Electronically Filed
Oct 29 2015 03:32 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

GILBERT JAY PALIOTTA, Appellant, v. STATE OF NEVADA IN RELATION TO THE NEVADA DEPARTMENT OF CORRECTIONS; AND RENEE BAKER, WARDEN, Respondents.	Supreme Court Case No. 66664 District Court Case No. CF 1111054

APPELLANT'S REPLACEMENT OPENING BRIEF

ADAM HOSMER-HENNER (#12779)
McDONALD CARANO WILSON LLP
100 West Liberty Street, 10th Floor, Reno, Nevada 89501
Telephone: (775) 788-2000
ahosmerhenner@mcwlaw.com

Attorneys for Appellant

Docket 66664 Document 2015-33133

NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, Gilbert Jay Paliotta affirms that he is an individual who is a resident of Nevada and represented by undersigned counsel in this appeal but was unrepresented during the District Court proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ROUTING STATEMENT

The Supreme Court should retain jurisdiction of this appeal under NRAP 17(a)(13) as a case "raising as a principal issue a question of first impression involving the United States or Nevada constitution or common law." This appeal raises important questions of first impression in Nevada concerning the interpretation and interaction of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc, and the Free Exercise Clause of the First Amendment. In the absence of guidance from the Nevada Supreme Court, the District Court below relied on outdated standards, replaced by newer analyses in other jurisdictions, which led to an incorrect result. Additionally, this appeal raises matters of "statewide public importance" as it concerns the proper level of protection from government-imposed burdens for inmates attempting to engage in religious exercises. NRAP 17(a)(14).

JURISDICTIONAL STATEMENT

This Court has jurisdiction over Appellant Gilbert Jay Paliotta's ("Paliotta") appeal pursuant to NRAP 3A(b). Paliotta has exhausted his administrative remedies pursuant to the Prison Litigation Reform Act, 42 U.S.C. § 1997(e), and he filed a timely Notice of Appeal on October 8, 2014.

STATEMENT OF THE ISSUES

(1) Whether the District Court erred in disposing of Paliotta's RLUIPA claim based solely on the application of less stringent standards taken from distinct Free Exercise Clause jurisprudence.

(2) Whether the District Court erred in disposing of Paliotta's Free Exercise claim by focusing on whether Paliotta's religion required a specific diet, rather than on whether Paliotta sincerely believed that the diet was consistent with his faith.

STATEMENT OF THE CASE

Paliotta is currently incarcerated at Ely State Prison by the Nevada Department of Corrections ("NDOC"). RA 753.[1] On November 28, 2011, Paliotta filed a civil rights complaint and demand for a jury trial with the Seventh Judicial District Court of the State of Nevada in and for the County of White Pine. RA 13. The Complaint named the State of Nevada and other individual state officers as Defendants (collectively referred to herein as the "State"). *Id.* The Complaint was filed pursuant to 42 U.S.C. § 1983 and asserted three causes of action based on RLUIPA, the First Amendment, and the Fourteenth Amendment. RA 21-24. The State answered on April 2, 2012. RA 753.

[1] Pursuant to this Court's July 31, 2015 Scheduling Order, all references are to the trial court record, which has been filed in this appeal. (RA")

Thereafter, Paliotta filed an Amended Complaint in an apparent attempt to correct certain service issues but the substance of the Amended Complaint was identical to the initial Complaint. RA 328-341.

After the parties engaged in discovery, Paliotta filed a Motion for Partial Summary Judgment on March 13, 2013. RA 273. This Motion requested that summary judgment be entered in favor of Paliotta on the First Amendment, Fourteenth Amendment, and RLUIPA claims in the Amended Complaint. RA 297. The State filed its own Motion for Summary Judgment against Paliotta's Amended Complaint on November 19, 2013. RA 665. Both motions were fully briefed and submitted to the District Court for decision by January 17, 2014. RA 750, 754.

The District Court issued an Order denying Plaintiff's Motion for Partial Summary Judgment and granting Defendants' Motion for Summary Judgment on September 30, 2014 ("Order"). RA 753. The District Court did not specify whether its analysis related to the Complaint or the Amended Complaint but this is immaterial as the two pleadings are essentially identical. Paliotta then timely appealed the Order by filing a Notice of Appeal on October 6, 2014. RA 767.

STATEMENT OF THE FACTS

Paliotta is in the custody of the Nevada Department of Corrections ("NDOC") at Ely State Prison in White Pine county. RA 753. Paliotta filed a Faith Group Affiliation Declaration Form with the NDOC in

order to officially declare his faith as Thelema. RA 427. Thelema is a recognized faith group in the NDOC Administrative Regulation 810 ("AR 810"). RA 398. AR 810 attempts to provide an overview of Thelemic practices, which it lumps together with Druid, Celtic, Pagans, Pre-Christian faith groups:

- "Diet Consideration and Fast Days: None"
- "Holy Day Observance: solstices & Equinoxes, Sumhain, Imbolc, Beltane, Lugnasash"
- "Worship Practices Personal Group: P - Personal worship ritual, divination or devotion. Accommodated around normal work times. G – Outdoor-based meetings."
- "Allowable Personal Items: Henge of Keltria ; 'Book of Ritual' or books acceptable under AR 750; pentacle disk; 1 sacred object pouch; 1 set of rune cards; 2 medallions, 2 inch max; 2 'Book of Shadows'; 1 altar cloth not to be in excess of 1 ½' x 2"; 1 spiritual bag no larger than 4" x 4"; 2 decks of Tarot cards; 4 talismans / amulets; 6 stones or crystals no larger than 1 ½"; 1 pendulum in stone, wood or crystal only; 1 chalice – plastic [no metal, glass or ceramics]; 1 set of runes in stone or wood; 1 small bell; Prayer beads."
- "Allowable Group Items: Approved herbs/herbal teas; 1 set of rune cards; 4-6 jewelry size stones; crackers/water for ceremonial use; plastic cups and bowls for ceremonial use;

> pendulum; 1 wand no longer than 8" [no metal, glass or cermaics]; 1 aluminum cauldron no larger than 6" across; 1 censer no larger than 3"; no more than 2 oz. of sea salt; 1 small bell; candles . . . one small candle holder, plastic or aluminum; one pack of matches/one lighter, one small, aluminum tea strainer."

RA 398.

From March 3, 2011, when Paliotta declared his faith group affiliation as Thelemist, RA 427, to March 13, 2013 when he filed for summary judgment, RA 297, Paliotta requested religious accommodations no fewer than fourteen times. RA 413-444. Each and every one of these reasonable requests was denied by the State. *Id.*

- March 2, 2011 – Paliotta requested literature on Thelema or anything written by Aleister Crowley. RA 417. None was provided.
- March 14, 2011 – Paliotta requested literature on the Ordo Templi Orientis, an order of Thelema. RA 418. None was provided.
- March 27, 2011 – Paliotta requested follow-up on his previous informal request for a religious diet. RA 419. The State responded that it was unaware of such a request and that the prison no longer had a chaplain. RA 419.
- April 20, 2011 – Paliotta requested a variety of philosophical and scientific literature. RA 420. None was provided.

- April 22, 2011 – Paliotta requested a "kosher meal in accordance w/my faith" and stated that Thelema draws its principles from the ancient Egyptian religion and "the Hebrews ate the original 'kosher' meal of the Egyptians." RA 421. He also submitted a separate Inmate Religious Diet Request Form requesting to participate in the Thelemist religious diet program. RA 429. The State rejected these requests stating that "[k]osher is not listed as a diet consideration for Thelema under AR 810." *Id.*
- May 3, 2011 – Paliotta requested access to the chapel in order to hold services with other Thelemists. RA 422. The State rejected this request.
- June 1, 2011 – Paliotta requested the ability to celebrate the summer solstice with other "Thelemists and/or Jews and/or Wiccans" on June 20 and June 21 in accordance with his faith. RA 423. He also requested a Thelemic holiday meal. *Id.* The State rejected these requests.
- June 7, 2011 – Paliotta repeated his request for the ability to celebrate the summer solstice and for a holiday meal. RA 424. The State again rejected these requests.
- June 20, 2011 – Paliotta submitted an Informal Grievance outlining in detail his sincere religious belief concerning dietary restrictions. RA 431-434. Paliotta expressed his wish

to be "placed on the kosher meal / diet in accordance with his belief & practices" but "if no kosher meal is provided, then grievant demands to be given traditional Thelemist diet/meal" that is in line with the Ordo Templi Orientis beliefs. RA 434. The State rejected this request.

- July 25, 2011 – Paliotta submitted an Informal Grievance stating that Thelema was incorrectly grouped with "Druid/Celtic/Pagans/Pre-Christian" religions and that he has been deprived "from practicing my religion" in connection with Thelema's holy days and methods of worship. RA 435-436. The State rejected this grievance.
- July 27, 2011 – Paliotta submitted a Second Level Grievance concerning his request for a kosher meal. RA 438. The State denied this request because "[p]er AR 810, the [k]osher Diet is not listed as a Religious Diet consideration for Thelema." RA 440.
- September 28, 2011 – Paliotta requested to speak with a practicing Thelemist and if one was not available "to be allowed to congregate in the chapel with other Thelemists." RA 425. The State rejected this request.
- April 21, 2012 – Paliotta submitted a Request for Accommodation of Religious Practices seeking to amend AR 810 to correct its interpretation of Thelema and to add specific holy days,

religious items, and dietary requirements related to Thelema. RA 442. Paliotta stated that AR 810 incorrectly claims that Thelemists "are the same as Druids, Pagans, and Pre-Christians." RA 442. The State denied this request.

- May 20, 2012 – Paliotta submitted an Inmate Request for Recognized Holiday Service for recognition of a Thelema summer solstice. RA 444. The State denied this request at the time because "Thelema is not an NVDOC Religious Group." *Id.*

The response by the State on September 28, 2011 reveals the blatantly hostile attitude toward Paliotta and Thelema: "You can practice your religion in your cell." RA 425.

SUMMARY OF THE ARGUMENT

The District Court's Order contravened both RLUIPA and the First Amendment by turning the judiciary into the arbiter of what is and what is not part of an individual's religion. The State cannot assume the role of high priest, defining the correct method of religious practice and substituting a judge's interpretation of a religion for the practitioner's. Yet, this is exactly what occurred when the District Court ruled against Appellant Paliotta as it decided that his religion, Thelema, did not include the practices that Paliotta sincerely believed were part of his faith.

The District Court erroneously reduced Paliotta's varied requests for religious accommodation into a single issue concerning kosher meals. Paliotta had initially requested a traditional Egyptian diet in keeping with his Thelemic faith, along with the ability to worship in the chapel, observe the solstice, and obtain religious texts. The prison's chaplain suggested instead that Paliotta could receive kosher meals, which might be an acceptable substitute given the ties between the two religions. But even kosher meals were denied to Paliotta. Thus, the District Court unfairly punished Paliotta's reasonable acceptance of a compromise, which was itself suggested by the State.

Despite finding that there was nothing in the record to suggest that Paliotta was not sincere in his beliefs concerning a religious diet, the District Court still rejected Paliotta's request because it decided that Thelema did not require a specific or a kosher diet. This intrusive analysis is prohibited by RLUIPA and the Free Exercise Clause, which prevent courts from telling Paliotta how he should be practicing his own religion.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court. *Wood v. Safeway, Inc*. 121 Nev. 724, 731, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the

moving party is entitled to judgment as a matter of law. *Id.* When reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party. *Id.*

II. THE ORDER RELIES ENTIRELY ON THE FALSE PREMISE THAT PALIOTTA WANTED A KOSHER MEAL AS HIS FIRST CHOICE.

The District Court's focus on kosher meals and Judaism is a red herring. Paliotta alleges in his Amended Complaint that he requested a "traditional Egyptian diet that is in accordance with Plaintiff's Thelemic beliefs." RA 333; *see also* RA 517 (admitting, in response to a request for admission to Defendant Renee Baker, that Paliotta sought to receive a traditional Egyptian diet). The prison chaplain responded that Paliotta should "consider a [k]osher meal as a substitute." *Id.* This suggestion was perhaps made because the prison did not provide "traditional Egyptian" meals but was already serving kosher meals to some prisoners. RA 502. Accordingly, Paliotta requested, but was denied, kosher meals. As the basis for his lawsuit, he alleges that he was denied both a "traditional Egyptian diet" and a "[k]osher diet." RA 337.

Rather than construe the allegations of a pro se plaintiff liberally as is required, the State and District Court construed Paliotta's allegations in a skewed and unfair manner. *See United States v. Seesing*, 234 F.3d 456, 462–63 (9th Cir. 2000) (requiring liberal

construction of prisoners' pro se pleadings). Instead of giving Paliotta any benefit of the doubt, the State and District Court pigeonholed Paliotta as a non-Jew who was only seeking kosher meals. The State relied on the reductionist argument that a "kosher diet is not part of Thelema. Therefore, the First Amendment does not require Defendants to provide Plaintiff with a kosher diet." RA 671. The District Court then held that Paliotta was not entitled to a kosher diet because his request was based on "a perceived social connection to Judaism or his philosophical understanding of Judaism." RA 763. Essentially, the State pulled a bait-and-switch on Paliotta whereby he was instructed to seek a kosher diet as a partial accommodation only to be told that he could not receive that diet because it did not match his faith.

The United States Supreme Court recently decided an analogous case in favor of a prisoner's rights to religious exercise. *See Holt v. Hobbs*, 135 S. Ct. 853, 861 (2015). In *Holt*, a Muslim prisoner "sought permission to grow a beard and, although he believes that his faith requires him not to trim his beard at all, he proposed a 'compromise' under which he would grow only a ½-inch beard." *Id.* The prison officials denied his request based on a "compelling interest in staunching the flow of contraband into and within" the prison. *Id.* at 863. Ultimately, the United States Supreme Court found that "the growing of a beard" is something "which petitioner believes is a dictate of his religious faith" and therefore held that the prison's grooming

policy violated RLUIPA as it prevented the prisoner from "growing a ½-inch beard in accordance with his religious beliefs." *Id.* at 867.

The United States Supreme Court did not decide, however, that the prisoner in *Holt* had forfeited his religious rights by seeking a compromise that was not strictly in keeping with his faith. If the United States Supreme Court had applied the same flawed reasoning as the District Court, it would have rejected the prisoner's claims on the basis that a ½-inch beard was not a tenet of Islam and therefore the prisoner did not have a "sincerely held religious belief." RA 763. This conclusion would be just as preposterous with respect to Paliotta as it would have been in *Holt*.

The District Court was overly focused on language stating that Paliotta had a social or philosophical connection to Judaism. RA 763. This language was incorrectly interpreted. Paliotta was not claiming a non-religious social connection with Judaism. Instead, he argued that the two religions were intertwined and that Thelema incorporated elements of Judaism. RA 334. (stating that "the connection between Hebrew traditions and Egyptian mysticism was stronger than previously believed and even supported by many authors and Jewish scholars" and that "Thelemic tradition and practice further supported the fact he should be allowed a [k]osher meal"). Accordingly, any discussion of social and philosophical connections should be construed in the context of theology. Paliotta's language may not always have

been precise, but it is undisputed that his requests for specific diets emerged from his religious convictions.

Moreover, religions commonly incorporate aspects of other religions based on history, philosophy, or other reasons. The smorgasboard approach to religion, as disclaimed by the State is actually the development path most religions have taken. For example, "Jews for Jesus" is an evangelical missionary society "whose followers . . . believe that Jesus was the Messiah, a belief that conflicts with traditional Jewish doctrine." *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of New York, Inc.*, 968 F.2d 286, 289 (2d Cir. 1992); *see also Marria v. Broaddus,* No. 97 CIV.8297 NRB, 2003 WL 21782633, at *3 (S.D.N.Y. July 31, 2003) (noting that a religion called the Nation of Gods and Earths included beliefs "based on the Koran and the Bible, which serve as secondary texts"). Paliotta's religious beliefs were based on his understanding of his own religion's historical and philosophical foundations.

The entirety of the District Court's Order must therefore be reversed because it ignores the factual predicate leading up to Paliotta's lawsuit. If anything, the Order should have focused on whether Paliotta was entitled to the "traditional Egyptian diet" he originally requested. Only if that was outweighed by a compelling state interest would an analysis of whether kosher meals were an acceptable substitute be appropriate. Again, Paliotta specifically stated in his Amended

Complaint that he "could demand a traditional Egyptian diet in accordance with his beliefs but to accommodate the defendant would accept a [k]osher meal since it is already available to other prisoners." RA 339. To focus solely on whether Paliotta had a sincere religious belief concerning kosher meals is contrary to the record and misses the point of his compromise.

Additionally, Paliotta's claims were based not just on dietary issues but on several other types of requests for accommodations. RA 333-335. Although not spelled out in as much detail in his Amended Complaint, the District Court should have liberally construed the pleadings to include these factual bases. For instance, Paliotta requested religious texts, access to the chapel, and the ability to celebrate his religious holidays. *Id.* None of these requests was accommodated. Therefore, regardless of the outcome of Paliotta's dietary claims, remanding is appropriate so that the District Court can consider these other requests.

III. THE DISTRICT COURT APPLIED THE WRONG ANALYSIS FOR A RLUIPA CLAIM.

Congress passed RLUIPA in order to provide increased protection for prisoners' free exercise of religion. *See Cutter v. Wilkinson*, 544 U.S. 709, 720–21 (2005) (explaining that institutionalized persons are those in state-run "mental hospitals, prisons, and the like—in which the government exerts a degree of control unparalleled in civilian society"). While general laws in society usually do not prevent the exercise of

religion in one's own home, when the state controls every aspect of a prisoner's life including daily schedules and components of meals, the burden on religion is extreme.

RLUIPA replaced the traditional free exercise analysis in the prison context. *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1314 (10th Cir. 2010) ("The standards under RLUIPA are different from those under the Free Exercise Clause.") RLUIPA provides that "[n]o 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 burden is "in furtherance of a compelling government interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). The United States Supreme Court recognized RLUIPA as "the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens . . ." *Cutter*, 544 U.S. at 714. The statute itself reflects this intent, stating that it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

Congress effectuated this broad intent by distinguishing RLUIPA from traditional First Amendment jurisprudence in at least two ways. First, "it expanded the reach of the protection to include any 'religious

exercise,' including 'any exercise of religion, whether or not compelled by or central to, a system of religious belief.'" *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 986 (9th Cir. 2008) (quotations omitted). Specifically, RLUIPA "bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion." *Id.* (quotations omitted). Second, the deferential rational basis standard of *Turner v. Safley*, 482 U.S. 78, 89-90 (1987) (cited by the State) is inapplicable to RLUIPA claims. Instead, "RLUIPA requires the government to meet the much stricter burden of showing that the burden it imposes on religious exercise" is the least restrictive means of furthering a compelling government interest. *Greene*, 513 F.3d at 986.

The District Court erred by conflating the Free Exercise Clause analysis with the RLUIPA analysis, giving short shrift to the latter. Paliotta demonstrated the existence of a genuine dispute of material facts concerning his religious beliefs and in fact the District Court found that there was nothing in the record suggesting he was not sincere in his faith. RA 760. Under RLUIPA, the inquiry stops there and the District Court should not have attempted to conduct a theological inquisition into Thelema's beliefs.

A. Paliotta Demonstrated That His Religious Exercise Was Grounded In Sincerely Held Beliefs.

RLUIPA defines a 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)(A). The definition is intentionally broad.

See Greene, 513 F.3d at 986. The Order is internally inconsistent on this point. At first, it states that there is "nothing in the record to suggest plaintiff isn't sincere in his belief that he is entitled to a religious diet as a result of his Thelemic faith" and therefore found that Paliotta "sincerely believes he should be afforded a religious diet." RA 760. Yet, when analyzing RLUIPA, the District Court somehow reached the opposite conclusion and found that "plaintiff cannot prove he has a sincerely held religious belief." RA 763. There is no way to reconcile these two holdings. Paliotta cannot have a sincere religious belief regarding dietary restrictions but also be considered insincere based on a finding that his religion does not have formal dietary restrictions.

The only permissible inquiry is whether Paliotta was sincere in his personal religious beliefs. Strangely, the District Court cites elsewhere to *Shakur v. Schriro*, 514 F.3d 878, 885 (9th Cir. 2008), but fails to comprehend the core of the Ninth Circuit's holding. *Shakur* invalidates the whole of the District Court's analysis. *Id.* In that decision, the Ninth Circuit evaluated a request by an Islamic prisoner to receive kosher meals. The prison staff rejected the request because a "[k]osher diet is not a requirement of his religion" and the prison allows "Muslim inmates the opportunity to request a vegetarian diet should they choose so as to avoid eating meat that is not Halal." *Id.* The Ninth Circuit conclusively held that the "the district court impermissibly focused on whether 'consuming Halal meat is required of Muslims as a

central tenant of Islam,' rather than on whether Shakur sincerely believes eating kosher meat is consistent with his faith." *Id.* There is no way around *Shakur's* logic for Respondent.

The District Court also "impermissibly focused" on whether Thelema had formal dietary restrictions rather than on whether Paliotta sincerely believed that kosher meals were consistent with his religion. *Id.* Once the District Court found that Paliotta was sincere, it should not have made the mistake of trying to interpret the tenets of Thelema. A religious claimant need not "prove that the exercise at issue is somehow 'central' or 'fundamental' to or 'compelled' by his faith.'" *Yellowbear v. Lampert*, 741 F.3d 48, 54-55 (10th Cir. 2014) ("Just as civil courts lack any warrant to decide the truth of a religion, in RLUIPA Congress made plain that we also lack any license to decide the relative value of a particular exercise to a religion.") Under the broad language of RLUIPA, it is not "for judges to decide whether a claimant who seeks to pursue a particular religious exercise has 'correctly perceived the commands of [his] faith' or to become 'arbiters of scriptural interpretation.'" *Id.* (citing *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 716 (1981).

Paliotta believed that only specific diets were compatible with his faith. Based on this sincere belief, Paliotta was unable to eat more than one meal a day since the "food provided by the Defendants is not acceptable in accordance with [Paliotta's] religious beliefs." RA 93. The

District Court therefore should have looked to Paliotta rather than Thelema to avoid coming to the wrong conclusion under RLUIPA.

B. Under RLUIPA, The State Cannot Define The Canons Of A Religion.

Courts faced with RLUIPA claims often make "the mistake of accepting the testimony of other members of the claimant's religion," believing that such testimony could establish whether the practice in question was central or compelled. *Coronel v. Paul*, 316 F. Supp. 2d 868, 878 (D. Ariz. 2004). But religion is an intensely personal experience and individuals "invariably form religious views that differ from those held by members of the same faith," and "the right to the free exercise of religion includes the right to develop views that vary from those of other believers." *Id.*; *see also Thomas*, 450 U.S. at 714 ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.")

The District Court erred in focusing on the religious doctrine of Thelema rather than on what Paliotta believed to be his religious faith. In an analogous case, the District of Arizona held that the prisoner "is therefore not required to show that consuming a kosher diet is mandated as a part of the Messianic Judaism tradition; rather, he is required to show that he sincerely believes that eating a kosher diet is consistent with his faith." *White v. Linderman*, No. CV 11-8152-PCT-RCB, 2013 WL 4496364, at *4 (D. Ariz. Aug. 22, 2013); *see also In re Garcia*, 201 Cal. App. 4th 892, 905-906 (Cal. Ct. App. 2012) (recognizing

an inmate's right to follow a kosher diet based on a sincere belief that Messianic Judaism included this dietary tenet, even though that belief system was not recognized by traditional Judaism). Because the District Court found that Paliotta sincerely believed that a kosher diet was consistent with his practice of Thelema, it should not have then inquired into the formal teachings of Thelema.

C. Dietary Restrictions Are Generally Considered To Be A Traditional Religious Exercise.

The definition of a religious exercise under RLUIPA is extremely broad. *Warsoldier v. Woodford*, 418 F.3d 989, 994 (9th Cir. 2005) (noting that RLUIPA expansively defines "religious exercise" as "'any exercise of religion, whether or not compelled by, or central to, a system of religious belief'") (quoting 42 U.S.C. § 2000cc-2(a)). The exercise of religion "involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation."" *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). Accordingly, the maintenance of a specific diet is a common and traditional part of religious exercise.

D. The District Court Split With Every Court That Has Considered Whether Dietary Restrictions Constitute A Religious Exercise For Thelemists.

The District Court weighed evidence submitted by the State and Paliotta, ultimately concluding that Thelema did not mandate a specific diet and that the incorporation of a kosher diet did not have religious significance for Thelemists. In the course of its dilettante theological inquiry, the District Court failed to cite any decision relating to Thelema practitioners, relying instead on its own analysis of the limited evidence presented by a pro se plaintiff and the State. Had the District Court or State cast a wider net, they would have identified numerous decisions where courts found that dietary restrictions constituted religious exercise by practitioners of Thelema.

In an on-point case, the Seventh Circuit analyzed RLUIPA and free exercise claims by Gregory Koger, a Thelemist inmate. *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008). Upon entering prison, Koger designated his religious affiliation as Baptist. *Id.* at 790. He then switched his affiliation to Buddhist, then to a nondenominational yoga practitioner, and then to the Ordo Templi Orientis order of Thelema. *Id.* After Koger's request for a non-meat diet was denied, he filed claims based on RLUIPA and the First and Fourteenth Amendments. *Id.* at 796.

The Seventh Circuit reversed the lower court's grant of summary judgment to the prison officials. *Id.* at 804. This decision was based on the holding that "while there are no dietary restrictions 'compelled by'

or 'central' to [Thelema or Ordo Templi Orientis], many of its practitioners adopt such restrictions as part of their 'exercise' of Thelema." *Id.* at 797. Thus, the court concluded that "Koger sought to refrain from eating meat as a religious exercise as that term is defined by RLUIPA." *Id.*

Other courts that have considered Thelema have similarly found a wide range of activity to be part of a practitioner's religious exercise. For example, the District of Oregon found that the "Thelemite religion does not have any universal requirements, and is centered upon encouraging members to develop their own 'personal regimen of spiritual discipline' in order to fulfil the central tenet that members 'Do what thou[] whilt . . .'" *Anello v. Williams*, No. 3:10-CV-622-AC, 2012 WL 2522280, at *8 (D. Or. Mar. 20, 2012). Thus, the court found that given "this broad 'divine purpose' it is reasonable that Anello, as a Thelemite, might incorporate various rituals and beliefs from other religions." *Id.* Additionally, the Southern District of Mississippi found that the "Thelema religion . . . is based upon the philosophy 'Do what thou wilt'" and that "Modern Thelema is a syncretic philosophy and religion, containing elements of numerous philosophical and religious traditions." *Wall v. Black*, No. CIV.A508CV274DCBMTP, 2009 WL 3215344, at *4, n.4 (S.D. Miss. Sept. 30, 2009). Finally, in *Grayson v. Schuler*, the Seventh Circuit noted that "Thelema's single mandatory

tenet invites an infinity of optional observances." 666 F.3d 450, 455 (7th Cir. 2012).

These cases, while certainly not binding, provide a clear contrast to the decision of the District Court, which attempted to define the activities constituting religious exercise for a Thelemite. Here, the District Court improperly required Paliotta to offer evidence that his religion included the relationship between Thelema and Hebrew traditions. RA 763. Equally improper was the requirement that Paliotta provide evidence that his religious beliefs "require[d] him as a practicing Thelemist to maintain a kosher diet." *Id.* The holding of *Koger* – individual practitioners of Thelema do incorporate dietary restrictions as part of their religious exercise – illustrates the District Court's error as do the other cases discussing the incorporation of other religions and philosophies into Thelema.

The District Court compounded its mistakes by finding that an "affidavit from a Thelemic priest . . . stating that Thelema doesn't require a religious diet or a kosher diet . . . [lent] support to the defendants' position that plaintiff's belief is not protected under the First Amendment." RA762. The United States Supreme Court rejected this type of reasoning, writing that:

> Intrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the

> Religion Clauses . . . the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Thomas, 450 U.S. at 715-16. Moreover, "clergy opinion has generally been deemed insufficient to override a prisoner's sincerely held religious belief." *Koger*, 523 F.3d at 799; *see also In re Garcia*, 2012 Cal. App. 4th at 905-906 (ignoring declaration from clergy). Accordingly, the ultimate decision against Paliotta cannot stand as the District Court relied, in part, on irrelevant evidence from clergy.

Especially when viewing all facts in the light most favorable to Paliotta, he has shown that he has a sincere belief about the aspects of his own religious practice. The District Court incorrectly split with the other courts above and improperly attempted to define Thelema as a discrete set of religious beliefs rather than analyze the religious beliefs of Paliotta as an individual.

E. The State Did Not Present Any Evidence Or Argument As To Its Compelling Interest In Denying Paliotta's Accommodations.

RLUIPA requires the government to demonstrate that its burden is "in furtherance of a compelling government interest" and "is the least

restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). The State did not attempt to meet this burden because it believed it Paliotta had not established a prima facie case under RLUIPA. Because this belief and the District Court's holding is incorrect, the State has not satisfied RLUIPA's requirements on this issue but should have the opportunity to do so on remand.

IV. PALIOTTA'S FREE EXERCISE CLAIM SHOULD NOT HAVE BEEN DENIED AS THE DISTRICT COURT IMPERMISSIBLY ADJUDICATED THE TENETS OF A RELIGION.

The free exercise of religion "means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Smith*, 494 U.S. at 877. This right is not limited to practitioners of organized religions or those faiths with fixed, formal doctrines. *See Malnak v. Yogi*, 592 F.2d 197, 200 (3d Cir. 1979) (describing transcendental meditation as religious in nature). Free exercise rights are also not denied to individuals who differ ideologically from their fellow practitioners. *See Thomas*, 450 U.S. at 715-16. Yet the District Court broke with both of these principles by rejecting Paliotta's request for religious accommodation after conducting an unnecessary and intrusive inquiry into Thelema.

The modern balancing test used for free exercise claims brought by prisoners weighs the burden on the practice of religion against the government's legitimate penological interests. *See Shakur,* 514 F.3d at 883–84 (9th Cir. 2008); *see also McElya v. Babbitt*, 833 F.2d 196, 197

(9th Cir. 1987) (holding that the "right to exercise religious practices and beliefs does not terminate at the prison door" but must be balanced against the state's legitimate penological interest). First, a prisoner must show that the religious practice at issue satisfies two criteria: (1) the proffered belief must be sincerely held and (2) the claim must be rooted in religious belief, not in purely secular philosophical concerns. *Shakur*, 514 F.3d at 884 (citing *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994)). Second, the Free Exercise Clause claim will fail if "the State shows that the challenged action is 'reasonably related to legitimate penological interests.'" *Walker v. Beard*, 789 F.3d 1125, 1138 (9th Cir. 2015) (quotations omitted).

Even though the District Court found that Paliotta's religious beliefs were sincere, it rejected his free exercise claim on the basis that his beliefs were not rooted in religion. This finding is internally contradictory.

A. Paliotta's Requests For Accommodation Are Sincere.

The District Court readily held that Paliotta "sincerely believes he should be afforded a religious diet." RA 760. The sincerity test is not a high barrier. *See Watts v. Florida Int'l Univ.,* 495 F.3d 1289, 1296 (11th Cir. 2007) (finding it sufficient to show sincerity of a religious conviction to "state that the belief is, in fact, your religious belief"). The only possible interpretation of this holding is that Paliotta is 1) a sincere practitioner of Thelema and 2) sincerely believes that the practice of

Thelema includes dietary restrictions compatible with either traditional Egyptian meals or kosher meals.

B. Paliotta's Requests For Accommodation Are Religiously Based.

After correctly ruling on the sincerity prong, the District Court went astray from modern case law by relying on two anachronistic decisions for the "rooted in religious belief" prong. Citing to *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the District Court attempted to differentiate between secular beliefs and theological beliefs. RA 761. But a subsequent decision by the United States Supreme Court, *Smith*, 494 U.S. at 877, "repudiated the method of analysis used in prior free exercise cases like *Wisconsin v. Yoder*." *Holt*, 135 S. Ct. 859. The second case relied upon by the District Court is *United States v. Seeger*, 380 U.S. 163, 176 (1965), which involved a question of statutory interpretation. In *Seeger*, the United States Supreme Court analyzed the application to conscientious objectors of a statute that defined religious belief as "an individual's belief in relation to a Supreme Being." *Id.* at 165. Although *Seeger* continues to be cited indirectly today, it should not be considered as the foundation of free exercise jurisprudence as it dates from an era when religion was largely equated with theism.

While purely secular concerns are not encompassed by the Free Exercise Clause, more modern courts have concluded a "plaintiff's claim need only be related to his sincerely held religious belief." *Ishmael v.*

Oregon Dep't of Corr., No. 2:14-CV-01651-JO, 2015 WL 5829808, at *5 (D. Or. Oct. 6, 2015). A "generous functional (and even idiosyncratic) definition best serves free exercise values." *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1537 (9th Cir. 1985). To be rooted in religious belief, a plaintiff's claim need not be compelled by or central to his religion. *See Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds.") Once the Court established that Paliotta had a sincerely held religious belief that he should limit himself to kosher meals, the only remaining question was to determine whether his legal claims were related to this belief.

This question is easily resolved in Paliotta's favor because the overlap between his beliefs and his requests is precise. For example, the Ninth Circuit held that "[o]nce [a plaintiff's] belief is established as sincere, it would seem undisputable that [plaintiff's] objection must be 'rooted in' that belief, at least in part." *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981). Had Paliotta merely wanted to receive kosher meals, he could have adopted a different faith such as Judaism. Had he merely wanted to inconvenience the prison, he could have requested traditional Egyptian meals. Instead, Paliotta opted for a compromise in keeping with his sincerely held religious beliefs.

Moreover, there is nothing at all unreasonable about Paliotta's belief that his religion is compatible with kosher meals because of a social and philosophical connection between the two religions. The District Court incorrectly interpreted this type of language that Paliotta had only a social interest in Judaism or kosher meals. Again, this was a formalistic and technicality-based decision that was a disservice to a pro se plaintiff. Paliotta's statements were not about his philosophical or social connection to Judaism but about Thelema's connection to that other religion. Thus, a belief about a kosher diet is rooted in Paliotta's sincerely held religious beliefs about Thelema.

C. The State Presented No Evidence Demonstrating A Legitimate Penological Interest.

Due to its holding on the first half of the free exercise analysis, the District Court did not reach the issue of whether the State could show that its denial of Paliotta's religious accommodation requests was reasonably related to a legitimate penological interest. Even if it had gone further, it could not possibly have found in the State's favor on this question as the State presented no evidence related to its penological interest. In fact, the State expressly disclaimed any "need to show a legitimate penological reason to deny Plaintiff a [k]osher diet" because "Thelema and [k]osher are unrelated." RA 737. To compare, in another case the court "determined that kosher meals can be provided in a cost-effective manner to Jewish inmates" and therefore there was an implicit judgment "that providing kosher meals is not currently cost

prohibitive." *In re Garcia*, 202 Cal. App. 4th 892, 905, 136 Cal. Rptr. 3d 298, 307 (2012).

Accordingly, should this Court find that Paliotta's requests fall within the ambit of the First Amendment, there is nothing on the other side of the scale related to the State's interests. Thus, summary judgment for Paliotta and against the State would be warranted or, at a minimum, remanding so that the State could present evidence on this part of its burden.

V. THE EQUAL PROTECTION CLAIM AND QUALIFIED IMMUNITY ISSUES SHOULD BE REMANDED AS THEY WERE NOT CONSIDERED IN THE DISTRICT COURT'S ORDER.

The third claim for relief in Paliotta's Amended Complaint alleges violations of his equal protection rights under the Fourteenth Amendment. RA 339. The State argued that it was entitled to judgment as a matter of law on this claim for relief. RA 671-72 (arguing that Paliotta was not similarly situated to other religious practitioners and pointing to an alleged lack of evidence for "the proposition that inmates whose religions don't require kosher are given a kosher diet"). Although the District Court did not analyze the Fourteenth Amendment or include any substantive discussion on this claim, it nevertheless granted, apparently in its entirety, the State's Motion for Summary Judgment.

The State also raised qualified immunity as a defense based on a lack of "evidence that Defendants had notice that their conduct would

be considered clearly unlawful." RA 672. The District Court found that "[s]ince summary judgment is being awarded to [the State] the issue of whether they can be sued in their individual capacity in this case is moot and the Court will not reach it." RA 764.

As the District Court did not actually decide these issues they should be remanded for further proceedings. This Court does not resolve "factual issue[s] that the district court did not reach, as doing so would require us to inappropriately weigh the evidence and resolve questions of fact for the first time on appeal. It is up to the district court on remand to resolve these questions." *Liu v. Christopher Homes, LLC*, 130 Nev. Adv. Op. 17, 321 P.3d 875, 881 (2014). Because the State's arguments on the Fourteenth Amendment claim and qualified immunity involved factual issues that were not weighed by the District Court, remand is appropriate.

CONCLUSION

For all of the above reasons, Paliotta respectfully requests that this Court reverse the District Court's Order and remand for further proceedings consistent with the above analysis.

///

///

///

///

AFFIRMATION

The undersigned does hereby affirm that the preceding document does not contain the Social Security number of any person.

MCDONALD CARANO WILSON LLP

By: /s/ Adam Hosmer-Henner
Adam Hosmer-Henner (#12779)
100 West Liberty Street, 10th Floor
Reno, Nevada 89501
ahosmerhenner@mcwlaw.com

Attorneys for Appellant

CERTIFICATION OF ATTORNEY

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century font.

I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 8,307 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in

conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted on October 29, 2015.

MCDONALD CARANO WILSON LLP

By: /s/ Adam Hosmer-Henner
Adam Hosmer-Henner (#12779)
100 West Liberty Street, 10th Floor
Reno, Nevada 89501
ahosmerhenner@mcwlaw.com

Attorneys for Appellant

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that I am an employee of McDONALD CARANO WILSON LLP and that on October 29, 2015, a true and correct copy of the foregoing APPELLANT'S OPENING BRIEF was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system and by United States First-Class mail to all unregistered parties as listed below:

ADAM PAUL LAXALT
Attorney General
Clark G. Leslie
Senior Deputy Attorney General
Nevada Bar No. 10124
100 North Carson Street
Carson City, NV 89701-4717
cleslie@ag.nv.gov
Tel. (775) 684-1258

/s/ Pamela Miller
An Employee of McDonald Carano Wilson