, unless the government demonstrates that imposition of the burden on that  
11 person: (1) is in furtherance of a compelling governmental interest; and (2) is the least  
12 restrictive means of furthering that compelling governmental interest."<sup>13</sup> RLUIPA defines  
13 religious exercise as "any exercise of religion, whether or not compelled by, or central to,  
14 a system of religious belief."<sup>14</sup> A plaintiff bringing a lawsuit under this act must produce  
15 prima facie evidence to support his claim that the government violated his rights under the  
16 Free Exercise clause or section 2 of RLUIPA, then the burden of persuasion shifts to the  
17 defendant to prove the regulation was the least restrictive way to further a compelling

18 \_\_\_\_\_  
19 <sup>10</sup> Sawyer v. Sugarless Shops, 106 Nev. 265, 267-68, 792 P.2d 14, 15-16 (1990)  
20 (citing Hidden Wells Ranch v. Strip Realty, 83 Nev. 143, 145, 425 P.2d 599, 601  
21 (1967)).

22 <sup>11</sup> Wood v. Safeway, Inc. at 732 (citing Matsushita Elec. Indus. Co. v. Zenith Radio  
23 Corp., 475 U.S. 574, (1986).

24 <sup>12</sup> Id. (citing Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 825 P.2d 588, (1992).

25 <sup>13</sup> Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (2000).

26 <sup>14</sup> Id. at 2000cc-5



government interest.<sup>15</sup>

RLUIPA doesn't define what is a substantial burden. The 9th Circuit Court of Appeals has ruled that for a regulation to impose a substantial burden on religious exercise it must "impose a significantly great restriction or onus upon such exercise."<sup>16</sup> The Supreme Court explained that a burden on religion exists when the government denies ... [an important benefit] because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs."<sup>17</sup>

### III. Free Exercise Clause of the First Amendment

The First Amendment has a dual purpose; it prohibits Congress from enacting a law establishing one particular religion at the detriment of another and it grants citizens the right to act on their religious beliefs.<sup>18</sup> While freedom to believe in a particular religious organization or faith is absolute, the freedom to act on those religious beliefs can be curtailed.<sup>19</sup> However, the United States Supreme Court cautions courts against limiting First Amendment rights:

Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. . . . The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First

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<sup>15</sup> Id. at 2000cc-2(b)

<sup>16</sup> San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004)

<sup>17</sup> Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 717-718 (1981).

<sup>18</sup> United States v. Ballard, 322 U.S. 78, 86 (1944).

<sup>19</sup> Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213, 1218 (1940).

1 Amendment does not select any one group or any one type of religion  
2 for preferred treatment.<sup>20</sup>

3 With the purpose of the First Amendment in mind, the United States Supreme Court, in  
4 United States v. Seeger, created a two-part test to determine whether free exercise of  
5 religion falls within the purview of Constitutional protections: (1) sincerity of belief, and (2)  
6 a theological-based conviction.<sup>21</sup> While longstanding religions with widely-recognizable  
7 precedents simplify courts' analysis in determining whether a petitioner's claim is  
8 theologically-based, "[n]either the trappings of robes, nor temples of stone, nor a fixed  
9 liturgy, nor an extensive literature or history is required to meet the test of beliefs  
10 cognizable under the Constitution as religious."<sup>22</sup> The court does not favor one person's  
11 religious beliefs over another; however, historic traditions easily satisfy a plaintiff's burden  
12 of evidentiary proof.<sup>23</sup> "Although support from tradition, history or authority is not required,  
13 without it a plaintiff may be unable to produce enough other evidence of religiosity to  
14 satisfy this preliminary burden."<sup>24</sup>

15 Defendants in their motion for summary judgment rely on the argument that the  
16 Thelemic religion doesn't require a religious diet or provide any restrictions or guidelines  
17 for an adherent's diet, and that since the tenets of the religion don't require a religious diet

18 <sup>20</sup> Ballard, 322 U.S. at 86-87.

19 <sup>21</sup> United States v. Seeger, 380 U.S. 163, 176, 85 S. Ct. 850, 859, 13 L. Ed. 2d 733,  
20 743 (1965).

21 <sup>22</sup> Stevens v. Berger, 428 F. Supp. 896, 900 (E.D.N.Y. 1977).

22 <sup>23</sup> Id.

23 <sup>24</sup> Id. at 900-01. See Therault v. Silber, 391 F. Supp. 578, 582 (W.D. Tex. 1975)  
24 (finding that a prisoners' religion, the Church of the New Song of Universal Life, did not  
25 receive First Amendment protections because it was "a relatively non-structured, free-  
26 form, do-as-you-please philosophy, the sole purpose of which is to cause or encourage  
disruption of established prison discipline for the sake of disruption. Disruption of  
and/or problems for prison authorities is not the result of this so-called religion; it is  
rather the underlying purpose of it.").





1 the plaintiff's exercise of his religion wasn't rendered effectively impossible.<sup>25</sup> However,  
2 whether the central tenets of a religion require a certain act or behavior is no longer the  
3 test used by the Ninth Circuit Court of Appeals. In Shakur v. Schriro, the Ninth Circuit  
4 Court of Appeals applied the sincerity test outlined in Seeger, citing "the Supreme Court's  
5 disapproval of the centrality test."<sup>26</sup> The Seeger sincerity test must be used to determine  
6 whether the Free Exercise clause applies in a particular case.

7 A. Sincerity of Plaintiff's Beliefs

8 In United States v. Seeger, the United States Supreme Court carved out a test to  
9 determine the sincerity of conscientious objectors' religious beliefs in regards to serving  
10 in the military.<sup>27</sup> "The test might be stated in these words: A sincere and meaningful belief  
11 which occupies in the life of its possessor a place parallel to that filled by the God of those  
12 admittedly qualifying for the exemption comes within the statutory definition. This  
13 construction avoids imputing to Congress an intent to classify different religious beliefs .  
14 . . ."<sup>28</sup> Courts caution that a sincere religious belief does not necessarily equate to the  
15 centrality of the conviction: "[i]t is not within the judicial ken to question the centrality of  
16 particular beliefs or practices to a faith, or the validity of particular litigants' interpretations

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19 <sup>25</sup> Defs'. mot. for summ. j. at 5.

20 <sup>26</sup> Shakur v. Schriro, 514 F.3d 878, 885 (2008). In this case a Muslim inmate claimed  
21 that the vegetarian diet provided to him by the prison caused him gastrointestinal  
22 distress and interfered with his religious practice and requested a kosher meat-based  
23 protein instead. The 9<sup>th</sup> Circuit Court of Appeals found that his sincere belief the  
24 kosher protein would satisfy the dietary requirements found in Islam entitled him to  
25 receive the diet. In its opinion overturning the district court ruling in favor of the prison  
26 the Court wrote: "Here the district court impermissibly focused on whether 'consuming  
Halal meat is required of Muslims as a central tenet of Islam,' rather than on whether  
Shakur sincerely believes eating kosher meat is consistent with his faith."

<sup>27</sup> Seeger, 380 U.S. at 164-66, 85 S. Ct. at 853-54, 13 L. Ed. 2d at 736-37.

<sup>28</sup> Id.



1 of those creeds."<sup>29</sup> Thus, when applying the first prong of the test courts must inquire into  
2 the strength of petitioner's religious conviction, rather than the accuracy of his or her  
3 belief.<sup>30</sup>

4 In order to determine the sincerity of a religious conviction, courts in other  
5 jurisdictions have found "[o]ne way [to establish the sincerity of a belief] is to state that the  
6 belief is, in fact, [petitioner's] religious belief."<sup>31</sup> In this case, plaintiff's faith on record is  
7 Thelema, and there is nothing in the record to suggest plaintiff isn't sincere in his belief  
8 that he is entitled to a religious diet as a result of his Thelemic faith. Since the summary  
9 judgment standard requires the court to view the facts in the light most favorable to the  
10 nonmoving party the court must take plaintiff at his word that he sincerely believes he  
11 should be afforded a religious diet. So the strength of plaintiff's belief satisfies the first  
12 prong of the sincerity test for the purposes of a summary judgment determination.

### 13 B. Religious Foundations of Plaintiff's Beliefs

14 Next, in order to ascertain whether a person's actions fall within the purview of First  
15 Amendment protections, the court must discern whether the act is firmly rooted in a  
16 theological conviction.<sup>32</sup> In Wisconsin v. Yoder, the United States Supreme Court  
17 addressed the difference between a theological conviction and a secular belief when  
18 evaluating whether an Amish conviction prohibiting formal education beyond the eighth  
19 grade received Constitution protection:

20 A way of life, however virtuous and admirable, may not be interposed  
21 as a barrier to reasonable state regulation of education if it is based

22 <sup>29</sup> Hernandez v. Comm'r, 490 U.S. 680, 699, 109 S. Ct. 2136, 2148, 104 L. Ed. 2d 766,  
23 786 (1989) (citing Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 716,  
24 101 S. Ct. 1425, 1431, 67 L. Ed. 2d 624, 632 (1981)).

25 <sup>30</sup> Shilling v. Crawford, U.S. Dist. LEXIS 70694, 45 (D. Nev. 2007).

26 <sup>31</sup> Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1296 (11th Cir. Fla. 2007).

<sup>32</sup> Stevens, 428 F. Supp. at 901.





1 on purely secular considerations; to have the protection of the  
2 Religion Clauses, the claims must be rooted in religious belief.  
3 Although a determination of what is a "religious" belief or practice  
4 entitled to constitutional protection may present a most delicate  
5 question, the very concept of ordered liberty precludes allowing  
6 every person to make his own standards on matters of conduct in  
7 which society as a whole has important interests. Thus, if the Amish  
8 asserted their claims because of their subjective evaluation and  
9 rejection of the contemporary secular values accepted by the  
10 majority, much as Thoreau rejected the social values of his time and  
11 isolated himself at Walden Pond, their claims would not rest on a  
12 religious basis. Thoreau's choice was philosophical and personal  
13 rather than religious, and such belief does not rise to the demands  
14 of the Religion Clauses.<sup>33</sup>

8 The United States Supreme Court guides courts to differentiate between secular  
9 beliefs—regardless of the strength of the conviction—and theological beliefs, which receive  
10 protections under the Religion Clauses of the First Amendment.<sup>34</sup>

11 In the present case plaintiff argues his sincere belief that he is entitled to a religious  
12 diet comes from his Thelemic faith. He would like a Thelemic diet<sup>35</sup>, or a traditional  
13 Egyptian diet, or at the very least a kosher diet.<sup>36</sup> As stated above and without deciding  
14 the credibility of his statements, Thelema is a religion which plaintiff claims is based on the  
15 writings of Aleister Crowley and which is closely related to the Egyptian religion.<sup>37</sup> Plaintiff  
16 bases his request for a kosher diet on his assertion that authors and Jewish scholars have  
17 seen stronger connections between Egyptian mysticism and Hebrew traditions than had

18  
19 <sup>33</sup> Wisconsin v. Yoder, 406 U.S. 205, 215-216, 92 S. Ct. 1526, 1534 (1972).

20 <sup>34</sup> Stevens, 428 F. Supp. at 902.

21 <sup>35</sup> This request appears in plaintiff's motion for partial summary judgment, Exhibit F-5,  
22 which is an informal grievance filed at the prison.

23 <sup>36</sup> It should be noted that the only reference to anything like a prescribed diet is in the  
24 religious literature provided by plaintiff that encourages Thelemists to "eat rich foods  
25 and drink sweet wines and wines that foam!" Pl's. Opp'n to defs'. mot. for summ. J. Ex.  
26 2 at 20. Plaintiff also claims that religious items required to practice Thelema include a  
dagger, a sickle, and strange drugs. Ex. 2.

<sup>37</sup> Pl's compl. at 7.



1 previously been thought to exist.<sup>38</sup> Plaintiff argues that the Hebrews gained secret  
2 knowledge during their time in Egypt and Babylon, and that this knowledge became known  
3 as the Cabala, and that Judaism is based on this knowledge, which is the same knowledge  
4 Thelema is based on.<sup>39</sup> This connection, plaintiff argues, gives him a "social connection"  
5 to Judaism that entitles him to a religious diet.<sup>40</sup> In his motion for partial summary  
6 judgment plaintiff offers no additional evidence that his beliefs are sincere and rooted in  
7 a theological conviction. His arguments as they relate to the First Amendment protections  
8 he is seeking focus on his inability to practice his religion as he wishes and the strength  
9 of the defendants' interest in maintaining the policies.<sup>41</sup> In their opposition to plaintiff's  
10 motion for partial summary judgment defendants have provided an affidavit from a  
11 Thelemic priest from Ordo Templi Orientis, the sect plaintiff claims membership to, stating  
12 that Thelema doesn't require a religious diet or a kosher diet.<sup>42</sup> This affidavit is not  
13 dispositive since intrafaith differences are common "and the judicial process is singularly  
14 ill equipped to resolve such differences in relation to the Religion Clauses."<sup>43</sup> But it does  
15 lend support to the defendants' position that plaintiff's belief is not protected under the First  
16 Amendment.

17 The summary judgment standard as it applies to defendants' motion for summary  
18 judgment requires the Court to view the asserted facts in the light most favorable to the

19 <sup>38</sup> Id. (Plaintiff fails to cite any references in support of this assertion with the exception  
20 of a nineteenth century French scholar who plaintiff quotes as writing that the Hebrews  
21 carried secret knowledge with them out of Egypt and resumed the Egyptian traditions in  
22 the Old Testament. Pl's. Ex. F-5.)

23 <sup>39</sup> Pl's ex. F-5.

24 <sup>40</sup> Pl's compl. at 7.

25 <sup>41</sup> Pl's mot. for partial summ. j. at 12-15.

26 <sup>42</sup> Defs' mot. for summ. j., Ex. 2.

<sup>43</sup> Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 715 (1981).



1 nonmoving party, who is the plaintiff in this case. But even under that standard it is clear  
2 plaintiff doesn't meet the requirements of the second prong of the sincerity test. Even  
3 assuming plaintiff's assertions about the relationship between the Egyptian religion and  
4 the Hebrew traditions are true, plaintiff fails to offer any evidence these ties are a part of  
5 his religion. Plaintiff also fails to offer any evidence that the alleged ties between the  
6 Egyptian religion and the Hebrew tradition requires him as a practicing Thelemist to  
7 maintain a kosher diet. He claims these ties give him a "social connection" to Judaism as  
8 well as a philosophical understanding of Judaism which entitle him to a religious diet, but  
9 the Seeger test isn't satisfied by philosophical understandings or social connections.<sup>44</sup>  
10 The second prong of the sincerity test requires claims to "... be rooted in religious belief."<sup>45</sup>  
11 Because plaintiff's sincere belief that he is entitled to a religious diet isn't based on a  
12 theological conviction but on a perceived social connection to Judaism or his philosophical  
13 understanding of Judaism it does not qualify as a sincere religious belief under the Seeger  
14 test, and therefore is not protected by the Free Exercise clause. Plaintiff's Free Exercise  
15 claim fails as a matter of law.

16 IV. PLAINTIFF'S RLUIPA CLAIM

17 RLUIPA's protections only extend to religious beliefs protected by the Free Exercise  
18 Clause or by section 2 of the act.<sup>46</sup> Plaintiff has the burden of establishing a prima facie  
19 case that his religious practice has been substantially burdened by the government.<sup>47</sup>  
20 Since, as discussed above, plaintiff cannot prove he has a sincerely held religious belief  
21 that has been substantially burdened by the defendants' actions he cannot establish his

22 <sup>44</sup> Seeger, 380 U.S. at 164-66, 85 S. Ct. at 853-54, 13 L. Ed. 2d at 736-37.

23 <sup>45</sup> Wisconsin v. Yoder, 406 U.S. 205, 215-216.

24 <sup>46</sup> 42 USCS § 2000cc-1(a)

25 <sup>47</sup> 42 USCS § 2000cc-2(b)



1 prima facie case. Therefore his RLUIPA claim fails as a matter of law.

2 V. QUALIFIED IMMUNITY

3 In their motion for summary judgement defendants raise the issue of qualified  
4 immunity from suit for damages. Since summary judgment is being awarded to them the  
5 issue of whether they can be sued in their individual capacity in this case is moot and the  
6 Court will not reach it.

7  
8 Good cause appearing,

9 IT IS HEREBY ORDERED that plaintiff's motion for partial summary judgment is  
10 DENIED.

11 IT IS HEREBY FURTHER ORDERED that defendants' motion for summary  
12 judgment is GRANTED.

13 DATED this 30<sup>th</sup> day of September, 2014.

14   
15 \_\_\_\_\_  
16 DISTRICT JUDGE



**OFFICE OF  
COUNTY CLERK and EX-OFFICIO CLERK  
OF THE SEVENTH JUDICIAL DISTRICT COURT  
IN AND FOR  
WHITE PINE COUNTY, NEVADA**

STATE OF NEVADA,                   }ss.  
COUNTY OF WHITE PINE,

I, Linda F. Burleigh, County Clerk and ex-officio Clerk of the Seventh Judicial District Court of the State of Nevada, County of White Pine, do hereby certify that the above and foregoing is a full, correct and true copy of the original *Notice of Appeal, Case Appeal Statement, District Court Docket Entries, and Order Denying Plaintiff's Motion For Partial Summary Judgment And Order Granting Defendants' Motion For Summary Judgment* which now remains of record in my office at Ely, County of White Pine and State of Nevada, aforesaid.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Court, at my office in the City of Ely, this 7th day of October, 2014.

*Linda F. Burleigh*

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County Clerk and Ex-Officio Clerk of  
Said Court

By:

*[Signature]*  
Chief Deputy Clerk