No. 13-6005

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RANDY HAIGHT, *et al.*,

Plaintiffs-Appellants,

v.

LADONNA THOMPSON, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Kentucky, No. 5:11-cv-00118
Honorable Thomas B. Russell, Senior District Judge, Presiding

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT AS TO ORAL ARGUMENT 1

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 2

STATEMENT OF THE CASE 3

STATEMENT OF THE FACTS 4

A. *The Clergy Claim*: Defendants Change Longstanding Prison Policy To Make It More Difficult for Clergy To Visit Prisoners 4

B. *The Sweat Lodge Claim*: Defendants Reject the Native Americans' Request for Access to a Sweat Lodge of the Type That Other Prisons Around the Country Have Constructed 6

C. *The Powwow Claim*: Defendants Refuse To Allow the Native Americans To Procure Buffalo Meat or Corn Pemmican for Their Annual Religious Powwow Ceremony 8

D. The District Court Grants Summary Judgment to Defendants on All Three Claims 9

SUMMARY OF ARGUMENT 13

STANDARD OF REVIEW 16

ARGUMENT 17

I. RLUIPA AUTHORIZES LIMITED MONETARY RELIEF AGAINST PRISON OFFICIALS IN THEIR PERSONAL CAPACITIES 18

A. RLUIPA Allows Individual-Capacity Suits, and Money Damages Constitute the Typical "Appropriate Relief" in Such Suits 19

B. There Is No Legitimate Constitutional Objection to RLUIPA's Authorization of Individual-Capacity Suits for Money Damages 24

C. Narrowly Construing RLUIPA To Preclude All Monetary Relief Would Deprive Many Prisoners of Effective Remedies, Contrary to Congressional Intent 32

TABLE OF CONTENTS
(continued)

Page

II. THE DISTRICT COURT ERRED BY HOLDING THAT THE DENIAL OF A SWEAT LODGE SATISFIED STRICT SCRUTINY, BECAUSE ITS "SECURITY" RATIONALE WAS *POST HOC* AND NOT SUPPORTED BY ANY RECORD EVIDENCE 34

A. Defendants Never Invoked "Security" Concerns as Their Basis To Deny a Sweat Lodge, and Such Concerns Therefore Cannot Serve as a Compelling State Interest Under Strict Scrutiny 35

B. The Record Contains No Evidence That "Security" Concerns Justify a Complete Ban on Inmate Sweat Lodge Access, or That Defendants Considered the Less-Restrictive Alternatives Used by Other State Prisons 38

III. THE DISTRICT COURT ERRED BY HOLDING THAT BLOCKING THE NATIVE AMERICANS FROM PROCURING TRADITIONAL FOODS FOR AN ANNUAL RELIGIOUS POWWOW WAS NOT A "SUBSTANTIAL BURDEN" ON THEIR RELIGIOUS EXERCISE 47

A. A Complete Prohibition on Religiously Motivated Conduct Is Necessarily a "Substantial Burden" on That Religious Exercise....48

B. The District Court Made One of Three Legal Errors in Holding That the Prohibition on the Requested Traditional Foods Was Not a "Substantial Burden." 50

CONCLUSION 57

CERTIFICATE OF COMPLIANCE 58

CERTIFICATE OF SERVICE 59

ADDENDUM: DESIGNATION OF RELEVANT DOCUMENTS....60

TABLE OF AUTHORITIES

Page(s)

CASES

Adkins v. Kaspar,
393 F.3d 559 (5th Cir. 2004) 51

Allen v. Toombs,
827 F.2d 563 (9th Cir. 1987) 6, 40

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995)....................30

Barbour v. Wash. Metro. Transit Auth.,
374 F.3d 1161 (D.C. Cir. 2004)....................28

Barnes v. Gorman,
536 U.S. 181 (2002)....................21

Beebe v. Birkett,
749 F. Supp. 2d 580 (E.D. Mich. 2010) 56

Bell v. Hood,
327 U.S. 678 (1946)....................20

Bivens v. Six Unknown Fed. Narcotics Agents,
403 U.S. 388 (1971)....................20

Brown v. Schuetzle,
368 F. Supp. 2d 1009 (D.N.D. 2005)....................6, 40

Calhoun v. DeTella,
319 F.3d 936 (7th Cir. 2003) 33

Cardinal v. Metrish,
564 F.3d 794 (6th Cir. 2009) 22

Centro Familiar Cristiano v. City of Yuma,
651 F.3d 1163 (9th Cir. 2011) 23

Cheema v. Thompson,
67 F.3d 883 (9th Cir. 1995) 39, 41

TABLE OF AUTHORITIES
(continued)

Page(s)

Civil Liberties for Urban Believers v. City of Chicago,
342 F.3d 752 (7th Cir. 2003) 49, 50, 54

Colvin v. Caruso,
605 F.3d 282 (6th Cir. 2010) 32

Cubero v. Burton,
96 F.3d 1450 (7th Cir. 1996) 6, 40

Cutter v. Wilkinson,
423 F.3d 579 (6th Cir. 2005) 17, 28, 29

Cutter v. Wilkinson,
544 U.S. 709 (2005)..17, 31, 51, 56

DiLaura v. Twp. of Ann Arbor,
112 F. App'x 445 (6th Cir. 2004) (per curiam) 49

Employment Division v. Smith,
494 U.S. 872 (1990)..17, 52

Fowler v. Crawford,
534 F.3d 931 (8th Cir. 2008) ....*passim*

Franklin v. Gwinnett County Public Schools,
503 U.S. 60 (1992)..21, 32

Frazee v. Ill. Dep't of Emp't Sec.,
489 U.S. 829 (1989)..54

Gladson v. Iowa Dep't of Corrs.,
551 F.3d 825 (8th Cir. 2009) 55

Gonzales v. Raich,
545 U.S. 1 (2005)..30, 31

Grayson v. Schuler,
666 F.3d 450 (7th Cir. 2012) 55

TABLE OF AUTHORITIES
(continued)

Page(s)

Hafer v. Melo,
502 U.S. 21 (1991) 19

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 33

Hayes v. Tennessee,
424 F. App'x 546 (6th Cir. 2011) 49, 50

Heard v. Caruso,
351 F. App'x 1 (6th Cir. 2009) 24, 49

Heart of Atlanta Motel, Inc. v. United States,
379 U.S. 241 (1964) 31

Hernandez v. Commissioner,
490 U.S. 680 (1989) 52

Hobby Lobby Stores, Inc. v. Sebelius,
723 F.3d 1114 (10th Cir. 2013) (en banc) 51, 52

Indian Inmates v. Gunter,
660 F. Supp. 394 (D. Neb. 1987) 6, 40

Katzenbach v. McClung,
379 U.S. 294 (1964) 31

Kentucky v. Graham,
473 U.S. 159 (1985) 19, 21, 23, 33

Lane v. Pena,
518 U.S. 187 (1996) 22

Lau v. Nichols,
414 U.S. 563 (1974) 28

Lindh v. Warden,
No. 2:09-cv-215, 2012 WL 379737 (S.D. Ind. Feb. 3, 2012) 45

TABLE OF AUTHORITIES
(continued)

Page(s)

Living Water Church of God v. Charter Twp. of Meridian,
258 F. App'x 729 (6th Cir. 2007) 49, 50

Mathes v. Carlson,
534 F. Supp. 226 (W.D. Mo. 1982) 6, 40

Mayfield v. Tex. Dep't of Criminal Justice,
529 F.3d 599 (5th Cir. 2008) 33

Meachum v. Fano,
427 U.S. 215 (1976)....................32

Monroe v. Pape,
365 U.S. 167 (1961)....................19

Murphy v. Missouri Dep't of Corrs.,
372 F.3d 979 (8th Cir. 2004) 38, 42

Native Am. Council of Tribes v. Weber,
897 F. Supp. 2d 828 (D.S.D. 2012) 36, 40, 41

Nelson v. Miller,
570 F.3d 868 (7th Cir. 2009) 24, 25

Norton v. Ashcroft,
298 F.3d 547 (6th Cir. 2002) 30

O'Bryan v. Bureau of Prisons,
349 F.3d 399 (7th Cir. 2003) 38, 43

Patel v. U.S. Bureau of Prisons,
515 F.3d 807 (8th Cir. 2008) 49, 52

Patrick v. Le Fevre,
745 F.2d 153 (2d Cir. 1984) 56

Pennhurst State School & Hospital v. Halderman,
451 U.S. 1 (1981)....................24, 26

TABLE OF AUTHORITIES
(continued)

Page(s)

Pennhurst State School & Hospital v. Halderman,
465 U.S. 89 (1984)....................22

Perez v. United States,
402 U.S. 146 (1971)....................30

Sabri v. United States,
541 U.S. 600 (2004)....................26, 27

Salahuddin v. Goord,
467 F.3d 263 (2d Cir. 2006)....................35

Scheuer v. Rhodes,
416 U.S. 232 (1974)....................19

Sharp v. Johnson,
669 F.3d 144 (3d Cir. 2012)....................24, 25, 29

Smith v. Ameritech,
129 F.3d 857 (6th Cir. 1997)....................16

Smith v. Wade,
461 U.S. 30 (1983)....................33

Sossamon v. Lone Star State of Texas,
560 F.3d 316 (5th Cir. 2009)....................24, 25

Sossamon v. Texas,
131 S. Ct. 1651 (2011)....................*passim*

South Dakota v. Dole,
483 U.S. 203 (1987)....................26, 28

Spratt v. R.I. Dep't of Corrs.,
482 F.3d 33 (1st Cir. 2007)....................*passim*

Thomas More Law Ctr. v. Obama,
651 F.3d 529 (6th Cir. 2011)....................31

TABLE OF AUTHORITIES
(continued)

Page(s)

Thomas v. Gunter,
32 F.3d 1258 (8th Cir. 1994) 43

Thomas v. Review Bd. of Ind. Empl. Sec. Div.,
450 U.S. 707 (1981)....................52, 55

United States v. Comstock,
130 S. Ct. 1949 (2010)....................27, 28

United States v. Faasse,
265 F.3d 475 (6th Cir. 2001) (en banc) 30

United States v. Seeger,
380 U.S. 163 (1965)....................56

United States v. Virginia,
518 U.S. 515 (1996)....................36

Vinning-El v. Evans,
657 F.3d 591 (7th Cir. 2011) 55

Walker v. Bain,
257 F.3d 660 (6th Cir. 2001) 20, 21

Warsoldier v. Woodford,
418 F.3d 989 (9th Cir. 2005) 38, 39, 41

Werner v. McCotter,
49 F.3d 1476 (10th Cir. 1995) 6, 43

Will v. Mich. Dep't of State Police,
491 U.S. 58 (1989)....................21

Youngbear v. Thalacker,
174 F. Supp. 2d 902 (N.D. Iowa 2001) 6, 40

STATUTES

18 U.S.C. § 666....................26

TABLE OF AUTHORITIES
(continued)

Page(s)

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

42 U.S.C. § 1983 19

42 U.S.C. § 1997e 33

42 U.S.C. § 2000cc .... *passim*

OTHER AUTHORITIES

146 Cong. Rec. S7774 (July 27, 2000) 17

U.S. Const., Article I, § 8, cl. 1 26

U.S. Const., Article I, § 8, cl. 3 30

U.S. Const., Article I, § 8, cl. 18 26

STATEMENT AS TO ORAL ARGUMENT

Appellants respectfully request that the Court hear oral argument in this case. Appellants are pressing three legal issues on appeal, each relating to the proper interpretation and application of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA"). These issues are important and recurring, and Appellants believe that oral argument would materially assist the Court in resolving them.

JURISDICTIONAL STATEMENT

The District Court had federal-question jurisdiction pursuant to 28 U.S.C. § 1331, because Appellants raised claims under the First Amendment to the U.S. Constitution and under RLUIPA, 42 U.S.C. § 2000cc *et seq.* [Compl., Dkt. No. 1, Page ID# 9.] The District Court entered final judgment on March 15, 2013. [Order, Dkt. No. 47, Page ID# 722.] Appellants sought and were granted an extension of time to file a motion to alter or amend the judgment. [Motion, Dkt. No. 48, Page ID# 723; Order, Dkt. No. 49, Page ID# 728.] The Court ultimately denied their timely motion to alter or amend the judgment on July 11, 2013. [Order, Dkt. No. 52, Page ID# 769.] Appellants filed a notice of appeal eight days later, on July 19, 2013. [Notice, Dkt. No. 53, Page ID# 774.] This Court therefore has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the District Court err by granting summary judgment to Defendants on Appellants' RLUIPA claim alleging suspension of their clergy visits on the basis that RLUIPA, which authorizes "appropriate relief" against any "person acting under color of State law" who violates its prohibitions, does not authorize any claims for monetary damages, even against officials in their personal capacities?

2. Did the District Court err by holding that Defendants' refusal to allow the three Native American Appellants access to a ritual sweat lodge satisfied strict scrutiny, based on a purported compelling interest that had never been formally articulated by Defendants and even though Defendants never considered the less restrictive means used by many other prison sweat lodges across the country?

3. Did the District Court err by holding that Defendants' refusal to allow the three Native American Appellants to obtain foods alleged to be required for an annual religious powwow ceremony did not impose a "substantial burden" on their religious exercise, based on the court's review of a federal manual summarizing the typical beliefs of adherents to Native American religion and without holding a hearing to evaluate the sincerity of the these individuals' religious beliefs?

STATEMENT OF THE CASE

On July 6, 2011, a group of five inmates at the Kentucky State Penitentiary ("KSP") filed a Complaint against five KSP officials and three officials at the state Department of Corrections, each in their official and individual capacities ("Defendants"). [Compl., Dkt. No. 1, Page ID# 1-3.] Two of the plaintiffs (Randy Haight and Gregory Wilson) alleged that Defendants were violating their rights under the First Amendment to the U.S. Constitution and RLUIPA by interfering with pastoral visits by clergy. [*Id.* at Page ID# 6-10.] The other three plaintiffs, namely Robert Foley, Roger Epperson, and Vincent Stopher (together, "the Native Americans"), alleged that Defendants were violating their First Amendment and RLUIPA rights by (i) refusing to provide them with access to a sweat lodge for ritual use; and (ii) refusing to allow them to procure certain traditional foods for their annual powwow ceremony. [*Id.* at Page ID# 10-12.]

Defendants filed an answer to the Complaint on January 24, 2012. [Answer, Dkt. No. 14, Page ID# 346.] Shortly thereafter, on April 26, 2012, they moved for summary judgment. [Motion, Dkt. No. 32, Page ID# 449.] The District Court granted the motion for summary judgment on March 15, 2013 [Opinion, Dkt. No. 46, Page ID# 656-81], and denied Appellants' motion to alter or amend that judgment on July 11, 2013. [Order, Dkt. No. 52, Page ID# 769.] Appellants filed a notice of appeal on July 19, 2013. [Notice, Dkt. No. 53, Page ID# 774.]

STATEMENT OF THE FACTS

There are three independent claims relevant to this appeal, all of which arise under RLUIPA, which protects the religious freedom rights of prison inmates. *First*, Appellants Haight and Wilson contend that Defendants violated RLUIPA by changing prison policy in a way that prevented them from receiving pastoral visits by their clergy of choice. *Second*, the three remaining plaintiffs, Foley, Epperson, and Stopher ("the Native Americans"), who are adherents of the Native American religion, contend that Defendants are violating RLUIPA by refusing to provide them with access to any type of "sweat lodge" for ritual use. *Third*, the Native Americans also contend that Defendants are violating RLUIPA by prohibiting them from procuring special traditional foods for use at their annual powwow ceremony. The facts relevant to each of these claims are set forth separately below, followed by a summary of the District Court's opinion granting summary judgment to Defendants on all three claims.

A. *The Clergy Claim*: Defendants Changed Longstanding Prison Policy To Make It More Difficult for Clergy To Visit Prisoners.

Prior to June 2010, the ordinary practice at KSP was that clergy—unlike other visitors—could visit inmates even if not listed on the inmate's "approved visitation list." [Opinion, Dkt. No. 46, Page ID# 658.] This was an important accommodation of religion, because each inmate was allowed to place only three individuals on his visitation list. [Policy, Dkt. No. 32-1, Page ID# 484.]

Moreover, a visitor could be listed on only one inmate's visitation list at a time. [Opinion, Dkt. No. 46, Page ID# 658.] In other words, if clergy were treated as regular visitors subject to the ordinary rules, an inmate would be forced to drop one of his regular visitors if he wanted a clergy visit—and would have no recourse if another inmate had already listed that clergy on his own visitation list.

Beginning in June 2010, however, KSP officials—apparently adopting a more restrictive reading of the relevant prison policies—began to deny permission for clergy to visit inmates who had not listed those clergy on their visitation lists. [*Id.*] Pursuant to that new policy, Appellants Haight and Wilson were denied visits from their pastors. [*Id.* at Page ID# 658-59.] After Haight launched a grievance, Defendants created a committee to review the facility's policies—and, pending its results, "suspended" clergy visits entirely. [*Id.* at Page ID# 659; *see also* Motion, Dkt. No. 32, Page ID# 450-51.] Ultimately, the review committee adhered to the restrictive visitation policy, requiring inmates to allocate highly limited visitor slots to their clergy. [Opinion, Dkt. No. 46, Page ID# 660.] Even if an inmate did so, a pastor would still be barred from visiting the inmate if another prisoner had listed the same pastor as a visitor. [*Id.*] Thus, for example, under the new policy, Pastor Gerry Otahal was barred from visiting Appellant Wilson because he was already listed on Appellant Haight's visitation list. [Otahal Affidavit, Dkt. No. 42-4, Page ID# 608; *see also* Hale Affidavit, Dkt. No. 42-1, Page ID# 588-89.]

"After exhausting KSP's grievance procedures," Haight and Wilson filed suit, asking the Court "to enjoin the Defendants from implementing the new policy interpretations" and also seeking money damages for the interference with their right to clergy visits. [Opinion, Dkt. No. 46, Page ID# 660.] After this suit was filed, however, Defendants again revised their clergy visitation policy, this time providing that each inmate could include a clergy on his visitation list in addition to the three ordinary visitor slots, and that the same clergy could be added to visitation lists of more than one inmate. [*Id.* at Page ID# 664, 715-16.]

B. ***The Sweat Lodge Claim*: Defendants Reject the Native Americans' Request for Access to a Sweat Lodge of the Type That Other Prisons Around the Country Have Constructed.**

A "sweat lodge" is a ritual during which steam is used to promote spiritual purity. It plays a "central and fundamental role" in Native American religion. *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995). Numerous states have therefore constructed sweat lodges in their prisons, for inmates' ritual use. *See, e.g.*, *Youngbear v. Thalacker*, 174 F. Supp. 2d 902, 912 (N.D. Iowa 2001) (Iowa); *Brown v. Schuetzle*, 368 F. Supp. 2d 1009, 1011 (D.N.D. 2005) (North Dakota); *Cubero v. Burton*, 96 F.3d 1450 (7th Cir. 1996) (Wisconsin); *Allen v. Toombs*, 827 F.2d 563, 565 n.5 (9th Cir. 1987) (Oregon); *Mathes v. Carlson*, 534 F. Supp. 226, 228 (W.D. Mo. 1982) (Missouri); *Indian Inmates v. Gunter*, 660 F. Supp. 394, 398 (D. Neb. 1987) (Nebraska).

Three of the plaintiffs—Foley, Epperson, and Stopher—are adherents of the Native American religion; since September 2009, they have requested that KSP officials permit them access to a sweat lodge, attesting that such access "is integral to their faith." [Opinion, Dkt. No. 46, Page ID# 661.] They made clear that they were flexible about the details and "would be happy with any location or time you feel comfortable with." [Letter, Dkt. No. 1-6, Page ID# 209.] They also further committed to "pay for everything," as they were "not trying to cost the state anything." [*Id.* at Page ID# 210-11.] And the Native Americans agreed to follow any safety and security protocols set in place. [*Id.* at Page ID# 210.]

Nevertheless, in January 2010, the KSP Warden rejected the request:

> To my knowledge, our Department has not approved for [sic] a sweat lodge at other prisons, so this would be a first, if granted. More to the point, whatever is decided on your grievance would likely set a precedence [sic] for other prisons in our Department. For this reason, I must deny your grievance at my level.

[Grievance Decision, Dkt. No. 1-6, Page ID# 214.] The Warden recommended that the Native Americans appeal his decision to the Commissioner, who would be able to conduct "a more systemic review" of the issue. [*Id.*] They did so, and the Commissioner indicated, in a letter dated February 25, 2010, that the Department was "reviewing the request," which "needs to be investigated further." [Grievance Decision, Dkt. No. 1-6, Page ID# 216.] She committed that a decision "will be rendered in the near future and inmates … will be notified." [*Id.*]

More than three and a half years later, no decision has been issued by the Commissioner. [*See* Opinion, Dkt. No. 46, Page ID# 662 ("As of the date the Plaintiffs filed this suit, no response had issued from Commissioner Thompson."); Deputy Commissioner Affidavit, Dkt. No. 32-2, Page ID# 493 ("The request for a sweat lodge continues to be under review.").]

C. *The Powwow Claim*: Defendants Refused To Allow the Native Americans To Procure Buffalo Meat or Corn Pemmican for Their Annual Religious Powwow Ceremony.

A powwow is a "day of traditional dancing, speaking, and praying in word, song, and music." [Opinion, Dkt. No. 46, Page ID# 662 (quoting Federal Bureau of Prisons, *Inmate Practices & Beliefs* 14 (2003)).] It is supposed to be accompanied by a "traditional meal." [*Id.*]

For several years, the Native Americans have been requesting authorization to purchase—using their own funds—the special foods that they believe are necessary to conduct a proper powwow on an annual basis, including buffalo meat and corn pemmican (traditional Native American foods). [*Id.* at Page ID# 662-63; *see also* Compl., Dkt. No. 1, Page ID# 12.] Defendants, however, have consistently rejected and denied these requests, allowing the Native Americans to procure only "fry bread" but not the other food items. [Opinion, Dkt. No. 46, Page ID# 663; Memo, Dkt. No. 1-6, Page ID# 223; Memo, Dkt. No. 1-8, Page ID# 277; Grievance Decision, Dkt. No. 1-8, Page ID# 280.]

Defendants refuse to allow the Native Americans to procure other traditional foods because, on their reading of a religious reference manual published by the Federal Bureau of Prisons, such foods are not required in order to hold a proper powwow. [*See, e.g.*, Memo, Dkt. No. 1-6, Page ID# 223.] For example, one of the defendants, the Commissioner of the Department of Corrections, denied the Native Americans' grievance on the grounds that "according to the Religious Practices Manual a meal is not required to be provided for Native Americans at the Pow-Wow." [Grievance Decision, Dkt. No. 1-8, Page ID# 280.] The referenced manual provides that "[a] feast of traditional, familiar foods (such as fry bread, corn pemmican, and buffalo meat) is seen as central to the gathering." [Manual, Dkt. No. 46, Page ID# 700.])

Defendants did not, in the course of the grievance procedure, conduct any fact-finding to determine whether the Native Americans were sincere in their contrary belief that such foods were an integral part of the powwow.

D. The District Court Grants Summary Judgment to Defendants on All Three Claims.

On March 15, 2013, the District Court granted summary judgment to Defendants on all three of Appellants' claims (as well as on a fourth claim that is not pursued on appeal). [Opinion, Dkt. No. 46, Page ID# 656-81.] The District Court's reasoning on each claim, as relevant to this appeal, is summarized below.

1. The Clergy Claim. As to the claim that Defendants violated the First Amendment and RLUIPA by suspending and restricting clergy visits, the District Court reasoned that Appellants' request for injunctive relief was moot because, "[s]ince the filing of this case, the Kentucky Department of Corrections has revised [its policies] in order to resolve the Plaintiffs' objections." [*Id.* at Page ID# 664.] "In particular, revised CPP 16.1 provides that clergy may be placed on more than one inmate's visitors list, and doing so does not take away from the total number of visitors an inmate is permitting to include on his visitors list." [*Id.*]

Appellants had also requested limited monetary damages "for the period they were denied clergy visits," and so the District Court proceeded to analyze their entitlement to such relief under both the First Amendment and RLUIPA. [*Id.* at Page ID# 665.] The Court found no violation of the First Amendment, applying the lenient rational basis standard of *Turner v. Safley*, 482 U.S. 78, 84 (1987). [Opinion, Dkt. No. 46, Page ID# 665-68.] RLUIPA, of course, imposes a much higher standard—namely, strict scrutiny. 42 U.S.C. § 2000cc-1(a) (requiring proof that burdens on religious exercise are justified by "compelling governmental interest" and are "least restrictive means"). But the District Court, while recognizing that this Court had not decided the issue, followed another District Judge's holding that RLUIPA does not authorize money damages against officials in their personal capacities. [Opinion, Dkt. No. 46, Page ID# 668.]

2. *The Sweat Lodge Claim*. As to the Native Americans' sweat lodge claim, the District Court assumed the sincerity of their belief that they needed a sweat lodge to exercise their religion, and assumed that depriving them of such constituted a "substantial burden" on their religion. [*Id.* at Page ID# 669.]

Nevertheless, the Court concluded that there was no violation of the First Amendment under *Turner*'s rational-basis test. [*Id.* at Page ID# 669-72.] More surprisingly, the District Court reached the same conclusion even under the strict-scrutiny test employed by RLUIPA. The Court found that "the prohibition [on a sweat lodge] furthers the government's compelling interest in safety and security at a maximum security prison, and even though the prohibition is absolute, it is carried out in the least restrictive means possible." [*Id.* at Page ID# 674.] In particular, the District Court stated that the materials needed for the sweat lodge, "like the heating element" used to create steam, "could easily become weapons in the inmates' hands." [*Id.* at Page ID# 676.] Moreover, the lodge "would be dimly lit and full of steam, making monitoring and observation exceedingly difficult, and a camera in the lodge would not remedy these problems." [*Id.*] The District Court also quoted the Eighth Circuit's findings in *Fowler v. Crawford*, 534 F.3d 931 (8th Cir. 2008), that, based on the factual record in that case, a sweat lodge would "consume considerable institutional finance and personnel resources" and risk creating "resentment among the inmate population." [*Id.*]

3. *The Powwow Claim*. As to the Native Americans' claim based on the prohibition on procuring traditional foods for their powwow, the District Court did not subject that restriction to *any* scrutiny under RLUIPA, concluding instead that the prohibition did not amount to a "substantial burden" on the right of the Native Americans to practice their religion. [*Id.* at Page ID# 677-79.]

Pointing to the Federal Bureau of Prisons' *Inmate Religious Practices and Beliefs Manual*'s statement that "a feast of traditional, familiar food (such as fry bread, corn pemmican, and buffalo meat) is seen as central to the powwow," the District Court observed that "[n]othing in this language mandates that [Defendants] provide the exact foods listed." [*Id.* at Page ID# 678.] Moreover, the Court added, "it appears that fry bread has been provided … at previous powwows," apparently implying that such sufficed to satisfy the Native Americans' religious needs. [*Id.*] As such, the Court concluded, "[t]here is no evidence tending to show that denial of the requested powwow foods pressured the Plaintiffs to 'modify their religious behavior or significantly modify their religious beliefs,' or caused them to 'refrain from religiously motivated conduct,' or compelled them to act 'contrary to their beliefs.'" [*Id.* at Page ID# 678-79 (quoting *Horacek v. Wilson*, No. 07-13822, 2009 WL 861248, at *3 (E.D. Mich. Mar. 30, 2009); *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996)).]

SUMMARY OF ARGUMENT

I. It is undisputed that Defendants entirely suspended clergy visits to Appellants for a period in 2010, and substantially restricted those visits for an even longer period—ultimately changing course only after this suit was filed. Yet the District Court held that Appellants' RLUIPA claim was moot, on the theory that the Act authorizes only forward-looking injunctive relief. That is wrong. RLUIPA broadly authorizes "appropriate relief," which presumptively includes monetary damages; and it provides for suits against officials in their personal capacities, where monetary damages are the *only* "appropriate" relief. Monetary damages are only unavailable from entities protected by sovereign immunity, because RLUIPA does not contain an unmistakeable waiver of that immunity. But officers in their personal capacities have no sovereign immunity.

The purported constitutional concerns that have led some other courts to ignore the plain language of RLUIPA are misplaced. Under its Spending Power, Congress can provide funds to help state prisons with rehabilitation. And, under the Necessary and Proper Clause, Congress can ensure that its funds promote that goal, by imposing personal liability on officials who fail to accommodate religion and thereby inhibit rehabilitation. Supreme Court authority is clear that Spending Clause legislation is *not* limited to regulating direct recipients of federal funds; it may also reach third-parties (like personal-capacity defendants).

Adopting a countertextual construction of RLUIPA that forbids monetary relief against officials in their personal capacities would substantially gut the law, which Congress intended to provide robust protections for prisoners. Damages against state entities are already foreclosed by sovereign immunity, and injunctive relief is often completely inadequate given prison officials' discretion to moot injunctive claims through policy revisions or prisoner transfers. Both statutory text and congressional intent thus counsel strongly in favor of allowing prisoners to vindicate their statutory rights through nominal damage awards (subject, of course, as always, to the potential defense of qualified immunity).

II. When three of the Appellants, adherents of the Native American religion, asked prison officials for periodic access to some type of sweat lodge for ritual purposes, their prison warden denied the request because he did not want to "set a precedence [sic]." No Kentucky prison offers any type of accommodation to those for whom a sweat lodge is the equivalent of a church, even though numerous other prisons across the country have done so for years or even decades. The Native Americans appealed to the state-wide Commissioner, but her office has failed for nearly four years to respond to their grievance. Yet the District Court held that the failure to allow sweat-lodge access was justified under *strict scrutiny* because of purported security concerns. That, too, was wrong.

Strict scrutiny under RLUIPA requires the court to evaluate the *true* reason for the defendants' actions—not to invent *post hoc* justifications. Defendants here never rejected the sweat-lodge request on security-related grounds, and the court therefore erred by upholding the deprivation on that basis. The only security concerns in the record appear in three short sentences in an affidavit submitted in support of summary judgment—hardly the type of robust factual record required to find a compelling governmental interest and absence of any less-restrictive means. Among other things, Defendants never explained why the security measures used by other prisons would not work; never identified any deficiencies in the solutions proposed by Appellants (such as an indoor sweat lodge and use of a security camera); and never even submitted any concrete evidence of the alleged security threats, which evidently did not trouble the KSP Warden. Perhaps it is possible for Defendants to compile a factual record sufficient to justify denial of a sweat lodge, but they have not done so yet, and the District Court erred by adopting wholesale the factual findings of a *different* court considering a *different* record.

III. Finally, the District Court further erred by holding that Defendants' refusal to allow the Native American Appellants to buy certain traditional foods for their annual powwow did not impose a "substantial burden" on that religious exercise. If *coercing* violation of religious beliefs constitutes such a burden, then *completely precluding* certain religiously motivated conduct obviously does.

The District Court may have believed that the burden imposed was not "substantial" because it is not especially important—from a religious perspective—to have any *particular* foods at the annual powwow feast. But that is not the role of the substantial-burden test, which measures not the *theological* substantiality of state impairment of religion but rather the substantiality of the *means used by the state* to impair it (*e.g.*, a heavy fine versus minor obstacle). Indeed, federal courts are neither equipped nor permitted to inquire into the centrality or materiality of a particular religious custom or practice to that faith. Nor may courts determine that particular conduct is not religiously mandated by reviewing accounts of the faith's doctrinal orthodoxy. The District Court therefore also erred by apparently relying on a reference manual published by the Federal Bureau of Prisons to conclude that the traditional foods requested by Appellants were not mandated by their religion. The only permissible course open to the court was to assess—as a *factual* matter, after a hearing—whether the Native Americans were sincere in their alleged belief that the foods were required. But the court did not do that.

As to all three of these claims, the District Court's summary judgment order should be vacated, and the case remanded for further proceedings.

STANDARD OF REVIEW

This Court reviews *de novo* the District Court's decision to grant summary judgment. *See Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997).

ARGUMENT

Before enacting RLUIPA, Congress heard extensive testimony concerning "frivolous or arbitrary" barriers that often impeded prisoners' religious practices. 146 Cong. Rec. S7774, S7775 (July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) ("Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways."). The federal courts could not remedy those infringements on religious freedom as a constitutional matter, however, due to the Supreme Court's restrictive interpretation of the Free Exercise Clause in *Employment Division v. Smith*, 494 U.S. 872 (1990). Congress therefore enacted a law to "accord religious exercise heightened protection" in the special context of prisons. *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). As relevant here, RLUIPA provides:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, … unless the government demonstrates that imposition of the burden … –
>
> > (1) is in furtherance of a compelling governmental interest; and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a). RLUIPA thus "effectively reinstate[s] the strict-scrutiny standard that the Court had rejected in *Smith*." *Cutter v. Wilkinson*, 423 F.3d 579, 582 (6th Cir. 2005). Congress also created a cause of action for violation of the law, authorizing courts to grant "appropriate relief." 42 U.S.C. § 2000cc-2(a).

In this case, Appellants pursued three separate claims under RLUIPA, in each complaining about a distinct burden that Defendants, state officials at KSP and the State Department of Corrections, imposed on their religious exercise. In dismissing the three claims, the District Court invoked three different rationales—and made three different errors of law, profoundly undermining the scheme of heightened protection for religion that Congress created in RLUIPA.

To be clear, Appellants are not contending in this appeal that this Court should grant summary judgment in their favor. (Indeed, they did not even move for summary judgment.) Rather, Appellants' argument is that the District Court committed legal error by granting summary judgment to Defendants, and that this case must be remanded for reconsideration under the proper standards.

I. RLUIPA AUTHORIZES LIMITED MONETARY RELIEF AGAINST PRISON OFFICIALS IN THEIR PERSONAL CAPACITIES.

The District Court never subjected Defendants' restrictions or suspensions of clergy visits to the strict scrutiny mandated by RLUIPA, because it concluded that (i) Appellants' request for injunctive relief was mooted by KSP's revision of the relevant policy, and (ii) RLUIPA does not authorize any monetary relief for past violations. [Opinion, Dkt. No. 46, Page ID# 664, 668-69.] The latter holding is wrong. RLUIPA clearly authorizes courts to grant monetary relief against officials in their individual capacities and, contrary to the view of some other courts, there is no legitimate constitutional objection to that authorization.

A. RLUIPA Allows Individual-Capacity Suits, and Money Damages Constitute the Typical "Appropriate Relief" in Such Suits.

The cause of action created by RLUIPA allows inmates to sue for violation of its provisions and to "obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a). RLUIPA then defines the term "government" to include three distinct types of defendant entities: *first*, a "State, county, municipality, or other governmental entity created under the authority of a State"; *second*, "any branch, department, agency, instrumentality, or official" of the above; and *third*, "any other person acting under color of State law." *Id.* § 2000cc-5(4)(A).

1. For purposes of this appeal, the latter is the important category. It is well established in civil-rights jurisprudence, such as under 42 U.S.C. § 1983, that a suit against a person acting "under color of State law" refers to a suit against a state official in his *individual or personal* capacity. *See Hafer v. Melo*, 502 U.S. 21, 24, 31 (1991) (affirming that "[b]ecause [defendant official] acted under color of state law, respondents could maintain a § 1983 individual-capacity suit against her"); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) ("Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law."); *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974) (explaining that § 1983 suit "against individual defendants" may proceed based on allegations that they violated federal rights "under color of state law"); *Monroe v. Pape*, 365 U.S. 167, 171-85 (1961) (construing this phrase).

Indeed, RLUIPA's authorization to sue "any other person acting under color of State law," 42 U.S.C. § 2000cc-5(4)(A)(iii), could hardly mean anything else. The first two prongs of the tripartite definition of "government" already encompass the other defendants that one may want to sue—(i) a State or other government entity itself; or (ii) an agency or "official" of such, *i.e.*, an official in his official capacity. Giving the third category of defendants its usual meaning therefore also comports with the canon that courts must "avoid an interpretation which would render words superfluous." *Walker v. Bain*, 257 F.3d 660, 667 (6th Cir. 2001).

2. Given that RLUIPA's text plainly authorizes personal-capacity suits against state officials, the next question is what constitutes "appropriate relief," 42 U.S.C. § 2000cc-2(a), in such a suit. Again, background principles and Supreme Court jurisprudence provide a clear answer: Damages are typical, ordinary, and clearly "appropriate" relief in a private right of action created by Congress.

"Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 395 (1971). And "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946). Putting these two axioms together, monetary damages are manifestly "appropriate" relief in a suit for violation of federal statutory rights.

Indeed, the Supreme Court has said so. In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court explained that "we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise," and that, "[u]nder the ordinary convention," this means that courts must consider "whether monetary damages provid[e] an adequate remedy" before considering the propriety of injunctive relief. *Id.* at 66, 76. Ten years later, in *Barnes v. Gorman*, 536 U.S. 181 (2002), the Court reiterated that "appropriate relief" includes "compensatory damages." *Id.* at 187.

Again, this simple interpretation of "appropriate relief" is necessary to avoid "render[ing] words superfluous or redundant." *Walker*, 257 F.3d at 667. To obtain injunctive or other equitable relief, inmates need only sue governments or officials in their *official* capacity. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989) (explaining that official can be sued "in his or her official capacity" for "injunctive relief"). But those official defendants cannot be held liable for money damages, due to sovereign immunity. *See Sossamon v. Texas*, 131 S. Ct. 1651, 1655 (2011). Sovereign immunity is inapplicable in individual-capacity suits, however, *see, e.g.*, *Kentucky*, 473 U.S. at 166-67, which is what gives RLUIPA's authorization to bring personal-capacity suits its independent force—*viz.*, provision of a damages remedy. Conversely, if an individual-capacity RLUIPA suit could not result in money damages, there would never be reason to bring one.

3. To be sure, the Supreme Court in *Sossamon* held that the phrase "appropriate relief" in RLUIPA does not authorize monetary damages against *states*, thus indirectly affirming this Court's earlier holding to the same effect. *See Sossamon*, 131 S. Ct. at 1655; *Cardinal v. Metrish*, 564 F.3d 794, 798-801 (6th Cir. 2009). But the reasoning of *Sossamon* and *Cardinal* leads to the opposite result here, where the defendants are not sovereign states but simply individuals acting under color of state law, who have no claim to sovereign immunity.

The Court in *Sossamon* explained that the phrase "appropriate relief" is "inherently context-dependent." 131 S. Ct. at 1659. In the particular context at issue there—namely, "where the defendant is a sovereign"—the Court concluded that "monetary damages are not 'suitable' or 'proper,'" given the default rule that sovereign entities are absolutely immune from damages liability. *Id.* Put another way, the Court held that the States, by accepting federal funds for their prisons and thus triggering RLUIPA, 42 U.S.C. § 2000cc-1(b)(1), had not waived immunity from damages liability. Waivers must be "unequivocally expressed" in the text of the law, *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984); and "extend unambiguously to … monetary claims," *Lane v. Pena*, 518 U.S. 187, 192 (1996). RLUIPA's "appropriate relief" language did not meet that demanding standard, and so States could not be deemed to have knowingly waived sovereign immunity by accepting federal funds. *Sossamon*, 131 S. Ct. at 1658-59.

The *Sossamon* Court thus distinguished the authority discussed above, *supra* Part I.A.2, on the grounds that cases like *Franklin* and *Barnes* are "irrelevant to construing the scope of an express waiver of sovereign immunity." *Id.* at 1660; *see also id.* at 1660 n.6 ("Those cases did not involve sovereign defendants … ."). Congressional silence may ordinarily imply that damages are available, but it has "an entirely different implication" if sovereign immunity applies. *Id.* at 1660.

None of this logic, however, extends to *individual-capacity* suits. Unlike sovereign entities (or officials in their official capacity, who stand in the shoes of sovereign entities), officials sued in their personal capacities are *not* protected by sovereign immunity and need not waive it. *See Kentucky*, 473 U.S. at 166-67 (clarifying that only in "official-capacity action" may defendant claim "sovereign immunity that the entity, *qua* entity, may possess"). Thus, the line of Eleventh Amendment authority upon which *Sossamon* relied is inapt. As the Ninth Circuit has accordingly held, the phrase "appropriate relief" in RLUIPA *does* encompass money damages against defendants who are *not* protected by sovereign immunity, because absent such immunity, the *Franklin* rule governs—not its exception. *See Centro Familiar Cristiano v. City of Yuma*, 651 F.3d 1163, 1168-69 (9th Cir. 2011) (holding that municipalities may be liable for money damages under RLUIPA because they have no Eleventh Amendment sovereign immunity and *Sossamon*'s rationale therefore does not apply to suits against them).

B. There Is No Legitimate Constitutional Objection to RLUIPA's Authorization of Individual-Capacity Suits for Money Damages.

While this Court has thus far reserved the question of the availability of monetary damages under RLUIPA against officials in their individual capacities, *see Heard v. Caruso*, 351 F. App'x 1, 13 n.5 (6th Cir. 2009), some other courts have held that such relief is not available. But those courts did not dispute the above analysis, or contend that the text of RLUIPA precludes individual-capacity suits for money damages. Some have even acknowledged that it does not. *See, e.g.*, *Nelson v. Miller*, 570 F.3d 868, 886 (7th Cir. 2009) ("[T]his language appears to authorize suit against [official] in his individual capacity … ."); *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 328 (5th Cir. 2009) (describing Eleventh Circuit as having "acknowledged that this language appears to create a right against state actors in their individual capacities" given how it "mirrors" § 1983, yet as having added "gloss" to hold otherwise); *Sharp v. Johnson*, 669 F.3d 144, 153 (3d Cir. 2012) (recounting statutory argument but not disputing it).

Rather, these courts have held that, notwithstanding RLUIPA's text, it should not be construed as authorizing individual-capacity suits because RLUIPA is Spending Clause legislation; its requirements are triggered when a state chooses to accept federal funds for its prisons. *See* 42 U.S.C. § 2000cc-1(b)(1). Spending Clause legislation operates as a "contract," *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981), whereby the funding recipients implicitly agree

to conditions on their receipt of the funds. These courts reason that because the individual officials were not the ones to "accept" the proffered contract or the federal funds, Congress lacks authority to impose personal liability upon them—or, at least, that doubts to that effect favor a countertextual construction. *See Sharp*, 669 F.3d at 154 ("non-recipients of the funds … cannot be subject to private liability"); *Nelson*, 570 F.3d at 888-89 (construing RLUIPA as not allowing damages in individual-capacity suits "to avoid the constitutional concerns that an alternative reading would entail"); *Sossamon*, 560 F.3d at 329 (same).

For two independent reasons, however, this analysis is flawed; there is no legitimate constitutional objection to RLUIPA's imposition of personal liability on state officials. *First*, the Supreme Court has made clear that Congress' power under the Spending Clause, as enlarged by the Necessary and Proper Clause, is not limited to placing conditions on governmental recipients of federal funds; rather, Congress may permissibly regulate independent, private third-parties if doing so would be a convenient and helpful way of furthering congressional purposes. *Second*, Congress expressly grounded the relevant provision of RLUIPA not only on the Spending Clause, but also and independently on the *Commerce Clause*—which is sufficiently broad in scope to allow Congress to impose personal liability for most, if not all, burdens on religion created by state officials (and certainly those at issue in this case).

1. The Constitution authorizes Congress to spend for the general welfare, which is known as the Spending Power. U.S. Const., Art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987). Such legislation "is much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Pennhurst*, 451 U.S. at 17.

Importantly, however, imposing conditions on the direct recipients of federal funds is not the *only* power incidental to the Spending Power. Congress also has the power to "make all laws which shall be necessary and proper for carrying into execution" the Spending Power. U.S. Const., Art. I, § 8, cl. 18. As the Supreme Court explained in *Sabri v. United States*, 541 U.S. 600 (2004): "Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, and it has corresponding authority under the Necessary and Proper Clause to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare." *Id.* at 605. *Sabri* accordingly upheld a criminal law prohibiting bribery of state or local officials of governments that receive federal funds. *Id.* at 605-08; 18 U.S.C. § 666(a)(2). That law, of course, did not impose conditions on a governmental recipient, but rather "br[ought] federal power to bear directly on individuals"—the bribers—who had not received any federal funds or agreed to any conditions thereupon. *Sabri*, 541 U.S. at 608.

It is therefore quite clear that, under the Spending Power in conjunction with the Necessary and Proper Clause, Congress may spend federal funds and also enact laws designed to ensure that such funds "are in fact spent for the general welfare" and not inconsistent with it. *Id.* at 605. Those laws might operate as conditions on direct recipients of the funds. Or they might operate "directly on individuals" who do not receive any such funds, *id.* at 608, like corrupt persons who threaten to render state officials "untrustworthy stewards of federal funds," *id.* at 606, or—as relevant here—state officials *qua* individuals, who threaten to turn federally funded prisons into intolerant facilities that restrict religious liberty.

The notion that RLUIPA cannot impose personal liability on officials who do not directly receive federal funds is therefore erroneous; Congress' powers are not so limited. To the contrary, the Necessary and Proper Clause offers "broad power to enact laws that are 'convenient, or useful' or 'conducive' to the [principal] authority's 'beneficial exercise.'" *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413, 418 (1819)). Under that Clause, a statute need only be "rationally related to the implementation of a constitutionally enumerated power." *Id.* Imposing personal liability on state officials who violate RLUIPA—and thus deterring its violation—is indisputably "convenient," "useful," and "rationally related" to Congress' interest in ensuring that federally-funded prisons respect religious freedom.

Indeed, the Necessary and Proper inquiry is essentially identical to the "relatedness" test for conditions on direct recipients of federal funds under *Dole*. *Compare Dole*, 483 U.S. at 208 (conditions on grants must be "german[e] … to federal purposes"), *with Comstock*, 130 S. Ct. at 1956 (legislation under Necessary and Proper Clause must be "rationally related" to congressional purpose). And this Court has already held that RLUIPA's protection for religious liberty is sufficiently tied to Congress' spending goal, *viz.*, prisoner rehabilitation, to survive *Dole*. *See Cutter*, 423 F.3d at 587 ("[T]he conditions imposed by RLUIPA and the federal funds received by [prison] are both directed at the goal of prisoner rehabilitation, establishing a sufficient nexus between the two as required by *Dole*."). The Act's imposition of personal liability, which provides teeth for its substantive commands, is necessarily also sufficiently related to that same spending goal to fall within the Necessary and Proper Clause. *Cf. Barbour v. Wash. Metro. Transit Auth.*, 374 F.3d 1161, 1168-69 (D.C. Cir. 2004) (noting that all Circuits to have addressed issue have upheld Rehabilitation Act because Congress "did not want *any* federal funds to be used to facilitate disability discrimination" and "threat of federal damage actions was an effective deterrent"); *see also Lau v. Nichols*, 414 U.S. 563, 569 (1974) (upholding Title VI of Civil Rights Act, which authorizes damages for "race and sex discrimination in programs or activities that receive federal funds," as permissible Spending Clause legislation).

In short, there is no plausible constitutional objection to giving RLUIPA its natural meaning, and no constitutional deficiency to warrant rendering large parts of its text superfluous. Notably, the Circuits that have concluded otherwise, with only one exception, did not consider the Necessary and Proper Clause or the Supreme Court's *Sabri* decision, and therefore should not be followed.[1]

2. Even setting aside the above, and erroneously assuming that Congress cannot invoke its Spending Power and the Necessary and Proper Clause to regulate third parties, RLUIPA's provision of a damages remedy for individual-capacity suits is *still* clearly constitutional under the Commerce Clause, at least on its face and as applied here. There is therefore no need to "avoid" constitutional concerns by giving the statute a facially cramped and countertextual interpretation.

Congress expressly specified that RLUIPA's provision protecting inmates from burdens on religion applies *both* to programs receiving federal funds *as well as* where such burden (or its removal) "affects … commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. § 2000cc-1(b). The

[1] The one exception is the Third Circuit, which in a footnote posited an unpersuasive distinction between RLUIPA and the statute in *Sabri*. The latter, said the Third Circuit, was enacted "to protect [Congress'] own expenditures," whereas RLUIPA was enacted "to protect the religious rights of institutionalized persons." *Sharp*, 669 F.3d at 155 n.15. But, as noted above, this Court has already held that Congress passed RLUIPA "to address the federal interest in inmate rehabilitation," and thus to protect and ensure the success of federal expenditures that are also "directed at the goal of prisoner rehabilitation." *Cutter*, 423 F.3d at 587.

latter invokes Congress' power under the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, which authorizes Congress to regulate "activities affecting commerce." *Perez v. United States*, 402 U.S. 146, 150 (1971). *Accord Sossamon*, 131 S. Ct. at 1656 ("Congress … enact[ed] RLUIPA pursuant to its Spending Clause *and Commerce Clause* authority." (emphasis added)). Indeed, the phrase "affecting commerce," the Supreme Court has recognized, "normally signals Congress' intent to exercise its Commerce Clause powers to the full." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273 (1995). And, if there were any remaining doubt, RLUIPA itself includes a rule of construction that it "shall be construed in favor of a broad protection of religious exercise, *to the maximum extent permitted by … the Constitution*." 42 U.S.C. § 2000cc-3(g) (emphasis added).

The Supreme Court has given the Commerce Clause an incredibly broad construction, allowing Congress to regulate "the instrumentalities of interstate commerce," "persons or things in interstate commerce," and even "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). This Court "may only invalidate a congressional enactment passed pursuant to the Commerce Clause if it bears no rational relation to interstate commerce." *United States v. Faasse*, 265 F.3d 475, 481 (6th Cir. 2001) (en banc); *see also Norton v. Ashcroft*, 298 F.3d 547, 555-59 (6th Cir. 2002).

RLUIPA does not come close to failing that test, certainly not on its face, *see Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 556 (6th Cir. 2011) (Sutton, J., concurring), and not here. Many burdens on religion will, when aggregated, "have a substantial effect on interstate commerce." *Gonzales*, 545 U.S. at 17. If a prison refuses access to kosher or halal food, for example—a quintessential violation of RLUIPA, *Cutter*, 544 U.S. at 716 n.5—the resulting burden plainly affects the interstate market for food. *See Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding ban on discrimination by restaurant because of effect on food market). Appellants' separate RLUIPA claim regarding access to special foods for an annual powwow, *see infra* Part III, implicates interstate commerce for the same reasons. And Defendants' restrictions on clergy visits affect commerce through interstate travel, *see Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding ban on discrimination by motel serving interstate travelers), especially given that some of Appellants' visitors were out-of-staters. [Affidavit, Dkt. No. 43-1, Page ID# 642 (Virginia resident denied right to visit Haight).]

Again, the courts that have rejected damages remedies under RLUIPA have generally neglected to consider the significance of the Commerce Clause on the viability of such relief. As explained above, it is clear that Congress has the power to impose personal liability for the imposition of burdens on religious exercise that "affect commerce" in the constitutional sense—and Congress has done just that.

C. Narrowly Construing RLUIPA To Preclude All Monetary Relief Would Deprive Many Prisoners of Effective Remedies, Contrary to Congressional Intent.

Finally, Congress' purpose in enacting RLUIPA counsels strongly against a countertextual construction that would deprive inmates of any right to monetary relief. Under *Sossamon*, inmates are limited to injunctive relief when they sue states or officials in their official capacities. *See* 131 S. Ct. at 1655. But, in many cases, "prospective relief accords … no remedy at all." *Franklin*, 503 U.S. at 76. This is particularly true in the prison context, because abusive officials have great flexibility in transferring prisoners, *see Meachum v. Fano*, 427 U.S. 215, 227 (1976), and such transfers moot claims for injunctive relief, *see, e.g.*, *Colvin v. Caruso*, 605 F.3d 282, 289 (6th Cir. 2010). If injunctive relief is the only remedy under RLUIPA, officials would be able to evade judicial review—if not via transfer then, as in this case, by belated changes in policy.

Justice Sotomayor unsuccessfully pressed this point in arguing for money damages even against *states*. *See Sossamon*, 131 S. Ct. at 1668-71 (Sotomayor, J., dissenting). But *Sossamon* left open that damages might be available at least in personal-capacity suits. If this Court slams that door shut too, many inmates would literally have *no* meaningful remedy for vindication of their statutory rights—a particularly anomalous result given Congress' express direction to give RLUIPA's protections a "[b]road construction," 42 U.S.C. § 2000cc-3(g).

At the same time, allowing monetary relief in personal-capacity suits would not impose much of a burden on state officials. Officers in individual-capacity actions are protected by qualified immunity, *see Kentucky*, 473 U.S. at 166-67, which means that they cannot be held liable unless they violate "clearly established statutory … rights of which a reasonable person would have known," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Moreover, RLUIPA preserves the Prison Litigation Reform Act, 42 U.S.C. § 2000cc-2(e), which courts have held limits prisoners to nominal and punitive damages, absent a physical injury. 42 U.S.C. § 1997e(e) (precluding prisoner suits "for mental or emotional injury … without a prior showing of physical injury"); *Calhoun v. DeTella*, 319 F.3d 936, 941 (7th Cir. 2003); *Mayfield v. Tex. Dep't of Criminal Justice*, 529 F.3d 599, 606 (5th Cir. 2008). (Punitive damages, of course, are generally available only in egregious cases. *See generally Smith v. Wade*, 461 U.S. 30 (1983).)

What is really at stake, therefore, is whether prisoners should be entitled to nominal damages—some symbolic recompense—for clear violations of the rights that Congress accorded to them, or whether they will instead be deprived of even that most basic recognition. It is clear how the Congress that enacted RLUIPA would have answered that question. Appellants respectfully submit that this Court should give the same answer, and remand this case to the District Court for consideration of their clergy-visits claim on the merits.

II. THE DISTRICT COURT ERRED BY HOLDING THAT THE DENIAL OF A SWEAT LODGE SATISFIED STRICT SCRUTINY, BECAUSE ITS "SECURITY" RATIONALE WAS *POST HOC* AND NOT SUPPORTED BY ANY RECORD EVIDENCE.

The Native American Appellants requested that Defendants allow them to access *some* type of sweat lodge suitable for religious use. As they explained, a sweat lodge for adherents of their faith is the equivalent of a church for Christians. [Affidavit, Dkt. No. 1-5, Page ID# 203, 206.] Defendants turned down their request at the KSP level, and for nearly four years have refused to address it at the state level. Yet the District Court nonetheless granted summary judgment to Defendants, finding that precluding access to a sweat lodge satisfied *strict scrutiny*—the most demanding standard known to constitutional law—because of purported "security" concerns. [Opinion, Dkt. No. 46, Page ID# 672-77.]

That was error, for two independent reasons. *First*, the record shows that Defendants never rejected the sweat lodge request on "security" grounds; rather, the KSP Defendants denied it because they did not want to set a precedent, and the State Defendants never followed up on the grievance. Yet strict scrutiny requires the "compelling interest" justifying a restriction on rights to be the *real* reason for the restriction—not a *post hoc* rationale developed by lawyers (or the court). The "security" rationale is the latter, and vacatur is thus required so that—at the least—the State Commissioner can be ordered to address the still-pending grievance and thereby provide a real record for the District Court to review.

Second, even setting aside that "security" was never Defendants' true reason for refusing a sweat lodge, the present record cannot support a finding that refusing *all* access to *any* type of sweat lodge is the least restrictive means of furthering a compelling interest in "security." Critically, many other state prison systems *do* allow sweat-lodge access—apparently without creating insurmountable security concerns—and there is no evidence that Defendants so much as *consulted* these other state prisons regarding their experiences. Strict scrutiny requires a serious effort by the state to gather the evidence, consider the available alternatives, and explain its decision—its burden cannot be satisfied with generalities, platitudes, or by relying on the District Court to engage in the necessary fact-finding on its behalf. For this reason, too, the decision below must be vacated.

A. Defendants Never Invoked "Security" Concerns as Their Basis To Deny a Sweat Lodge, and Such Concerns Therefore Cannot Serve as a Compelling State Interest Under Strict Scrutiny.

It is well established in the RLUIPA context (as in the constitutional one) that the "compelling governmental interest" necessary to survive strict scrutiny must be the *genuine* reason for the restriction on religion—not a *post hoc* rationalization. *See, e.g.*, *Fowler v. Crawford*, 534 F.3d 931, 939 (8th Cir. 2008) ("post-hoc rationalizations" do not suffice); *Spratt v. R.I. Dep't of Corrs.*, 482 F.3d 33, 39 (1st Cir. 2007) (quoting congressional sponsors' statement that "post-hoc rationalizations will not suffice to meet [RLUIPA's] requirements"); *Salahuddin v.*

Goord, 467 F.3d 263, 277 (2d Cir. 2006) ("Post hoc justifications with no record support will not suffice."); *see also United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."). As one court recently explained, "[b]ecause post-hoc rationalizations provide an insufficient basis to find a compelling governmental interest, the court must look to the compelling interest asserted by defendants at the time of the [challenged act]." *Native Am. Council of Tribes v. Weber*, 897 F. Supp. 2d 828, 849 (D.S.D. 2012).

Here, the record is clear that the "security" concerns invoked by the District Court were not, in fact, the "genuine" reason for Defendants' denial of the sweat lodge, *Virginia*, 518 U.S. at 533. In response to the Native Americans' request for a sweat lodge, the KSP Warden (a Defendant here) stated:

> To my knowledge, our Department has not approved for [sic] a sweat lodge at other prisons, so this would be a first, if granted. More to the point, whatever is decided on your grievance would likely set a precedence [sic] for other prisons in our Department. *For this reason*, I must deny your grievance at my level.

[Grievance Decision, Dkt. No. 1-6, Page ID# 214 (emphasis added).]

In other words, the KSP Defendants denied a sweat lodge because it would "be a first" and, if granted, might lead other religious prisoners to seek to vindicate their rights, too. But that was not the "compelling governmental interest" that the District Court below found justified the denial.

The Native Americans appealed their grievance to the State Commissioner of Corrections, as the Warden suggested. [Grievance Appeal, Dkt. No. 1-6, Page ID# 215.] But, although the Commissioner indicated in February 2010 that her Department would be "reviewing" the issue and "investigat[ing] further" [Grievance Decision, Dkt. No. 1-6, Page ID# 216], no final decision has issued in the nearly four years since. Indeed, the Deputy Commissioner's affidavit in support of Defendants' motion for summary judgment claims that the sweat-lodge request "continues to be under review." [Affidavit, Dkt. No. 32-2, Page ID# 493.]

Accordingly, the only denial of the Native Americans' request for a sweat lodge came at the KSP level, and was expressly based on a desire to avoid creating a precedent. The Commissioner simply never issued a decision on these prisoners' grievance appeal, and so added nothing to the record. Under the black-letter authority cited above, the District Court could not invent or affirm a *post hoc* security rationale for a decision actually made on other grounds.

For these reasons, the judgment below must be vacated, and the case should be remanded to the District Court, which should either require the Commissioner to issue a final decision on the pending grievance within a reasonable time frame, or else assess whether Defendants' only articulated interest in refusing to allow a sweat lodge—namely, avoiding creation of a precedent of accommodating religion—is a "compelling governmental interest" that satisfies strict scrutiny.

B. The Record Contains No Evidence That "Security" Concerns Justify a Complete Ban on Inmate Sweat Lodge Access, or That Defendants Considered the Less-Restrictive Alternatives Used by Other State Prisons.

Even assuming that Defendants denied the Native Americans' sweat-lodge grievance on security grounds, the present record does not come close to reflecting the rigorous consideration of their request that strict scrutiny demands. Conclusory objections based on generalized security concerns cannot replace real evidence or meaningful analysis of less-restrictive alternatives—which are wholly absent here. The judgment below must therefore be vacated in any case; if Defendants want to justify denial of a sweat lodge on security grounds, they must assemble a robust record truly supporting such a conclusion.

1. Under RLUIPA's strict scrutiny test, a prison "must do more than merely assert a security concern." *Murphy v. Missouri Dep't of Corrs.*, 372 F.3d 979, 988 (8th Cir. 2004). It must "provide some basis for [its] concern" and also adduce "evidence that [its decision] was the least restrictive means necessary to preserve its security interest." *Id.* at 989. The government must "demonstrate[e] that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005). This burden can be satisfied with "lengthy testimony," "studies," or "research." *Spratt*, 482 F.3d at 39, 41. An "empty record" is not enough. *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003).

Moreover, if other similarly situated entities found ways to preserve security while accommodating religion, defendants must at least explain why they could not follow the same path. For example, the Ninth Circuit affirmed a preliminary injunction against a school policy forbidding Sikh students from carrying a *kirpan*, or ceremonial knife. *See Cheema v. Thompson*, 67 F.3d 883, 885 (9th Cir. 1995). Critical to the court's reasoning was that "other school districts with a Khalsa Sikh population had managed to accommodate kirpans without sacrificing student safety," such as by requiring their blades to be short, dulled, and "securely riveted to their sheaths." *Id.* at 885 n.3. "The natural question was why the same compromise would not work here. The school district gave us no answer." *Id.* Similarly, the First Circuit in *Spratt* noted that the Federal Bureau of Prisons' religious reference manual "appears to contemplate" the conduct prohibited in that case; "in the absence of any explanation by [defendants] of significant differences between [their facility] and a federal prison that would render the federal policy unworkable," that suggested that the state prison was not using the least restrictive means of ensuring security. 482 F.3d at 42. Likewise, the court in *Warsoldier* held that the defendants there could not satisfy RLUIPA because they could not explain "why [other] prison systems are able to meet their indistinguishable interests without infringing on their inmates' right to freely exercise their religious beliefs." 418 F.3d at 1000.

2. Here, the only evidence in the record of Defendants' security-related concerns can be found in a single paragraph in the affidavit of Deputy Commissioner James Erwin submitted in support of Defendants' summary judgment motion. [Affidavit, Dkt. No. 32-2, Page ID# 493.] In conclusory fashion, Erwin asserts that "[d]ue to safety and security reasons, a sweat lodge cannot be placed in a maximum security prison," because guards would not be able to engage in "immediate observation" of the inmates. [*Id.*] For several reasons, this bare rationale—which, as explained, was not even the basis for a formal denial of the sweat-lodge request—cannot withstand strict scrutiny.

a. Most importantly, Defendants have offered no explanation for why KSP cannot offer inmates access to a sweat lodge even though numerous other prisons across the country do so, and in some cases have for decades. *See, e.g.*, *Youngbear*, 174 F. Supp. 2d at 912 (Iowa); *Brown*, 368 F. Supp. 2d at 1011 (North Dakota); *Cubero*, 96 F.3d at 1450 (Wisconsin); *Allen*, 827 F.2d at 565 n.5 (Oregon); *Mathes*, 534 F. Supp. at 228 (Missouri); *Indian Inmates*, 660 F. Supp. at 398 (Nebraska). In *Native American Council*, the district court heard testimony that "there have been no security problems at sweat lodge ceremonies in 31 years" in South Dakota prisons. 897 F. Supp. 2d at 852. Moreover, the Federal Bureau of Prisons' *Inmate Religious Beliefs and Practices* manual—which the District Court treated as canonical in connection with the Native Americans' powwow claim, *see*

infra Part III.B.2—contemplates sweat lodge access in prisons and even provides guidance on how lodges should be conducted and supervised. [Manual, Dkt. No. 46, Page ID# 700-02, 707-09.]

Just as in *Cheema*, *Pratt*, and *Warsoldier*, Defendants cannot plausibly claim to have considered and rejected less-restrictive alternatives if they have not so much as *consulted* with other prisons about their experiences with sweat lodges and how their security concerns are addressed. *See also Native Am. Council*, 897 F. Supp. 2d at 853 ("There is no indication, however, that defendants consulted with Wyoming, New Hampshire, or Idaho before banning all tobacco."). If prisons run by the federal government and by Iowa, North Dakota, Wisconsin, Oregon, Missouri, Nebraska, and South Dakota, among other states, can "meet their indistinguishable interests" in prison security without "infringing on their inmates' right to freely exercise their religious beliefs," *Warsoldier*, 418 F.3d at 1000, the "natural question" is why the same approach "would not work here," *Cheema*, 67 F.3d at 885 n.3. But Defendants have given no answer, much less shown that approaches used elsewhere would be "unworkable" in Kentucky. *Spratt*, 482 F.3d at 42. To be sure, that other prisons allow a prohibited practice is not necessarily *dispositive* of the RLUIPA claim, but Defendants must at least engage in some comparative analysis in order to satisfy strict scrutiny. There is nothing in the present record to indicate that they have done so.

b. Furthermore, even without taking into account that many other prisons offer access to sweat lodges without apparent security breaches, the present records contains no real evidence that providing access to a sweat lodge would raise true security risks or that Defendants considered and rejected less restrictive means than a total ban on access. Erwin's affidavit objects that the inmates must be supervised at all times [*see* Affidavit, Dkt. No. 32-2, Page ID# 493], but does not explain (i) why allowing inmates to participate in a sweat lodge is any different from, for example, allowing them to shower; (ii) why supervision could not be achieved through other means, such as a security camera, as suggested by Plaintiffs themselves [*see* Opinion, Dkt. No. 46, Page ID# 670][2]; or (iii) why it would not satisfy Defendants' concerns to allow inmates to use the sweat lodge individually, which is religiously permissible [*id.*], thus avoiding the risks (cited by the District Court) of sexual misconduct or physical assault [*id.* at Page ID# 675]. As the First Circuit has stated, "[w]e do not think that an affidavit that contains only conclusory statements about the need to protect inmate security is sufficient to meet [prison's] burden under RLUIPA." *Spratt*, 482 F.3d at 40 n.10; *see also Murphy*, 372 F.3d at 988 (prison must "do more than merely assert a security concern").

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[2] The District Court speculated that a video camera would not function "in a dimly lit and steamy room" [Opinion, Dkt. No. 46, Page ID# 670], but there is no evidence in the record to support that supposition about video technology.

Circuits addressing similar sweat-lodge claims on similarly vacuous records have remanded. The Tenth Circuit, for example, reversed summary judgment for prison officials and remanded because the record was "almost devoid of any … evidence upon this issue," leaving the court "nothing by which to judge the magnitude of the governmental interest at stake" or "burden that accommodation would place upon the state." *Werner*, 49 F.3d at 1480-81. The Eighth Circuit did the same in another sweat-lodge case; there, officials' "simple and unelaborated assertion that decisions concerning access to the sweat lodge were made on the basis of 'security-related limitations'" gave the court "little basis" to judge the validity of the action. *Thomas v. Gunter*, 32 F.3d 1258, 1260 (8th Cir. 1994).

In light of Defendants' failure to establish a record demonstrating that access to a sweat lodge (of some sort) would pose insurmountable security concerns, this Court should similarly vacate the grant of summary judgment and remand. The District Court could reconsider the matter if Defendants choose to formally deny the Native Americans' request on security grounds and substantiate those grounds with a record that the District Court could meaningfully review.[3]

[3] Beyond security issues, the District Court also hypothesized that creating a sweat lodge for use by only a subpopulation of the prison could lead to resentment, unrest, and disturbance. [Opinion, Dkt. No. 46, Page ID# 675.] But, again, there is nothing to that effect in the record, and moreover, "relying on other inmates' *reactions* to a religious practice is a form of hecklers' veto"; RLUIPA "does not allow governments to defeat claims so easily." *O'Bryan*, 349 F.3d at 401.

c. Given the absence of any genuine record, the District Court relied heavily instead on the Eighth Circuit's 2008 decision in *Fowler v. Crawford*, which affirmed a district court's grant of summary judgment for prison officials in a sweat-lodge case, finding its legal analysis "substantively indistinguishable from the present case." [Opinion, Dkt. No. 46, Page ID# 676.] That is not correct.

For one thing, there are important factual distinctions between the RLUIPA claims in *Fowler* versus here. Fowler "rejected anything short of a sweat lodge a *minimum* of 17 times a year, insisting [the prison] utilize whatever resources and screening procedures are necessary to meet his demand." *Fowler*, 534 F.3d at 940. He insisted that the sweat lodge be located outdoors and operated using the traditional method of heating rocks in a wood fire. *Id.* at 933-34. In short, while prison officials "suggested alternatives" and "sought a compromise," *id.* at 939, Fowler adopted an "all-or-nothing" attitude, *id.* at 938 (quoting *Hamilton v. Schriro*, 74 F.3d 1545, 1556 (8th Cir. 1996)). By contrast, the Native Americans in this case framed their request in extraordinarily flexible terms, volunteering "to work with the Warden and his staff as to any and all standards which are set out," agreeing to an indoor lodge because the Warden was "more comfortable with the idea of … an indoor Sweat Lodge over one outdoors," and offering to "work with the D.O.C. and the staff at K.S.P. to meet all safety and security concerns." [Grievance, Dkt. No. 1-6, Page ID# 215.] (Appellants also made clear that they

would pay for the costs of the sweat lodge. [*See id.*].) Yet Defendants here—unlike those in *Fowler*—made no effort to seek a compromise solution with Appellants. Other courts have distinguished the harsh result of *Fowler* on these grounds. *See Lindh v. Warden*, No. 2:09-cv-215, 2012 WL 379737 at *9 (S.D. Ind. Feb. 3, 2012) (distinguishing *Fowler* because plaintiff there "was unwilling to accept anything but a full sweat lodge").

Perhaps even more important, whether state action satisfies strict scrutiny is not a pure question of law; it depends also on the *facts* and the *record*. One court therefore cannot simply adopt the conclusions of another without considering the evidence put forward in the case at hand. The decision in *Fowler* may have been correct in light of the substantial record evidence presented there: "Numerous officials … offered a myriad of reasons why they believe Fowler's request for a sweat lodge compromises security at [the prison] to an unacceptable degree." 534 F.3d at 934-35. The officials provided *specific* evidence, including instances of misconduct at the prison's "predecessor institution," and refuted various proposed less-restrictive means. *See id.* at 935. Even the prison chaplain "expressed serious concerns" about the sweat lodge Fowler requested. *Id.* at 936. In resolving the case, the *Fowler* Court properly relied on the record before it: "The record before us well documents [the prison] officials' legitimate fears surrounding a sweat lodge." *Id.* at 939. "The record before us plainly reveals that [prison] officials

suggested alternatives to and sought a compromise with Fowler, to no avail." *Id.* By contrast, the record before the District Court in this case showed none of that. Defendants provided no evidence and refuted no less-restrictive means. The District Court therefore erred by adopting wholesale the factual and legal analysis conducted on a very different record.

Notably, the KSP Defendants, for their part, did not appear to have any security concerns about the sweat lodge; as explained, they rejected the request expressly because of fear of setting a system-wide precedent. In fact, the Native Americans "worked with Warden Parker on safety and security concerns" and apparently even reached "agreement" with him as to such security issues. [Letter, Dkt. No. 1-6, Page ID# 217.] It was the *state-wide* corrections officials, not the local prison warden or his staff, who expressed security concerns to the District Court (despite never having acted one way or the other on the pending grievance). Thus, further distinguishing *Fowler*, there is no basis here for deference to local expert prison administrators. *Cf. Fowler*, 534 F.3d at 943.

In sum, whether Defendants could theoretically put forward a factual record that justifies the District Court's holding is not the question here. What matters is whether they actually *did* establish such a record. Appellants respectfully submit that they clearly did not, and that the grant of summary judgment must therefore be vacated, as in *Werner* and *Thomas*.

III. THE DISTRICT COURT ERRED BY HOLDING THAT BLOCKING THE NATIVE AMERICANS FROM PROCURING TRADITIONAL FOODS FOR AN ANNUAL RELIGIOUS POWWOW WAS NOT A "SUBSTANTIAL BURDEN" ON THEIR RELIGIOUS EXERCISE.

With respect to the Native Americans' other claim—that Defendants refuse to allow them to procure (at their own expense) special, traditional foods for their annual powwow—the District Court granted summary judgment on a different ground. The court held that this deprivation need not be subject to *any* scrutiny under RLUIPA, because it does not impose a "substantial burden" on religious exercise. [*See* Opinion, Dkt. No. 46, Page ID# 6778-79.]

That was legal error. The "substantial burden" test does not authorize courts to inquire into the religious *necessity* or *importance* of a particular act, as the court apparently believed; to the contrary, any such inquiry is improper under basic First Amendment principles. Rather, the "substantial burden" test expands the scope of protection for religious freedom, by subjecting to review even state actions that do not *prohibit* a particular act but merely *coerce* it, such as through penalties or other incidental burdens. The latter, if "substantial" in the sense that they would likely pressure adherents to change their behavior, must also satisfy strict scrutiny. Of course, the claim here is that Defendants *completely* barred the Native Americans from buying traditional foods for their powwow, which is more than a "substantial burden"; it is an *absolute prohibition* on that religious conduct.

While the District Court's contrary reasoning is not entirely clear, it made one of three legal mistakes. *First*, to the extent that the court found the foods not sufficiently central to the Native Americans' religious practice, it erred by using the substantial-burden test to impose that prerequisite, which both RLUIPA and the Supreme Court expressly eschew. *Second*, to the extent that the court found the traditional foods were not *required* by the Native Americans' religion, it erred by holding Appellants to doctrinal orthodoxy gleaned from a federal manual on religious practices, as opposed to evaluating the sincerity of their individual beliefs. *Third*, to the extent that the District Court found that Appellants were not sincere in their claim that they sought the traditional foods for religious reasons, it erred by doing so without holding a hearing on that question of fact.

A. A Complete Prohibition on Religiously Motivated Conduct Is Necessarily a "Substantial Burden" on That Religious Exercise.

RLUIPA protects prisoners from any "substantial burden" on their "religious exercise." 42 U.S.C. § 2000cc-1(a). The Act then defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A). Accordingly, the Act's protections apply if a prison places a "substantial burden" on any exercise of religion, whether or not that exercise is strictly required by the religion in question, and regardless of how "central" the conduct is to the system of religious beliefs at issue.

This Circuit has described a "substantial burden" as one that either "place[s] substantial pressure on [the adherent] to violate its religious beliefs" or "effectively bar[s]" the conduct. *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 739 (6th Cir. 2007); *see also DiLaura v. Twp. of Ann Arbor*, 112 F. App'x 445, 446 (6th Cir. 2004) (per curiam) (finding substantial burden where "plaintiffs would have been barred from serving alcohol" needed for ritual ceremony and "effectively barred … from using the property in the exercise of their religion"). In other words, a substantial burden exists if the state action pressures an adherent "to modify his behavior." *Hayes v. Tennessee*, 424 F. App'x 546, 555 (6th Cir. 2011) (quoting *Barhite v. Caruso*, 377 F. App'x 508, 511 (6th Cir. 2010)). This approach is consistent with other Circuits, and even with the caselaw cited by the District Court. *See, e.g.*, *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (substantial burden if adherent is forced "to refrain from religiously motivated conduct").

Under this standard, failure to accommodate a religious diet "would impose a substantial burden," as it would prevent the inmate from complying with his religious duty to eat the required foods. *Heard*, 351 F. App'x at 13. By contrast, it would not be a substantial burden to require a prisoner to *pay* for special meals. *See, e.g.*, *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 814 (8th Cir. 2008). The latter burden, unlike the former, is hardly insurmountable.

Here, Defendants' refusal to allow the Native Americans to buy the foods that they require for an annual religious ceremony clearly imposes a "substantial burden" on their religious exercise. As the District Court recognized, "Plaintiffs claim that fry bread, corn pemmican, and buffalo meat are *required* for a powwow meal." [Opinion, Dkt. No. 46, Page ID# 678.] Yet Defendants' actions completely preclude them from satisfying that requisite. Defendants did not just "effectively bar" the conduct, *Living Water*, 258 F. App'x at 739; they *directly* barred it. Defendants' actions manifestly caused the Native Americans "to modify [their] behavior," *Hayes*, 424 F. App'x at 555, and "refrain from religiously motivated conduct," *Civil Liberties*, 342 F.3d at 761, because they would have ordered the corn pemmican and buffalo meat absent the prohibition by Defendants.

B. The District Court Made One of Three Legal Errors in Holding That the Prohibition on the Requested Traditional Foods Was Not a "Substantial Burden."

Despite recognizing the nature of Appellants' claim—that certain traditional foods were "*required*" for their powwow meal—and despite citing the appropriate caselaw defining the "substantial burden" standard, the District Court nevertheless concluded that no substantial burden had been demonstrated. [*See* Opinion, Dkt. No. 46, Page ID# 678-79.] The District Court's precise reasoning is not entirely clear from its brief analysis, but none of the three potential ways to understand its opinion is legally defensible.

1. The District Court noted that Appellants "failed to show how a *limited* powwow meal is a substantial burden on their religious beliefs." [*Id.* at Page ID# 679 (emphasis added).] This suggests that the District Court may have been of the view that having buffalo meat and corn pemmican at the powwow, while allegedly "*required*" [*id.* at Page ID# 678], is not important enough to the overall powwow that the absence of those foods would constitute a "substantial" burden.

If so, the court made a clear—albeit perhaps understandable—error of law. As the Tenth Circuit recently explained in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), "substantial burden" on religion could be thought to require "inquiry into the theological" significance of the conduct, *id.* at 1137—under which a substantial burden exists if an *important* religious practice is affected, but not if the state action relates to a relatively minor religious matter. That view, however, as *Hobby Lobby* proceeds to explain, *see id.*, is wrong: RLUIPA itself provides that religious conduct need not be "central" to a religion to warrant protection. 42 U.S.C. § 2000cc-5(7)(A). The Supreme Court has thus recognized that "RLUIPA bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion." *Cutter*, 544 U.S. at 725 n.13; *see also Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) ("[N]o test for the presence of a 'substantial burden' … may require that the religious exercise that is claimed to be thus burdened be central to the adherent's religious belief system.").

Rather, the word "substantial" in "substantial burden" refers not to theology but to "the *intensity of the coercion* applied by the government." *Hobby Lobby*, 723 F.3d at 1137. That is, the state might not be imposing a "substantial" burden on keeping kosher if it requires prisoners to pay a reasonable cost for kosher meals; that is a burden, but not a "substantial" one. *See Patel*, 515 F.3d at 814. Other burdens, by contrast, such as denying unemployment benefits to those terminated for refusing on religious grounds to participate in the manufacture of weaponry, may be sufficiently coercive to be labeled "substantial." *See Thomas v. Review Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 716-19 (1981). And, of course, a complete prohibition on religious conduct is the most "substantial" burden of all. The point, in sum, is that a burden's substantiality depends not on the *theological materiality* of the burdened practice, but on the *coerciveness of the government action*.

Indeed, any contrary rule—one that required courts to determine whether a particular religious practice or custom is "substantial" or "material" to the faith—would likely violate the Establishment Clause. "Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of differing religious claims.'" *Smith*, 494 U.S. at 887 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)). "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith." *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989).

Accordingly, to the extent that the District Court's holding of no substantial burden resulted from its view that the special foods the Native Americans claimed to be required by their faith were not sufficiently *central* or *material* thereto, that was error and the grant of summary judgment should be reversed. So long as the special foods were sought for religious reasons, Defendants' *complete prohibition* of those foods was the most "substantial" type of burden conceivable, whatever its significance within the larger framework of Native American religion.

2. Alternatively, it is possible that the District Court found no substantial burden because it believed that having buffalo meat and corn pemmican at a powwow is not even *required* by Appellants' Native American faith, and therefore that prohibiting those foods did not burden religious exercise at all. Suggesting that it held such a view, the court quoted an *Inmate Religious Beliefs and Practices* manual published by the Federal Bureau of Prisons, which states that "traditional familiar food (such as fry bread, corn pemmican, and buffalo meat) is seen as central to the powwow." [Opinion, Dkt. No. 46, Page ID# 678.] That statement, reasoned the court, did not "mandate[e] that [Defendants] provide the exact foods listed." [*Id.*] The apparent implication is that a proper powwow does require some traditional food—but not any *particular* foods, and so Defendants' refusal to allow any foods beyond fry bread imposed no burden on Appellants' religion.

Again, if this is what the District Court meant, it was error. At the threshold, RLUIPA expressly provides that conduct counts as "religious exercise" under the statute "whether or not *compelled by* … a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (emphasis added). Congress could not have been clearer that it did not want courts judging whether particular religious behaviors were strictly *mandated* by inmates' religious beliefs; conduct is entitled to statutory protection so long as it is "religiously motivated," *Civil Liberties*, 342 F.3d at 761. For example, many religions generally *encourage* giving charity, but do not strictly *require* that any particular amount is given. If a prison were to prohibit inmates from sending the contents of their prison trust accounts to religious charities, that would nevertheless surely be a "substantial burden" subject to RLUIPA.

More importantly, even if the District Court could legitimately inquire into whether a "proper" powwow could be conducted without the particular foods requested, the court clearly erred by answering that question on the basis of a reference manual purporting to summarize typical beliefs of adherents of Native American religion. The Supreme Court has ruled that all that is needed to invoke a religious liberty claim is "a sincere belief" that the individual's religion requires or prohibits certain behavior. *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 833 (1989). "[W]e reject the notion that … one must be responding to the commands of a particular religious organization." *Id.* at 834. Religious liberty "is not limited

to beliefs which are shared by all of the members of a religious sect," and "the judicial process is singularly ill equipped to resolve [intrafaith] differences." *Thomas*, 450 U.S. at 715-16. Indeed, any other rule would force courts into the troubling role of serving as "arbiters of scriptural interpretation." *Id.*

Accordingly, the "narrow function" of a court in the RLUIPA context (as in the Free Exercise context) is to determine whether a plaintiff holds "an honest conviction" about his alleged religious beliefs. *Id.* at 716. Courts may not demand that inmates justify their beliefs with religious doctrine, and may not hold them to the orthodoxy of any particular faith group. *See Gladson v. Iowa Dep't of Corrs.*, 551 F.3d 825, 833 (8th Cir. 2009) ("We agree with the inmates that no 'doctrinal justification' is required to support the religious practice allegedly infringed."). "Religious belief must be sincere to be protected …, but it does not have to be orthodox." *Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012); *see also Vinning-El v. Evans*, 657 F.3d 591, 594 (7th Cir. 2011) ("[S]incerity rather than orthodoxy is the touchstone.").

Thus, the District Court erred by apparently relying on the federal manual to determine whether the traditional foods requested by Appellants were religiously motivated or required. The court could have assessed the sincerity of Appellants' alleged religious beliefs (or allowed Defendants to do so), but could not impose upon them the official orthodoxy published by the Federal Bureau of Prisons.

3. Finally, to the extent that the District Court found (*sub silentio*) that Appellants were not sincere in their allegation that "fry bread, corn pemmican, and buffalo meat are *required* for a powwow meal" [Opinion, Dkt. No. 46, Page ID# 678], the court erred by doing so on this record, at the summary judgment stage. As noted, courts may inquire into the sincerity of alleged religious beliefs. *Cutter*, 544 U.S. at 725 n.13 ("[P]rison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic."). But sincerity is a quintessential question of *fact*, and so cannot be assessed without an evidentiary hearing or trial. *See United States v. Seeger*, 380 U.S. 163, 185 (1965) (describing "threshold question of sincerity" as "of course, a question of fact"); *Patrick v. Le Fevre*, 745 F.2d 153, 159 (2d Cir. 1984) ("[W]here subjective issues regarding a litigant's … sincerity or conscience are squarely implicated, summary judgment would appear to be inappropriate and a trial indispensable."); *Beebe v. Birkett*, 749 F. Supp. 2d 580, 594-95 (E.D. Mich. 2010) ("[T]he sincerity of a person's religious belief is a question of fact" and "summary judgment will rarely be appropriate on state of mind issues.").

In other words, sincerity is a legitimate inquiry—but, here, a premature one. Because neither Defendants nor the District Court ever conducted any inquiry into the sincerity of the Native Americans' religious beliefs, summary judgment on the powwow claim was improper if granted on that basis.

CONCLUSION

For the reasons explained above, Appellants respectfully request that this Court vacate the judgment below and remand this case to the District Court for further proceedings consistent with this opinion.

Dated: October 17, 2013.

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I hereby certify that this brief complies with the type-volume limitation in Fed. R. App. P. 28.1(e)(2). This brief contains 13,712 words and was prepared in Microsoft Word.

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I hereby certify that on this 17th day of October, 2013, I caused true and correct copies of the foregoing Brief of Plaintiffs-Appellants to be served on the following via the Electronic Case Filing (ECF) service:

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RULE 30(g)(1) ADDENDUM
DESIGNATING RELEVANT DOCKET ENTRIES

Description	Docket Entry	Page ID# Range
Complaint	Dkt. No. 1	Page ID# 1-19
Grievance Materials Regarding Clergy Visits	Dkt. No. 1-1	Page ID# 20-72
Plaintiffs' Affidavits	Dkt. Nos. 1-4 & 1-5	Page ID# 175-80, 198-206
Grievance Materials Regarding Sweat Lodge	Dkt. No. 1-6	Page ID# 209-18
Grievance Materials Regarding Powwow	Dkt. Nos. 1-6 & 1-8	Page ID# 222-29, 274-80
Defendants' Motion for Summary Judgment	Dkt. No. 32	Page ID# 449-80
Policy Statement	Dkt. No. 32-1	Page ID# 482-92
Defendants' Affidavits	Dkt. No. 32-2	Page ID# 493-503
Affidavits of Pastors	Dkt. Nos. 42-1 & 42-4	Page ID# 588-90, 606
Opinion Granting Summary Judgment	Dkt. No. 46	Page ID# 656-721
Judgment	Dkt. No. 47	Page ID# 722
Notice of Appeal	Dkt. No. 53	Page ID# 774-77