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 REPLY 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

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

ARGUMENT

I. INTRODUCTION

Each and every argument advanced by the State requires this Court to interpret a religion and rule upon whether a particular practice is part of that religion. Congress expressly absolved courts of this impossible task via the Religious Land Use and Institutionalized Persons Act ("RLUIPA") by protecting religious exercise "whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Nevertheless, the State persists in advancing variations on the same theme: Paliotta is not entitled to protection of his personal religious practices because they are not formally recognized parts of his religion of Thelema.

This is what the State argued at the District Court, when it claimed that Paliotta "*must* show that Kosher is part of Thelemic religious practice." RA 734-35 (State's Reply To Plaintiff's Opp. To Defs' Mot. For Summary Judgment) (emphasis added).[1] This is what the State argues now on appeal when it writes that the "religion before this Court is Thelema and the practice under scrutiny, kosher meals, is not based upon Thelema religious precepts or Theology." Respondents' Replacement Answering Brief ("Resp'ts' Br.") 33. And if left unchecked, this is exactly the approach the State will take against the next inmate

[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")

seeking protection for his or her individual religious beliefs. The error of only recognizing formal religious practices is pervasive throughout the Answering Brief and warrants reversal.

Paliotta's position is straightforward. The District Court held that he was a sincere practitioner of Thelema and that he sincerely believed that he was "entitled to a religious diet as a result of his Thelemic faith." RA 760. The State points to nothing in the record to the contrary. Based on these unchallenged facts, it does not matter whether the religious diet requested by Paliotta was based on kosher practices, Thelemic theology, or any other creed. Paliotta sincerely believed that the diet he requested was integral to his own subjective religious beliefs. The District Court erred by rejecting Paliotta's accommodation based solely on a perceived discrepancy between his requests and the canonical tenets of Thelema.

This approach is neither novel nor impractical. Religious accommodation in prisons is not mandatory or automatic; requests can be denied for any number of legitimate reasons such as safety or cost, so long as the proper balancing test is used. The State did not introduce, and the record does not contain, any evidence concerning these penological interests or alternatives to providing Paliotta with his requested diet. Paliotta objects, therefore, to the District Court's decision to not even reach these questions because it first determined that Paliotta's otherwise sincere request was not sufficiently orthodox.

II. THE STATE DOES NOT GROUND ITS LEGAL ARGUMENTS ON THE FACTUAL RECORD.

The State does not provide this Court with a single citation to the record in support of its brief. While some of the assertions in the "Statement of Facts" at least attempt to cite to filings in the District Court, many others rely on citations to internet websites external to the record,[2] and other assertions are not accompanied by any reference whatsoever.

Pursuant to Rule 28(e)(1) of the Nevada Rules of Appellate Procedure, "[e]very assertion in briefs regarding matters in the record shall be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found." NRAP 28(e)(1). Counsel for the State specifically certified that the "brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1)." Resp'ts' Br. 46 (Certificate of Compliance of Clark G. Leslie). Further, counsel for State certified that he understood that he "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." *Id.* at 46-47.

The violation of NRAP 28(e)(1) is not merely a technicality as the State substantially relies upon unsupported factual assertions in an attempt to deprive Paliotta of his rights to religious exercise. Most

[2] The State has not requested judicial notice in support of any of its religious texts or authorities.

egregiously, the State claims that "the record and Paliotta are silent as to why a meatless/vegetarian diet (offered by the NDOC in 2012) would not have met his religious needs." Resp'ts' Br. 7. The State is right in one respect as the record is indeed silent on this issue. The offering of a meatless/vegetarian diet to Paliotta in 2012 is not in the record and the State did not make this argument in its Motion for Summary Judgment below. Regardless, the existence of a vegetarian diet is irrelevant as no religious diet at issue (whether called Egyptian, Thelemic, or kosher) is satisfied simply by abstention from meat. *See, e.g., In re Garcia,* 202 Cal. App. 4th 892, 906, 136 Cal. Rptr. 3d 298, 308 (2012) (discussing the "differences in preparation of kosher meals from nonkosher meals, indicating that neither the pork-free nor the vegetarian option is consistent with a traditional kosher diet"). As the issue of whether a meatless/vegetarian diet could constitute an acceptable accommodation was not litigated at the District Court, it would be inappropriate to consider it here.

The remainder of the "facts" presented by the State all relate to an attempt to formally define the precepts of Thelema. Half of these sources presented by the State are from internet sites outside the record. *See* Resp'ts' Br. 6 n.3 (citing, without explanation, to http://www.religioustolerance.org and http://thelema.org). The other half are from sources that should be deemed irrelevant as a matter of

law. *Id.* (citing the "Thelemic holy book" and the declaration of the "O.T.O. Lodge Master, Master Sewell").

Finally, by not addressing Paliotta's Statement of Facts, the State concedes several key points including that 1) Paliotta initially requested a traditional Egyptian meal, RA 333, 517; 2) Paliotta's requests for religious accommodation were more expansive than just a dietary request, RA 413-444; 3) the State improperly grouped Thelema with several other religions, RA 398; and 4) the State exhibited hostility toward Paliotta and Thelema by rejecting his requests and telling him: "You can practice your religion in your cell." RA 425.

III. THE INTRUSIVE THEOLOGICAL INQUIRY USED BY THE STATE WILL CONTINUE TO BURDEN RELIGIOUS EXERCISE IF LEFT UNCHECKED.

The State does not hide the dogmatic approach it used to reject Paliotta's requests for religious accommodation; rather, it embraces it as the centerpiece of its arguments. Resp'ts' Br. 16 (arguing that Paliotta should not be provided with kosher meals because "he is not Jewish and no Thelemic text or book" requires a particular diet). If the State's position is accepted, the next inmate seeking religious accommodation will face similar ecclesiastical scrutiny.

The State claims that the "dire consequences of granting this appeal cannot be understated" and claims that it "is not hyperbole for State to argue that [providing Paliotta with kosher meals] would lead to unprecedented expansions of religious demands in prisons." Resp'ts' Br.

17. Any expansion feared by the State has already taken place at the explicit direction of the Congress that passed RLUIPA. And contrary to the State's position, courts have routinely confirmed religious accommodations such as kosher meals for non-Jewish prisoners. *E.g., Shakur v. Schriro*, 514 F.3d 878, 885 (9th Cir. 2008) ("Given [a non-Jewish prisoner's] sincere belief that he is personally required to consume kosher meat to maintain his spirituality . . . the prison's refusal to provide a kosher meat diet implicates the Free Exercise Clause."); *Porter v. Wegman*, No. 1:10CV01500 LJO DLB, 2013 WL 3863925, at *3 (E.D. Cal. July 24, 2013) ("Under the *Turner* test, then, the failure to provide a Kosher Diet to a non-Jewish prisoner, where the inmate's sincerely held beliefs require such a diet, violates the First Amendment unless justified by legitimate penological interests.") Even the State "readily admits that some inmates" already in the prison are "non-Jewish but receive[] a kosher meal." Resp'ts' Br. 41. The parade of horribles set forth by the State is either already in place under existing law or highly exaggerated by the State.

Barring religious accommodations based on theological constructs is not the correct solution for the State's concerns. Rather, if a religious accommodation is requested, courts are well-equipped to balance that accommodation with the State's legitimate penological interests. The State, however, has not introduced any evidence that providing Paliotta with a kosher meal would be cost-prohibitive or disruptive to prison life.

The State provides several examples, without bothering to include citations or support, to religious practices that are supposedly disallowed in the prison setting. Resp'ts' Br. 14-15 (discussing prohibitions against animal sacrifice and the possession of ceremonial spears). The State does not provide any authority that these practices were rejected because they were insufficiently religious. It is clear instead that every example provided by the State is related to a serious and legitimate concern about prison safety. Obviously there are Thelemic practices that can never be accommodated by prisons, but the balancing test must still be employed rather than short-circuited on theological grounds by a de facto ecclesiastical court.

A. The State Should Not Turn Every Request For Accommodation Into An Intrafaith Dispute.

An inmate's request for a specific diet should not convert a court into the Diet of Worms. Permitting the introduction of testimony from clergy concerning the tenets of a religion is a perilous path. In contrast to the unrealistically "dire" outlook presented by the State, the harms of the State's approach are real and significant.

When Paliotta sought judicial relief, the State responded by conducting an inquisition into Thelemic beliefs. In its Motion for Summary Judgment, the State relied upon internet research, its own reading of the "Book of the Law of [Thelema], or Liber Al vel Legis," and a declaration from Jon Sewell, the "Master of the Lodge of Ordo Templi Orientes for Thelema." RA 667. There is no other way to categorize this

approach except as an attempt by the State to substitute its interpretation of Thelema, supported by one clerical faction, for that of the practitioner. This exactly the type of "slipshod investigation" resulting in the denial of a practitioner's ability to follow the dictates of his or her faith warned about in *McElyea v. Babbitt,* 833 F.2d 196, 198 (9th Cir. 1987).

The danger of this method is illustrated by a comparison to the factually similar case, *Koger v. Bryan*, where the inmate submitted evidence from another clergy member of the Ordo Templi Orientes ("OTO") who took an opposite position from Master Sewell. 523 F.3d 789, 797 (7th Cir. 2008). The inmate in *Koger* submitted "paperwork from OTO stating that, while his new religion had no general dietary requirements, 'each individual Thelemite may, from time to time, include dietary restrictions as part of his or her personal regimen of spiritual discipline.'" *Id.* The State's approach would turn each request for accommodation into a battle of religious experts and force the courts to choose one sect over another. Depending on which member of the clergy submits a declaration, the same sincere request for accommodation could be approved or rejected.

The District Court found that the declaration of Master Sewell lent "support to the defendants' position that [Paliotta's] belief is not protected under the First Amendment." RA 762. The State argues that the District Court should have gone further and recognized Sewell's

declaration as "strong support for the proposition that Paliotta's desire for a kosher diet is not firmly rooted in a theological conviction." Resp'ts' Br. 9 (citations omitted). This conclusion is untenable and would substantially burden religious practices. One's religious practices can be deeply rooted in a theological conviction without being rooted in a specific church's doctrine.

Mainstream religions would be equally affected by the State's tactics. As the court noted in *Grayson v. Schuler*, a "Catholic who vows to obey the Rule of St. Benedict and therefore avoid 'the meat of four-footed animals' is performing a religious observance even though not a mandatory one." 666 F.3d 450, 454 (7th Cir. 2012). This dietary practice should not be rejected if a priest testifies that the vow is not a core precept of Catholicism.

The District Court and State were wrong to rely upon the declaration of one clergy member. The presentation of such evidence necessarily and impermissibly requires the court to evaluate the truth of both the practitioner's and the clergy's representations about the religion.

B. Transforming A Request For Accommodation Into A Scriptural Debate Unduly Burdens Religious Exercise.

Inmates of whatever faith who seek religious accommodation will be met by the State with scrutiny of their religious beliefs. In court or in motion practice, an inmate may be confronted by a priest who could challenge individual beliefs as unorthodox or heresy. That is not a

result that the First Amendment or RLUIPA can tolerate. The prison system may present evidence that a particular practice is too dangerous or expensive to accommodate, but it cannot reject a sincerely held religious belief because it is insufficiently mainstream.

The State argues that the District Court had to "to determine whether Paliotta's demand for a kosher meal was a religious tenet of Thelema or a personal preference" and that this could only be accomplished after "at least some examination of what Thelema beliefs are." Resp'ts' Br. 22; *see also id.* at 24 (arguing that for a "practice to be 'rooted in religion' the religious expression must be 'inseparable and interdependent' from the religion in question'"). Consequently, the State seems to believe that Jewish inmates can receive accommodation because their religion has "long-standing, well documented dietary restrictions." *Id.* at 20. This analysis leads to an impermissible favoritism toward older, traditional religions and reflects the antiquated analysis of *Wisconsin v. Yoder,* 406 U.S. 205 (1972), which was repudiated by *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

While the sincerity of a prisoner can be questioned, this inquiry is limited to external practices. *See, e.g., McElyea,* 833 F.2d at 198 (assessing a prisoner's purported failure to follow the requested dietary practices at a previous facility). The State cannot cite to a single decision where a court has rejected a request for religious

accommodation after an "examination of [the religion's] beliefs" and a determination that the practitioner's request is not supported in doctrine. The State is wrong as a matter of law when it instructs courts to examine religious beliefs and determine whether a practice is a tenet of the religion.

IV. CONGRESS INTENDED RLUIPA TO PREVENT THIS VERY SITUATION WHERE RELIGIOUS ACCOMMODATION IS DENIED FOR THEOLOGICAL, NOT PRACTICAL REASONS.

A. *Holt v. Hobbs* Reaffirmed That The Role Of The Courts Is To Review The State's Penological Interests, Not Theological Interpretations.

The United States Supreme Court issued a very recent opinion, *Holt v. Hobbs*, 135 S. Ct. 853, 861 (2015), comprehensively interpreting RLUIPA, yet the State claims that it has absolutely "no bearing on the issues before the Court in this matter." Resp'ts' Br. 43. The State does not address the analysis presented by Paliotta in his Opening Brief, but instead only contrasts the superficially different fact patterns (e.g. diet versus facial hair). *Id.*

Holt has been interpreted as holding that "RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise . . . not whether the RLUIPA claimant is able to engage in other forms of religious exercise." *Trapp v. Roden*, 473 Mass. 210, 41 N.E.3d 1, 6 (2015) (quoting *Holt*, 135 S. Ct. at 862). Paliotta's ability to engage in other forms of Thelemic practices does not diminish the burden imposed upon his dietary practices. Additionally,

Holt holds that a prisoner need not even show that the "practice is subscribed to by other adherents of that religion." *LaPlante v. Massachusetts Dep't of Correction*, 89 F. Supp. 3d 235, 241-42 (D. Mass. 2015) (interpreting *Holt*, 135 S. Ct. at 862).

Continuing a line of precedent, *Holt* confirmed that "a prisoner's request for an accommodation must be sincerely based on a religious belief and not some other motivation." *Holt*, 135 S. Ct. at 862. The court found that the "religious exercise at issue is the growing of a beard, which petitioner believes is a dictate of his religious faith, and the Department does not dispute the sincerity of petitioner's belief." *Id.* This lack of an objection to sincerity is common as it is extremely difficult for the government to challenge personal beliefs without running afoul of RLUIPA or the First Amendment. The State argues that *Holt* is different because "the plaintiff-inmate made a prima facie case establishing he was engaged in a religious exercise as a sincere believer." Resp'ts' Br. 43. But Paliotta has made the same prima face case as the District Court found that he "sincerely believes he should be afforded a religious diet." RA 760. Once the inmate meets the initial burden of showing a religious exercise, then the government must establish that its policies are the least restrictive means of achieving its secular objectives.

The State argues that the "'least restrictive means' burden is not an issue here" because there "is no alternative to either kosher meals or

standard prison fare." Resp'ts' Br. 43. First, this is an argument that is not based in the record. Second, even if there are no alternatives currently provided by the State, the inquiry does not end there. The State must justify why it is unable to provide additional alternatives to alleviate the burden upon prisoners' religious exercises. *Holt*, 135 S. Ct. at 864 (discussing the failure of the government to "prove that it could not adopt the less restrictive alternative of having the prisoner run a comb through his beard").

The only reason that the "less restrictive alternative" analysis is not at issue now is because it was not litigated at the District Court. Kosher meals are already available to other non-Jewish prisoners at Paliotta's facility. RA 339. The policy of outright denying Paliotta's dietary requests is clearly not the least restrictive means available to the State.

B. The Accommodations Requested By Paliotta Are All Rooted In Religion.

If Paliotta only wanted a kosher meal for secular reasons, he could easily change his faith affiliation to Judaism and receive such meals. But Paliotta's religious reasons for his request are well documented in the record. Conclusively, the District Court found that Paliotta was "sincere in his belief that he is entitled to a religious diet as a result of his Thelemic faith" and therefore any of the State's hypothetical questions concerning the nature of a religious exercise should be essentially moot. RA 760. The State nevertheless persists in challenging

Paliotta's request for accommodation as secular and not religious. This challenge fails for both legal and factual reasons.

Legally, every case proffered by either Paliotta or the State to reach this issue has held that dietary restrictions by Thelemists constitute religious practices. *E.g., Koger*, 523 F.3d at 797 (holding that a Thelemic prisoner's request for a specific diet was a "religious exercise" under RLUIPA). The State has not provided a single example of a court that denied a Thelemist's request for accommodation based on its lack of support in Thelemic tradition or, for that matter, a case where any such request has been denied for theological reasons. Maintaining a specific diet is a common feature of many religions and is a recognized type of religious exercise.

Factually, Paliotta has provided sufficient evidence to show that from a personal perspective, he believes that his version of Thelema incorporates kosher meals. RA 334 (stating that "Thelemic tradition and practice further supported the fact he should be allowed a [k]osher meal"). Importantly, Paliotta's acceptance of a kosher meal is a compromise as he initially requested a traditional Egyptian meal. The State completely ignores this key fact.

The District Court's holding that Paliotta was "sincere in his belief that he is entitled to a religious diet as a result of his Thelemic faith" is also unchallenged by the State. RA 760. Paliotta argued in his Opening Brief that after this determination of sincerity "the inquiry stops there

and the District Court should not have attempted to conduct a theological inquisition into Thelema's beliefs." Opening Br. 16. The State derides this "sweeping comment" as "completely, utterly erroneous." Resp'ts' Br. 3. Yet the State does not counter with any authority rejecting Paliotta's argument let alone any authority where a court commenced a doctrinal inquiry after finding that a practitioner was sincere.

It may be the case that the State is correct – although without any support in case law it is difficult to say – that one can be a sincere adherent of a religion but insincere with respect to a request for a particular accommodation. A sincere Reform Jew may not sincerely believe in the necessity of keeping kosher and this potentially could be demonstrated through inconsistency of diet, lapses, or lack of credible testimony. But what the State claims is that the lack of sincerity of a Reform Jew can be shown through an examination, by the court, of the tenets of Reform Judaism. RLUIPA protects practices "whether or not compelled by, or central to, a system of religious belief" and therefore prevents the same practices from being found insincere because they are not "compelled by, or central to" a religion. 42 U.S.C. § 2000cc-5(7)(A).

C. Paliotta Has Demonstrated A Substantial Burden On His Religious Practice From Being Denied The Diet He Believes Is Integral To His Religion.

In a clear example of circular reasoning, the State argues that the denial of a religious meal to Paliotta is not a substantial burden on his religious practice because Thelema does not include dietary restrictions. Resp'ts' Br. 28 (asking "how can the denial of a kosher meal be a substantial burden to a Thelemic believer"). The State argues that Paliotta could never "prove that a denial of kosher meals would be a 'substantial burden' to the exercise of" Thelema. *Id.* at 30. This is the only argument advanced by the State with respect to the burden on Paliotta and it is again foreclosed by RLUIPA.

First, if only deprivations of the formal practices of a religion were a substantial burden then the "compelled by, or central to" language of RLUIPA would be meaningless. The State is unconditionally wrong here.

Second, the record supports the substantial burden faced by Paliotta. He has established a prima facie case by demonstrating that he has a sincere belief that he requires a religious diet and that he has been denied this diet. It is not necessary for a practitioner to detail the precise circle of hell he is faced with for foregoing a specific practice. Regardless of whether the practice is optional or mandatory, the complete inability to engage in that practice constitutes a substantial burden.

Moreover, based on his sincere belief, Paliotta was unable to "eat more than one (1) meal a day since the food provided by the Defendants is not acceptable in accordance with [Paliotta's] religious beliefs." RA 93. There is no evidence in the record to contradict the burden on his religious exercise set forth by Paliotta as the State hangs its hat entirely on its own interpretation of the dictates of Thelema.

D. The Balance Of Authorities Is One-Sided In Paliotta's Favor.

The State selects four authorities from Paliotta's Opening Brief and attempts to distinguish them, but for its part cannot present this Court with any authority whatsoever providing a contrary interpretation of RLUIPA. The State does not even provide a decision where a court based its decision upon an analysis of a religion like the District Court did here. The lack of authority presented by the State is unsurprising as the plain language of RLUIPA negates the State's only argument that Paliotta is not Jewish and therefore cannot receive a kosher meal.

To start, the State does not attempt to distinguish *Shakur*, which Paliotta set forth as a dispositive analysis. 514 F.3d at 885. The Ninth Circuit held that it was impermissible to focus on whether a kosher diet was a requirement of a prisoner's Islamic faith, rather than on whether he personally believed that a kosher diet was consistent with his faith. *Id.* The four authorities addressed by the State are consistent with *Shakur* and are not substantively distinguishable. Instead, Paliotta

submits that these authorities should be read closely because they demonstrate the approach taken by nearly every other court in rejecting the State's position.

First, in *Koger*, the Seventh Circuit addressed the primary argument of the State head on and held that even though Thelema did not have any dietary requirements, a Thelemic prisoner's request for a specific diet was a "religious exercise" under RLUIPA. 523 F.3d at 797 (noting that many Thelemic "practitioners adopt such [dietary] restrictions as part of their exercise of Thelema"). These were the premises for which *Koger* was initially cited in the Opening Brief.

The State believes that *Koger* is distinguishable because the inmate requested non-meat rather than kosher meals. But Paliotta's request for a kosher diet is certainly more grounded in religion than a request for vegetarian meals, which could also be secularly or nutritionally based. Regardless, in the absence of any theological requirements for Thelemic diets, it makes no difference what kind of diet is requested. The court in *Koger* did not reject the request based on the tenets of Thelema as the District Court did here. The court noted that Thelema did not have a dietary requirement but then ignored this entirely and held that the requested diet was religious because the record indicated that "Koger stated that his desire for a non-meat diet was based on his religious beliefs." *Id.* at 727. This was sufficient for the

Seventh Circuit and the record here contains the same evidence for Paliotta.

Second, *Grayson* was cited only for the Seventh Circuit's recognition in dicta that "Thelema's single mandatory tenet invites an infinity of optional observances." 666 F.3d at 455. The religious accommodation in *Grayson* was "denied on the basis of the chaplain's theological opinion." 666 F.3d at 452. On appeal, the Seventh Circuit held that "[p]rison chaplains may not determine which religious observances are permissible because orthodox." *Id.* at 455. The court wrote that "[h]eretics have religious rights" and noted that the "founders of Christianity (Jesus Christ, the Apostles, and St. Paul) were Jewish heretics; Luther and Calvin and the other founders of Protestantism were Catholic heretics." *Id.* at 453-54.

In *Grayson*, the inmate wished to wear dreadlocks and the court held that the basis of his claim was that "wearing dreadlocks is for him a religious observance, though dreadlocks do not have the symbolic significance for [his religion of] African Hebrew Israelites of Jerusalem that they do for Rastafarians." *Id.* The State once again takes up the mantle of amateur theologian and tries to distinguish the relationship between African Hebrews and Rastafarians and that between Thelema and Judaism. Resp'ts' Br. 36. The State implies that the Seventh Circuit looked deeply into the former relationship and found sufficient "historical or textual predicate" to warrant permitting an African

Hebrew to adopt Rastafarian practices. *Id.* While the Seventh Circuit did engage in a brief theological discussion, it was for the purpose of demonstrating the irrelevance of that debate.

What is certain is that the *Grayson* court did not find that there was a sufficient connection between African Hebrew Israelites of Jerusalem and Rastafarianism to permit practitioners to interchange religious exercises freely. Even if this was a requirement, Paliotta provided the same sort of evidence as did the prisoner in *Grayson.* RA 334 (stating that "the connection between Hebrew traditions and Egyptian mysticism was . . . supported by many authors and Jewish scholars" and that "Thelemic tradition and practice further supported the fact he should be allowed a Kosher meal"). Neither *Grayson* nor any case cited by the State issues a definitive ruling that separates religions into non-overlapping columns.

Third, while *Anello v. Williams* was only cited for the limited proposition that Thelema could include dietary restrictions, it illustrates the lack of concern courts have for formal theology. No. 3:10-CV-622-AC, 2012 WL 2522280, at *8 (D. Or. Mar. 20, 2012) (holding that it is reasonable that a Thelemite "might incorporate various rituals and beliefs from other religions"). The State is right that some of Anello's requests for religious accommodation were denied, but not for any reason related to the present case. The court found that Anello had not provided any "evidence of any particular religious rituals, exercises,

or practices that he performs." *Id.* Here, Paliotta has outlined the specific religious practices, including dietary guidelines, for which he has requested accommodation. Crucially, in *Anello*, the plaintiff professed "membership in Native American, Thelemite, and Sufism religions" but the court still continued its analysis without rejecting all of his beliefs as insincere. *Id.* If Anello could practice three religions simultaneously, then there can be no issue with Paliotta incorporating elements of one other religion, Judaism, into Thelema.

Finally, *In re Garcia*, 201 Cal. App. 4th at 905-906, was cited for 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. The only distinction presented by the State is that the prison did not challenge the prisoner's belief system in that case, like they did for Paliotta. But this only further reveals the error of the State in attempting to dispute internal beliefs, which other courts avoid doing.

V. THE FIRST AMENDMENT PROTECTS BOTH TRADITIONAL AND NON-TRADITIONAL RELIGIONS AS WELL AS BOTH ORTHODOX AND HERETICAL BELIEFS.

The State undoubtedly has less of an uphill battle defending against Paliotta's Free Exercise claim, which requires the State to meet a less strict burden than for a RLUIPA claim. *See Greene v. Solano Cnty. Jail*, 513 F.3d 982, 986 (9th Cir. 2008). Yet the State cannot even satisfy this lower standard because it relies solely on the false premise

that Paliotta's religious exercise is not protected unless it is part of the formal religion to which he belongs.

Most of the State's Free Exercise discussion relates to non-controversial aspects of the general balancing test used in such cases. Resp'ts' Br. 19 (discussing the interaction between free exercise rights and legitimate correctional goals). The State, however, veers off the rails when it assumes the role of novitiate and engages in amateur theological discourse. Resp'ts' Br. 20 (citing to Luke 2:22 and *Quran,* Al-Baqara 2:173 in an attempt to define "millennia" of religious practice). Notably absent from the State's entire section on Free Exercise is a single case where a religious practice was not recognized because it fell outside of formal church doctrine.[3]

A. Paliotta Requested Religious, Not Secular Accommodation.

Deriving a definition for "religion" or a religious practice is no small feat. The State's oversimplified position is that each religion is a unitary construct and that once an inmate files a faith declaration form for that religion, he or she is irrevocably bound to the full slate of tenets of that religion and only those tenets. Resp'ts' Br. 20 (writing that a "Christian inmate could be sincere in his belief that he must seek the use of a Native American sweat lodge to achieve the purification described in the *Bible*" but that a court should still reject this

[3] State cites to *Guzzi v. Thompson*, 470 F. Supp. 2d 17 (D. Mass. 2007), which could arguably support State's position but this unpublished opinion was vacated making it inappropriate to cite let alone rely upon. Resp'ts' Br. 24-25.

accommodation as non-religious); Resp'ts' Br. 26 ("Adopting another religion's dietary precepts where no historical or theological underpinning is present is not protected conduct under the First Amendment.") The State wants it to be one way, but it is the other way. Religious practice is far more complex and nuanced than the State suggests.

The Eleventh Circuit categorically held that "judges and juries must not inquire into the validity of a religious doctrine." *Watts v. Florida Int'l Univ.*, 495 F.3d 1289, 1298 (11th Cir. 2007). Instead, the "task of courts is to examine whether a plaintiff's beliefs are, in his own scheme of things, religious. The question is not whether the plaintiff's beliefs are religious in the objective, reasonable person's view, but whether they are religious in the subjective, personal view of the plaintiff." *Id.* This comprehensive rejection of a doctrinal approach is the only permissible option for courts.

Paliotta's Opening Brief discussed the Ninth Circuit's opinion in *Shakur,* 514 F.3d at 885, at length but the State failed to offer any rebuttal to this on-point decision. Critically, *Shakur* holds that it was impermissible for the district court to focus 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." *Id.* In *Shakur*, the prisoner was a Muslim who sincerely believed he should receive a kosher meal; here, Paliotta is

a Thelemist who sincerely believes he should receive a kosher meal. It is no wonder why the State elides this case.

Paliotta also takes issue with the State's hypothetical concerning a "Christian inmate" who sincerely believes that he "must seek the use of a Native American sweat lodge to achieve the purification described in the *Bible*." Resp'ts' Br. 20. Why is this request wrong? Would the State approve the request if a Christian minister provided a detailed scriptural analysis explaining the compatibility of the two religions? If that inmate sincerely believed that incorporating elements of another religion was necessary for his religious beliefs, then it seems like that sincere belief is worth protecting. Moreover, there does not seem to be any legal reason why an individual cannot subscribe to more than one faith. *See Anello,* No. 3:10-CV-622-AC, 2012 WL 2522280, at *8. If Paliotta's request for a diet is religious in his own scheme of things, that is sufficient to be balanced against the State's legitimate penological interests.

B. Paliotta's Sincerity Is Unchallenged In The Record.

The District Court readily held that Paliotta "sincerely believes he should be afforded a religious diet." RA 760. The State believes that Paliotta is only requesting such a diet based on a "personal desire" or a "personal preference" rather than a "Thelemic religious tenet." Resp'ts' Br. 22. This is the same error that has been discussed repeatedly

herein. It would be one thing if the State could provide any authority to support its position, but the cases cited are inapposite.

The State relies heavily upon *Warsoldier v. Woodford,* 418 F.3d 989, 992 (9th Cir. 2005), but that decision does not address the inmate's sincerity at all. The Ninth Circuit certainly did not engage in any analysis of what Native American religions require or do not require. *Cf. A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 701 F. Supp. 2d 863, 875 (S.D. Tex. 2009) (finding that some "Native American communities assign religious significance to hair length" and that "Plaintiff Arocha clearly shares that belief, even though he does not belong to a tribe that practices it. He does not have to prove that all other Lipan Apaches have beliefs that are identical to his own; moreover, he is not required to prove his belief by pointing to a 'tenet or dogma' of any particular Indian tribe or organization. Plaintiff Arocha is only required to show that he himself has these 'deeply held religious beliefs,' which he has done").

Similarly, the individual in *Moore-King v. Cty. of Chesterfield, Va.*, 819 F. Supp. 2d 604, 622 (E.D. Va. 2011), was not scrutinized for orthodoxy or sincerity. Instead, the court found that the individual "follows *no* religion." *Id.* (emphasis in original). The court specifically distinguished the case it was considering from another situation, similar to Paliotta's, by stating that it "is not as if she claims the mantle of Buddhism, but engages in practices in the name of Buddhism that no

other Buddhist believes central to the religion." *Id.* By drawing that distinction, the court indicated that it would be correct to extend the protection of free exercise to the nominal Buddhist. Thus, *Moore-King* actually supports Paliotta's position.

Carson v. Riley is also cited by the State even though that decision holds that in "inquiring into the sincerity of an inmate's religious beliefs, prison officials should not attempt to evaluate the truth or validity of the beliefs." No. 2:07-CV-45, 2009 WL 2590134, at *4 (W.D. Mich. Aug. 19, 2009). The State and District Court unequivocally attempted to "evaluate the truth and validity" of Paliotta's beliefs. In the absence of the State's doctrinal arguments, there is no evidence at all to suggest that Paliotta is insincere.

VI. THE FOURTEENTH AMENDMENT CLAIMS ARE NOT PROPERLY PRESENTED ON APPEAL.

The State concedes that "the district court did not issue findings or rulings on Paliotta's Fourteenth Amendment Claim." Resp'ts' Br. 39. Accordingly, this Court should not address this claim, which must first be addressed upon remand. *See Citizens for Cold Springs v. City of Reno,* 125 Nev. 625, 629, 218 P.3d 847, 850 (2009) ("Because it found that Cold Springs had no standing, the district court did not reach any other issues raised by Cold Springs . . . Accordingly, we similarly limit our holding to the issue of whether Cold Springs had standing to challenge the annexation at issue.")

CONCLUSION

Paliotta respectfully requests that this Court reverse the District Court's Order and remand for further proceedings.

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 6,310 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 January 13, 2016.

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 January 13, 2016, a true and correct copy of the foregoing APPELLANT'S REPLY 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