**CASE NO. 13-6005**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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**RANDY HAIGHT, *et. al.*,**

**PLAINTIFFS-APPELLANTS**

**v.**

**LADONNA THOMPSON, *et. al.*,**

**DEFENDANTS-APPELLEES**

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**APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF KENTUCKY AT LONDON**
**CIVIL ACTION NO. 5:11-CV-118**
**HONORABLE THOMAS B. RUSSELL, SENIOR DISTRICT JUDGE, PRESIDING**

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# BRIEF OF DEFENDANTS-APPELLEES

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# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES**

## WAIVER OF ORAL ARGUMENT

It does not seem likely that oral argument will significantly assist the court in understanding the facts or arguments presented in the parties' briefs.

## STATEMENT OF THE CASE

On July 6, 2011, five (5) death row inmates housed at the Kentucky State Penitentiary (hereinafter, "KSP") filed a Complaint against five (5) KSP officials and three (3) Kentucky Department of Corrections ("DOC") officials stationed at DOC Central Office in Frankfort, each in their official and individual capacities ("Defendants"). [Compl., Dkt. No. 1, Page ID# 1-3.] Two of the death row inmates – Randy Haight and Gregory Wilson- alleged that the Defendants were violating their rights under the First Amendment to the U.S. Constitution and RLUIPA by interfering with pastoral visits by clergy that were occurring outside of the parameters of any Correctional Policies and Procedures ("CPP") or Institutional Policies and Procedures ("IPP"). [*Id.* at Page ID#6-10.] The other three (3) plaintiffs, Robert Foley, Roger Epperson, and Vincent Stopher, alleged that the Defendants violated their First Amendment and RLUIPA rights by (1) refusing to build them a sweat lodge for use by death row inmates in Kentucky's only maximum security correctional facility, KSP; and (2) refusing to provide them hard-to-obtain food items for DOC-approved powwow ceremonies. [*Id.* at Page ID# 10-12.]

Defendants filed an answer to the Complaint on January 24, 2012. [Answer, Dkt. No. 14, Page ID# 346.] Then, on April 26, 2012, the Defendants moved for summary judgment. [Motion, Dkt. No. 32, Page ID# 449.] The District Court granted summary judgment to the Department of Corrections on March 15, 2013 [Opinion, Dkt. No. 46, Page ID# 656-681], and denied Appellants' motion to alter or amend that judgment on July 11, 2013. [Order, Dkt. No. 52, Page ID# 769.] Appellants then filed a notice of appeal on July 19, 2013. [Notice, Dkt. No. 53, Page ID# 774.].

## STATEMENT OF THE ISSUES

I. Since summary judgment was granted to the Department of Corrections, the RLUIPA monetary damages issue is not ripe and is irrelevant to the analysis of the instant appeal.

II. The District Court correctly decided that the Appellees were entitled to summary judgment as to the denial of an institutional sweat lodge, as such denial did not violate the Appellants' rights secured by RLUIPA, where the Appellees had a compelling governmental interest in ensuring the safety and security of the correctional facility.

III. The District Court correctly decided that denying the Appellants' request for certain foods did not impose a substantial burden on the death row inmates' religious exercise.

## STATEMENT OF FACTS

The facts found by the District Court and upon which its decision was made are largely undisputed between the parties, either before that Court or on appeal. The facts found by the District Court are that:

> The Kentucky Department of Corrections maintains policies and procedures that govern the operation of Kentucky's correctional facilities. In addition to the correctional policies and procedures ("CPPs"), each facility, like KSP, may create and maintain its own institutional policies and procedures ("IPPs"), which apply specifically to that facility. To the extent that CPPs and IPPs conflict with one another, CPPs issued by the Kentucky Department of Corrections control over facility-specific policies. At issue in this case are CPP 16.1 and KSP specific procedures, IPP 16-01-01 and IPP 23-01-03. CPP 16.1 and IPP 16-01-01 govern visitation procedures at KSP, while IPP 23-01-03 applies to religious services at the facility. Plaintiffs Haight and Wilson claim that a change in visitation policy violates their Free Exercise rights and RLUIPA because it prohibits them from receiving visits from the clergy member of their choice.
>
> Prior to June 2010, clergy were allowed to visit inmates at KSP pursuant to IPP 16-01-01. (*See* IPP 16-01-01, DN 1-1, pp. 28-37.) That procedure specifically provided that clergy could make "Special Visits" for "a family death, illness, or similar situation." (*Id.* at pp. 35-36.) In practice, however, clergy and their family members, including minor children, were allowed to visit KSP inmates for any number of reasons, not just those outlined in the policy.
>
> During a review of prison procedures, Defendant Ernest Williams, a deputy warden at KSP, discovered that the visitation policy, as liberally applied to clergy under the "Special Visits" provision, conflicted with [CPP] 16.1. (William Aff., DN 32-2, p. 7.) CPP 16.1 did not contain a "Special Visits" provision similar to IPP 16-01-01. In fact, subject to certain exceptions, the version of CPP 16.1 applicable at the time of Williams's review provided that "[a]n individual shall not be allowed to visit an inmate unless his name appears on the approved visitation list." ([CPP] 16.1, DN 32-1, p. 4.) That policy also stated that "[a] visitor shall not be placed on more than one (1) inmate [visitation] list[.]" (*Id.*) As the policy

was applied at KSP, however, clergy were allowed to visit an inmate after receiving approval from the facility, did not have to be on an inmate's approved visitation list, and could visit multiple inmates during a single trip to the prison. Additionally, their children were sometimes allowed to accompany them even though they were not included on any inmate's visitation list.

Around May 28, 2010, Pastor Ralph Hale wrote to Defendant Rocky Roberts requesting to visit Ralph Baze, a death-row inmate who is not a party to this action. (*See* Email of May 28, 2010, DN 1-1, p. 6.) On June 3, 2010, Defendant Williams denied Pastor Hale's request. (*See* Letter of June 3, 2010, DN 1-1, p. 4.) Williams denied the request even though he noted that Pastor Hale had "been approved on many occasions[,]" and directed him to "ask the inmate to place [Pastor Hale] on [the inmate's] visitation list." (*Id.*) Williams also denied a similar request by Pastor Hale to visit Plaintiff Randy Haight. (*See* Letter of June 21, 2010, DN 1-1, p. 8.) These visitation requests were denied because Pastor Hale was not on either inmates' visitation list, and his visit would have violated CPP 16.1 if allowed. (*See* William Aff., DN 32-2, p. 7.) Similar to Haight, Plaintiff Gregory Wilson was denied visits from another clergyman, Pastor Gerry Otahal.

Soon after the visits were denied, Plaintiff Haight filed a grievance seeking restoration of clergy visits in accordance with KSP's previous application and interpretation of CPP 16.1 and IPP 16-01-01. (*See* Grievance Number #10-07-005-G, DN 1-1, p. 1.) Haight's chief argument – developed in more detail through the grievance process – was that regardless of the terms of CPP 16.1 and IPP 16-01-01, clergy visits were governed by IPP 23-01-03. Under the heading "Religious Programming," the version of IPP 23-01-03 applicable at the time of Haight's grievance stated, "An inmate visit by a Certified Religious Leader shall be conducted in the visitation area during regular visitation. The Program Director shall approve this visit after verification of credentials." (IPP 23-01-03, DN 1-1, p. 42; *see* Grievance Appeal Form, DN 1-1, pp. 48-49.) This policy did not contain the restrictions set forth in CPP 16.1 and IPP 16-01-01.

While Plaintiff Haight's grievance was pending, Defendant Williams notified Defendant Philip Parker, the Warden at KSP, of the discrepancies and inconsistencies between KDOC and KSP policy. (Williams Aff., DN 32-2, p. 7.) Warden Parker then placed Defendant Rocky Roberts, KSP's Program Director, in charge of a

committee formed to review visitation policy at KSP. (*See* Mem. of July 8, 2010, DN 1-1, p. 10.) Visits with clergy were suspended during the period of the committee's review. (*Id.*) According to Defendant James Erwin, the Deputy Commissioner of KDOC and an individual with supervisory capacity over Warden Parker, the decision to suspend clergy visits during the period of review helped ensure safety and security at KSP while a new policy was being formed and implemented. (*See* Erwin Aff., DN 32-2, p. 3.)

On July 13, 2010, Defendant Roberts issued a memorandum to Ralph Baze and the other death-row inmates explaining the new interpretation and application of KDOC and KSP policy. (*See* Mem. of July 13, 2010, DN 1-1, p. 12.) Roberts was clear that "clergy visits will not be approved as a regularly scheduled visit has been in the past." (*Id.*) This change was necessary because the policies "do not allow for such visits to occur in the context as previously done."(*Id.*) For future visits by clergy, Roberts offered two solutions: clergy members could join the volunteer chaplains' program at KSP or a prisoner could list the individual on his visitation list. (*Id.*)

As pointed out by the Plaintiffs, neither of these solutions allowed the same access to clergy as previously granted. Some clergy members only wanted to visit a select number of inmates and did not want to become volunteer chaplains for the prison as a whole. Further, and most restrictive, the applicable version of CPP 16.1 restricted a visitor to only one inmate's visitors list. Thus, if Ralph Baze listed Pastor Hale as his visitor, Pastor Hale could not be placed on Plaintiff Haight's list and would be barred from visiting him.

In addition to reinterpreting IPP 16-01-01 so as to bring it into compliance with CPP 16.1, Defendant Roberts and the policy review committee recommended that the above-quoted language be removed from IPP 23-01-03. (Roberts Aff., DN 32-2, p. 11.) This deletion removed the clergy visitation language from IPP 23-01-03 and made it so that all visits to KSP, whether by clergy or others, were governed solely by [CPP] 16.1 and IPP 16-01-01.

After exhausting KSP's grievance procedures, Plaintiffs Haight and Wilson filed the instant suit alleging that the new interpretation of CPP 16.1 and IPP 16-01-01, and the deletion from IPP 23-01-03, violated their Free Exercise rights and RLUIPA by not granting them access to the clergy member of their choice.

They ask the Court to enjoin the Defendants from implementing the new policy interpretations and also seek money damages for the period in which clergy visits were temporarily suspended.

**B. Facts Concerning the Sweat Lodge**

KSP maintains an "Institutional Religious Center" where members of various faiths may congregate in order to conduct religious services. At no time has this facility been used as a sweat lodge for Native American religious ceremonies, and KSP does not maintain any other facility for use as a sweat lodge. In fact, KSP readily admits that a sweat lodge has never been constructed, used, or made available at the facility. Plaintiffs Robert Foley, Roger Epperson, and Vincent Stopher, espousing Native American beliefs, claim that access to and use of a sweat lodge is integral to their faith. Beginning on September 6, 2009, these Plaintiffs requested that KSP construct or otherwise provide a sweat lodge for use in their religious practices. (Letter of Sept. 6, 2009, DN 1-6, p. 2; Foley Aff., DN 1-5, p. 18.) Receiving no response to their request, the Plaintiffs filed a grievance on November 12, 2009, requesting a sweat lodge. (*See* Grievance Number 09-11-018-G, DN 1-6, p. 1.) The grievance proceeded through the appropriate process at KSP, ultimately resulting in Warden Parker denying the Plaintiffs' request. (*See* Warden's Review, DN 1-6, p. 8.) Warden Parker reasoned that the sweat lodge would be denied because KDOC "has not approved . . . 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 precedent for other prisons in [KDOC]." (*Id.*) Warden Parker informed the Plaintiffs that they could appeal his decision "to the Commissioner which will allow a more systemic review, including impacts, of this religious practice in the prison system as a whole." (*Id.*)

Following Warden Parker's advice, the Plaintiffs appealed to Defendant LaDonna Thompson, the Commissioner of KDOC, on February 1, 2010, seeking approval for and installation of a sweat lodge. (*See* Grievance Appeal Form, DN 1-6, p. 9.) On February 25, 2010, Commissioner Thompson responded to the Plaintiffs' appeal. As to the Plaintiffs' request for a sweat lodge, she stated:
I have reviewed your grievance. The Department is reviewing the request of inmates on Death Row concerning the use of a sweat lodge to practice their religion. A final decision has not been made yet and this issue needs to be investigated further. A decision on this matter will be rendered in the near future

and inmates in this grievance will be notified of the outcome. No further response necessary. (Comm'r's Resp., DN 1-6, p. 10.)

Because no response was forthcoming, the Plaintiffs sent Commissioner Thompson a letter on August 2, 2010, inquiring into the status of their grievance. (*See* Letter of Aug. 2, 2010, DN 1-6, p. 11.) On August 9, 2010, the Plaintiffs received another response indicating that "no final decision has been made[,]" and that "an answer should be forthcoming in the near future." (Letter of August 9, 2010, DN 1-6, p. 12.) As of the date the Plaintiffs filed this suit, no response had issued from Commissioner Thompson.

Plaintiffs Foley, Epperson, and Stopher allege that Warden Parker's denial of a sweat lodge at KSP and Commissioner Thompson's continued refusal to respond to or otherwise accommodate their request violates their Free Exercise rights and RLUIPA. They seek an affirmative injunction and order from this Court requiring KSP to construct a sweat lodge and money damages to compensate for their previous deprivation.

**C. Facts Concerning Traditional Foods at the Powwow**

In exercising their religious beliefs, inmates at KSP are permitted to hold religious ceremonies and other observances. Plaintiffs Foley, Epperson, Stopher, and other inmates have, on occasion, been permitted to hold a powwow in furtherance of their Native American spiritual beliefs. A powwow is simply a "day of traditional dancing, speaking, and praying in word, song, and music for all that lives. The gathering of inmates . . . symbolizes a renewal of unity in the Spirit." (*See* Excerpt from Federal Bureau of Prison, *Inmate Practices & Beliefs* 14 (2003) (attached hereto as Exhibit 1).) In filing this suit, the Plaintiffs do not allege that they were prohibited from holding a powwow. Rather, they claim that KSP officials did not permit them to obtain the foods necessary for a traditional meal that normally accompanies a powwow. As the Federal Bureau of Prison's publication on inmate religious practices and beliefs states, "A feast of traditional, familiar foods (such as fry bread, corn pemmican, and buffalo meat) is seen as central to the [powwow]." (*Id.*) Evidence in the record shows that the Plaintiffs were allowed to have "fry bread" at their powwow but that their request for other foods, like buffalo meat, was denied. They claim that not being permitted to have a complete traditional meal in conjunction with

> their powwow violates their Free Exercise rights and RLUIPA.
> [Opinion, Dkt. No. 46, Page ID# 657-663.]

Neither party to this action has claimed any substantial disagreement with those basic facts.

## SUMMARY OF ARGUMENT

The Western District of Kentucky correctly determined that the Defendants did not violate the U.S. Constitution or RLUIPA through (1) amending KSP institutional policy to bring it into conformity with controlling CPPs, (2) deciding that institutional safety and security concerns justify examination and/or denial of the creation of a sweat lodge to be used by death row inmates in Kentucky's only maximum security correctional facility, and (3) declining to provide certain hard-to-obtain, non-essential foods during a powwow.

## STANDARD OF REVIEW

On appeal, this honorable Court reviews *de novo* the District Court's grant of summary judgment to the Defendants. See *Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997).

## ARGUMENT

### I. RLUIPA MONETARY DAMAGES

The Defendant-Appellees herein will only address somewhat briefly the Plaintiff-Appellants argument for the imposition of nominal damages against prison officials in their individual capacities in RLUIPA litigation. This is because no action taken or not taken by any Defendant-Appellee violated RLUIPA and, thus, consideration of the theoretical availability of nominal damages essentially seeks an advisory opinion from this honorable Court. Further, the Plaintiff inmates below did not fully raise and the District Court did not fully consider or rule on the availability of monetary damages in RLUIPA individual capacity litigation, so the availability of individual capacity RLUIPA damages is not subject to review on appeal.

However, as to the merits, the District Court correctly found, at the time of the alleged RLUIPA violations, it was clear that "the Sixth Circuit held that RLUIPA 'does not contain a clear indication that Congress unambiguously conditioned receipt of federal prison funds on a State's consent to suit for monetary damages.' As a result, RLUIPA plaintiffs may not recover monetary damages from defendants in their official capacities." Cardinal v. Metrish, 564 F.3d 794, 799-802 (6th Cir. 2009). Here, although several individuals are named as Defendants in this matter and allegations are made against those individuals in their individual capacity, none of the people named took sufficient adverse action - or failed to take a beneficial action - to sustain a claim against them in their individual capacities.

The Plaintiff-Appellants named the following people as defendants: LaDonna Thompson, Commissioner of the DOC; James Erwin, Director of Operations/Programs for the DOC; Al Parke, then-Deputy Commissioner of DOC; Philip Parker, Warden of KSP; Ernest Williams, Deputy

Warden of Security of KSP; Alan Brown, Deputy Warden of Programs of KSP; Michael Ray, Unit Administrator of KSP; and Robert ("Rocky") Roberts, Program Director of KSP. Each of these individuals were named as individual Defendants either because of their involvement in addressing the revision of institutional policy or because of their handling of the Plaintiffs' grievances.

Yet, the law is well-settled that prison supervisory staff cannot be held accountable under *respondeat superior* theories for their handling of grievances or for the actions of their subordinates. These theories of recovery have been rejected as a basis for a §1983 claim, which is especially important here as the Plaintiff-Appellants seek to incorporate the "acting under color of state law" component of a §1983 individual capacity suit . See Monell v. Department of Social Services, 436 U.S. 658, 691-694 (1978); 42 U.S.C. § 1983. The Sixth Circuit has stated, "The law is clear that liability of supervisory personnel must be based on more than merely the right to control employees." Hayes v. Jefferson County, 668 F.2d 869, 872 (6th Cir. 1982).

For example, in Bellamy v. Bradley, 729 F.2d 416 (6th Cir.) c*ert. denied* 469 U.S. 845 (1984), the plaintiff alleged that several complaints to supervisory officials about the alleged incidents of harassment by correctional employees were ignored. Witnesses testified that supervisory officials were notified about harassment by prison guards but no action was ever taken. The Court found:

> Bellamy has made no showing that any of the supervisory officials who were defendants in this case actively participated in or authorized any harassment of appellant. The testimony presented by Bellamy, at best, indicates that some instances of alleged harassment were brought to the attention of prison supervisory officials.

*Id*. at 421. Here, the Plaintiffs only allege that the individuals named in this action either handled their grievances on pastoral visitation, the sweat lodge, and the foods permitted at their powwow or

that the individuals failed to command their employees to give the Plaintiffs the benefits they requested. However, no specific facts are alleged concerning any named Defendant-Appellee, which would tend to demonstrate any deliberate action on their part which could be considered a constitutional violation.

Further, the District Court below specifically considered the allegations of constitutional violation made against the Defendant-Appellees and explicitly rejected all allegation of constitutional violation as a matter of law. Equally importantly, the Plaintiff-Appellants agreed that the Defendant prison officials did not commit any constitutional violation and therefore they declined to appeal any of the District Court's rejections of their constitutional claims. The inmate Plaintiff-Appellants have not – and cannot -made any showing that any of the supervisory officials who were Defendants in this case actively participated in or authorized any deprivation of religious freedoms. The allegations presented by the inmates, at best, indicate that some instances of alleged deprivation were brought to the attention of prison supervisory officials.

The inmate Plaintiffs allege that Commissioner Thompson, Warden Parker, and their staff named as Defendants were in a position to correct the alleged deprivations as being supervisors when it was brought to their attention by way of prisoner grievances, which they denied, and requests, which they did not act upon. However, in Shehee v. Luttrell, 199 F.3d 295, 300 (1999), this honorable Court held that officials whose only "action involve[s] the denial of administrative grievances or the failure to act" are not liable under §1983. The court relied on cases indicating "that § 1983 liability must be based on more than *respondeat superior*, or the right to control employees." Id. The court further stated, "liability under § 1983 must be based on active unconstitutional behavior and cannot be based upon 'a mere failure to act.'" Id., quoting Salehpour

v. University of Tennessee, 159 F.3d 199, 206 (6th Cir. 1998), *cert. denied* 526 U.S. 1115 (1999). The inmate Plaintiffs here have only indicated that the named Defendants either handled their grievances on pastoral visitation, the sweat lodge, and the foods permitted at their powwow or that the individuals failed to command their employees to give the Plaintiffs the benefits they requested. The inmate Plaintiffs have not stated any facts that would tend to indicate that the named Defendants were actively involved in any alleged unconstitutional behavior.

The Bellamy case was considered in Shelly v. Johnson, 684 F.Supp. 941, 946 (W.D.Mich. 1987), which provided, in pertinent part:

> The fact that some instances of alleged harassment have occurred or have even been brought to the attention of prison supervisory officials is not a sufficient basis for subjecting the officials to liability under §1983. There must be a showing that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum, a §1983 plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate. Otherwise, a claim that supervisory prison officials negligently failed to halt harassment will not stand.

*Shelly v. Johnson*, 684 F.Supp. at 946, citing Bellamy, 729 F.2d at 421.

Here, none of the named Defendants either directly or implicitly authorized, approved or knowingly acquiesced in any unconstitutional action or failure to act. Thus, none of the named Defendants were "acting" under color of State law, thus, precluding them from being deemed "any other person acting under color of State law" for the purposes of an RLUIPA analysis. This preclusion is vital when dealing with prisoners and their continuous stream of litigation. The practical considerations underlying the principle that a supervisor's failure to stop alleged unconstitutional conduct by subordinates upon gaining knowledge of the alleged conduct are described in the Seventh Circuit's published opinion in the case of Burks v. Raemisch, 555 F.3d 592 (7th Cir. 2009), a case involving another inmate plaintiff who contended that the Secretary of the

Wisconsin Department of Corrections and various other corrections officials were liable under §1983 due to deliberate indifference to his serious medical need. As stated by the Seventh Circuit:

> Public officials do not have a free-floating obligation to put things to rights, disregarding rules . . . along the way. Bureaucracies divide tasks; no prisoner is entitled to insist that one employee do another's job. The division of labor is important not only to bureaucratic organization but also to efficient performance of tasks; people who stay within their roles can get more work done, more effectively, and cannot be hit with damages under §1983 for not being ombudsmen. Burks's view that everyone who knows about a prisoner's problem must pay damages implies that he could write letters to the Governor of Wisconsin and 999 other public officials, demand that every one of those 1,000 officials drop everything he or she is doing in order to investigate a single prisoner's claims, and then collect damages from all 1,000 recipients if the letter-writing campaign does not lead to better medical care. That can't be right. The Governor, and for that matter the Superintendent of Prisons and the Warden of each prison, is entitled to relegate to the prison's medical staff the provision of good medical care.

*Burks*, 555 F.3d at 595.

Similarly, here, the named Defendants cannot be subject to RLUIPA damages merely because they happened to be one of the many people the inmate Plaintiff made religious demands of. The named Defendants, particularly LaDonna Thompson, James Erwin, Al Parke, Philip Parker, Ernest Williams, Alan Brown and Michael Ray, were entitled to relegate to the prison's front line chaplains and program staff the provision of constitutionally adequate religious services that also comply with RLUIPA.

Further, even if the named Defendants are deemed to have taken sufficient action to be considered to be "any other person acting under color of State law," they should still not be subject to damages under RLUIPA. This is because the District Court below was correct when they held that:

> The Cardinal Court did not consider whether money damages were available against defendants in their individual capacities, however, and as noted in Heard v. Caruso, 351 F. App'x 1, 13 n.5

> (6th Cir. 2009), the Sixth Circuit "has not . . . ruled on whether RLUIPA authorized suits for monetary damages against state officials in their *individual* capacities."
>
> Another court of this district has addressed the issue, however. *Froman v. Ky. Dep't of Corr.*, No. 3:08CV-P234-H, 2010 WL 1416682, at *2 (W.D. Ky. Mar. 31, 2010) (Heyburn, J.), followed precedent from several circuits considering the issue and held that "RLUIPA . . . does not authorize a claim for damages against state employees in their individual capacities."

Froman specifically rejects the inmate Plaintiff's Spending Clause argument. The Froman Court found:

> several other federal appellate courts have considered precisely that issue and all have held that RLUIPA, as an exercise of Congress' Spending Clause power, does not authorize a claim for damages against state employees in their individual capacities. See Nelson v. Miller, 570 F.3d 868, 877–79 (7th Cir.2009); Rendelman v. Rouse, 569 F.3d 182, 187–89 (4th Cir.2009); Sossamon v. Lone Star State of Texas, 560 F.3d 316, 327–29 (5th Cir.2009); Smith v. Allen, 502 F.3d 1255, 1274 (11th Cir.2007); accord Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 641 (1999); National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 468, (1999). Because the reasoning of those circuits is persuasive, this Court finds that the Sixth Circuit would likely follow suit.
>
> RLUIPA was enacted pursuant to Congress' powers under the Spending Clause. Cutter v. Wilkinson, 423 F.3d 579 (6th Cir. 2005). "Such legislation has been described as creating a 'contract' between the federal government and the state that receives the federal funds." Nelson, 570 F.3d at 887. Only by accepting federal funds does the state become liable for any noncompliance with conditions imposed by the statute. Id. The individual defendants here do not receive any funds from the federal government. Therefore, they are not a party to the "contract" and are not liable for non-compliance with the conditions imposed by RLUIPA. See, *e.g.*, Smith, 502 F.3d at 1273 ("Congress cannot use its Spending Power to subject non-recipient of federal funds, including a state official acting [in] his or her individual capacity, to private liability for monetary damages."); accord Davis, 526 U.S. at 641 (finding that under Title

> IX, another Spending Power statute, "[t]he Government's enforcement power may only be exercised against the funding recipient ... and we have not extended damages liability under Title IX to parties outside the scope of this power.").

In the instant action, the inmate Plaintiffs seek damages under RLUIPA against individual Defendants in their individual capacities. However, it is clear that "only by accepting federal funds does the state become liable for any noncompliance with conditions imposed by" RLUIPA. Id. As in Froman and as in all actions involving Kentucky DOC employees, the individual defendants do not receive any funds from the federal government. Accordingly, as in Froman, the individuals named as Defendants in this action "are not a party to the 'contract' and are not liable for non-compliance with the conditions imposed by RLUIPA." Id. As the Froman Court acknowledged in footnote 3, the RLUIPA monetary damages structure:

> creates somewhat of a Catch 22 for plaintiffs seeking monetary relief under RLUIPA in the Sixth Circuit. The plaintiff may only sue state government actors. When sued in their official capacities, those actors are entitled to Eleventh Amendment immunity. When sued in their individual capacities, they simply are not liable under the statute. The practical result, of course, is that monetary damages are unavailable to a plaintiff who has been wronged in violation of RLUIPA. However, the Court is bound by the language of the statute and the application of Congress' Spending Powers. Should Congress decide that it wishes to impose liability for money damages against state's receiving federal funds, it may amend RLUIPA to require a waiver of Eleventh Amendment immunity. Without such an amendment, however, Plaintiffs' claims for money damages in this case simply cannot proceed.

Id.

Therefore, here, as in Froman, this honorable Court should determine that the named Defendants simply are not liable under RLUIPA and monetary damages cannot issue against those Defendants as a matter of law. Further, even if this Court were so inclined to take the unprecedented

position of expanding RLUIPA to cover individuals employed by the state, the Defendants submit that the instant action would not be an appropriate vehicle for such expansion as this is not an incident where "state officials *qua* individuals [] threaten to turn federally funded prisons into intolerant facilities that restrict religious liberty," contrary to the inmate Plaintiff's assertion on page 27 of his brief. Accordingly, the Defendants-Appellees respectfully request this honorable Court to declare that RLUIPA does not authorized monetary damages against state officials sued in their individual capacities. In the alternative, if the Court believes monetary damages may be theoretically available, the Defendants-Appellees request a determination that no Defendant-Appellee has taken or failed to take any action while "acting under color of state law" that would constitute a constitutional violation that would invoke RLUIPA and, thus, the question of whether RLUIPA authorizes monetary damages is irrelevant to the instant appeal.

## II. SWEAT LODGE CLAIMS

As to the Plaintiff-Appellants' claimed entitlement to a sweat lodge for use by death row inmates in Kentucky's only maximum-security facility, the District Court correctly determined that:

> Assuming that the prohibition on a sweat lodge at KSP is a substantial burden on the Plaintiffs' religious exercise, their cause of action under RLUIPA fails because the prohibition 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. In coming to this conclusion, the Court was guided in substantial part by *Fowler v. Crawford*, 534 F.3d 931 (8th Cir. 2008), a case in which, after examining facts similar to those *sub judice*, the Eighth Circuit held that an absolute prohibition on a sweat lodge did not violate RLUIPA.
>
> In *Fowler*, the plaintiff was serving a life sentence in a maximum security prison operated by the Missouri Department of Corrections. *Id.* at 933. Although he and other adherents to Native American spiritual practices held congregational meetings and

practiced their religion in various other ways, Fowler was adamant that he could not properly exercise his religion without access to a sweat lodge. *Id.* He brought suit against state officials under RLUIPA seeking construction of a sweat lodge at the prison. *Id.* Throughout the suit, prison officials did not question the sincerity of Fowler's beliefs nor did they dispute that an absolute prohibition on a sweat lodge substantially burdened the exercise of his religion. *Id.* at 934. Rather, they presented "a myriad of reasons why they believe[d] Fowler's request for a sweat lodge compromise[d] security at [the prison] to an unacceptable degree." *Id.* at 935.

It should be noted that the type of sweat lodge Fowler requested varied from the one sought by the Plaintiffs in this case. Fowler wanted access to a traditional sweat lodge where the internal steam was generated by pouring water [over] rocks that had been heated in a wood fire outside of the lodge. *Id.* at 934. It also involved access to items that could be used as dangerous weapons, such as shovels and deer antlers. *Id.* Regardless of the type of sweat lodge, however, the safety concerns were the same as those present in this case. First, the sweat lodge created the "risk of sexual misconduct, physical assault, and drug use, as well as fire and heat related safety concerns." *Id.* at 935. Second, the "sweat lodge would consume considerable institutional finance and personnel resources and expend many institutional hours." *Id.* Finally, extending the unique privilege of the sweat lodge to "one group of inmates to the exclusion of others [could] create[] a risk of resentment among the inmate population leading to the potential for unrest and disturbance." *Id.* And much like the present case, officials determined that installing a security camera in the lodge would not deter inappropriate conduct because "the interior of the lodge was dark and . . . steam from the rocks would fog a security camera's lens." *Id.* at 936.

In the process of dismissing Fowler's RLUIPA action, the court thoroughly discussed the compelling governmental interests at play as well as whether an absolute prohibition on a sweat lodge could be a "least restrictive means" within the meaning of the statute. First, the court found that the state's interest in safety and security at a prison "is always compelling." *Id.* at 939. In addition to safety and security, the court found "a sweat lodge's drain on prison security manpower over the 6-7 hour duration of the sweat lodge" as well as the consumption of other resources was another compelling interest. *Id.* Second, the court found that an absolute

prohibition on a sweat lodge was "the least restrictive means by which to further the [prison's] compelling interest in safety and security." *Id.* at 942. Relying on the Supreme Court's decision in *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) ("*Cutter I*") the court found that substantial deference is due "to the experience and expertise of prison and jail administrators in construing RLUIPA." *Id.* at 941. Where prison officials had determined that absolute prohibition of a sweat lodge was the only means of ensuring safety and security at the prison, the court found that this did not violate RLUIPA's least restrictive means test.

Aside from minor factual differences between the type of sweat lodge at issue in *Fowler* and the sweat lodge sought here, the legal and policy analysis in *Fowler* is substantively indistinguishable from the present case. First, the Defendants have shown that absolute prohibition of the sweat lodge furthers their compelling interest in safety and security at KSP, while preserving resources and allocating them in a way that benefits the whole prison population and not just a select few. The materials needed for the sweat lodge, like the heating element, could easily become weapons in the inmates' hands. 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. Second, because of the substantial deference due to prison administrators in ensuring safety at the prison, absolute prohibition of the sweat lodge has "presented [the Court] with the unusual situation where the government has satisfied the least restrictive means prong by demonstrating that other less restrictive alternatives are not acceptable to plaintiff . . . ." *Id.* at 938 (quoting *Hamilton v. Schriro*, 74 F.3d 1545, 1556 (8th Cir. 1996)).

So as to be clear, the Supreme Court in *Cutter I* repeatedly directed that "prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area." *Cutter I*, 544 U.S. at 725 n.13. In this case, the Defendants claim that the sweat lodge proposed by the Plaintiffs must be prohibited entirely because it would create safety and security concerns that are too great to accommodate at the prison. Giving due deference to their statements and the evidence in the record, the Court concludes that the absolute prohibition of a sweat lodge at KSP is the least restrictive means of furthering KSP's compelling interest in safety and security. Accordingly, the Defendants have not violated RLUIPA in their individual or official capacities in regards to the requested sweat lodge.

The Plaintiff-Appellants now seek to undermine the valid safety and security concerns of the DOC that necessarily follow the proposed installation of a potentially lethal sweat lodge by attacking the factual record developed below by 1) claiming that the DOC's safety and security concerns were an improper *post hoc* rationale, 2) claiming the record is bare as to specific safety concerns, and that 3) claiming the DOC failed to consider less-restrictive alternatives used by state prisons in other Circuits. However, because the record developed below supports the District Court's determination that DOC's prohibition of a sweat lodge at KSP "is the least restrictive means of furthering KSP's compelling interest in safety and security," the District Court below correctly determined that the Defendant-Appellants did not violate RLUIPA in either their individual or official capacities. [Opinion, Dkt. No. 46, Page ID# 676.]

First, as to the Plaintiff-Appellants' claim that the DOC's safety and security concerns were a *post hoc* rationale developed after-the-fact by lawyers, the Defendant-Appellees would submit that such a statement belies a clear lack of understanding of a correctional setting and the motivations of individuals working in such a setting.

As this Court well knows, correctional employees literally risk their very lives every time they go to work; this is especially true at KSP where, by definition, almost every inmate housed there is a rapist, murderer, or violent criminal. Every DOC employee stationed at a correctional facility goes through months of safety and security training before they are permitted to work in a prison. Every DOC employee stationed at a correctional facility is required to undergo weeks of annual training to ensure every DOC employee is aware of the latest techniques and strategies to make it more likely that they are able to leave the facility in one piece and return home to their families unharmed. Every DOC employee stationed at a correctional facility is always acutely

aware of individual, group, and institutional safety and security concerns. Any assertion that such deeply-engrained, life-saving security considerations should be discarded and/or considered *post hoc* rationalizations because the Warden, in replying to a low-level institutional grievance, didn't use the magic legal words "safety and security concerns" when denying the death row inmates access to a potential lethal sweat lodge is simply incorrect from the perspective of anyone with any type of correctional experience. [Appellant's Brief, pages 34-35].

Further, the Defendant-Appellees submit that the Warden's response to the inmate's grievance goes to show how seriously the Warden took the safety and security implications of the creation of a sweat lodge, not the lack of concern as the Plaintiff-Appellants claim. Warden Parker, a DOC employee for several decades, stated in his affidavit that he denied the inmates' sweat lodge grievance because of security concerns. [Affidavit of Parker, Dkt. No. 32-2, Page ID# 496]. Further, Warden Parker said that, after he carefully reviewed KSP policy, history, and guidelines, he also reviewed DOC policy, history, and guidelines and determined that if a sweat lodge were created at KSP, it would be a first in DOC history. Given that actions in one correctional facility can cause significant impacts on every other correctional facility in the state, Warden Parker determined that the wide-reaching, system-wide effects of the rebalancing of the safety and security vs. religious freedom analysis implicit in installation of a sweat lodge could be better assessed by the Commissioner at DOC central office. Id. at Page ID# 495. Therefore, as Warden Parker already explicitly said, the Defendants rejected the death row inmates request for a sweat lodge on security grounds.

Similarly, the record before the District Court showed that DOC's security concerns justified the denial of sweat lodges and that the Defendant-Appellees adequately considered alternatives.

The Defendant-Appellees submitted seven (7) affidavits from high-ranking DOC officials that set out their thought process and their understanding of the events that underlie the instant action. In fact, every DOC official who had substantial decision making authority as to pastoral visitation, the installation of the proposed sweat lodge, and the non-provision of certain foods at the death row inmates' powwow submitted notarized affidavits.

Importantly, the Plaintiff-Appellants had opportunities to conduct discovery, to depose or otherwise challenge the sworn testimony of those officials who submitted affidavits, yet the death row inmates chose not to. Although the death row inmates' new counsel might have preferred "lengthy testimony," "studies," or "research," the record developed below is more than sufficient for a determination that the DOC officials had significant, compelling interests in maintaining the safety and security of KSP and that those same officials considered alternatives and correctly determined that non-approval of the sweat lodge was the least restrictive means of ensuring that facilities' safety and security. Spratt v. R.I. Dep't of Corrections., 482 F.3d 33, 39 (1st Cir. 2007). The Plaintiff-Appellants cannot here claim that RLUIPA demands the rejection of the DOC officials' sworn statements because Plaintiff-Appellants failed to fully utilize the discovery process to challenge said statements.

Thus, the District Court below properly determined that the Defendant-Appellee DOC officials' denial of a sweat lodge in Kentucky's only maximum security prison was adequately considered, that the record was sufficient to support the prohibition of the installation of the sweat lodge, and that "the prohibition 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." [Opinion, Dkt. No. 46, Page ID# 674.]

Moreover, the Court correctly determined that the circumstances in Fowler v. Crawford, 534 F.3d 931 (8th Cir. 2008) were substantially similar to the circumstances underlying the instant appeal; although the Plaintiff-Appellant attempts to make minor distinctions between the two situations, the Defendant-Appellees submit the same rationale of security concerns was operating here, as noted by Deputy Commissioner Erwin:

> Due to safety and security reasons, a sweat lodge cannot be placed in a maximum security prison. Security practices in a maximum security setting require staff to have the ability for immediate observation of an inmate and that ability would be compromised with the utilization of the sweat lodge. The need for immediate observation is required to ensure that a breach of security does not occur, the inmate is not a danger to himself or others, or the inmate is in need of medical attention. The request for a sweat lodge continues to be under review; however, the department has not determined a method to implement the sweat lodge without a compromise to security.

[Affidavit of Erwin, Dkt. No. 32-2, Page ID# 493].

Erwin's sworn statement, by itself, is sufficient evidence of the DOC's safety and security concerns, particularly when read in conjunction with Fowler. Erwin's sworn statement directly dovetails with the observations of Fowler that:

> [T]he sweat lodge created the "risk of sexual misconduct, physical assault, and drug use, as well as fire and heat related safety concerns." *Id.* at 935. Second, the "sweat lodge would consume considerable institutional finance and personnel resources and expend many institutional hours." *Id.* Finally, extending the unique privilege of the sweat lodge to "one group of inmates to the exclusion of others [could] create[] a risk of resentment among the inmate population leading to the potential for unrest and disturbance." *Id.* And much like the present case, officials determined that installing a security camera in the lodge would not deter inappropriate conduct because "the interior of the lodge was dark and . . . steam from the rocks would fog a security camera's lens." *Id.* at 936

[Opinion, Dkt. No. 46, Page ID# 675 (quoting Fowler, 534 F.3d. at 935-936)]

The Defendant-Appellees submit that the circumstances at the heart of Fowler are substantially similar to the circumstances herein. Further, given the deference afforded local expert prison administrators, the Defendant-Appellees respectfully request this honorable Court to affirm the determination of the District Court that safety and security concerns justify the denial of the installation of an inherently dangerous sweat lodge at Kentucky's only maximum security correctional facility.

## III. POWWOW CLAIMS

While the Plaintiff-Appellants claim the non-provision of certain "traditional" foods for their annual powwow constitutes a violation of RLUIPA, the District Court below correctly determined that not receiving a particular optional food item does not constitute a "substantial burden" on the death row inmates' practice of their professed religion, thus not invoking RLUIPA's strict scrutiny analysis. As the District Court correctly set out below:

> "[W]hen faced with both a Free Exercise claim and a RLUIPA claim, a court must, as a threshold matter, inquire as to whether the prison has placed a 'substantial burden' on the prisoner's ability to practice his religion." Gladson v. Iowa Dep't of Corr., 551 F.3d 825, 833 (8th Cir. 2009) (citing Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 813 (8th Cir. 2008). "If the prisoner fails to put forth evidence that his ability to practice his religion has been substantially burdened, then the court need not apply the *Turner* test to the [Free] Exercise claim and the strict scrutiny test to the RLUIPA claim." Id.
>
> As stated previously, a restriction or regulation will only rise to the level of "substantial burden 'if it forced an individual to choose between following the precepts of [his] religion and forfeiting benefits or when the action in question placed substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Hays*, 424 F. App'x at 554-55 (quoting Barhite, 377 F. App'x at 511). Stated another way, "[a] governmental practice, decision or regulation imposes a 'substantial burden' on the exercise of

> religion 'if it truly pressures the adherent to significantly modify his religious behavior and significantly modify his religious beliefs.'" Horacek v. Wilson, No. 07-13822, 2009 WL 861248, at *3 (E.D. Mich. Mar. 30, 2009) (quoting Adkins v. Kaspar, 393 F.3d 559, 569-70 (5th Cir. 2004)). "[A] substantial burden on religious exercise 'is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenant of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs.'" Civil Liberties for Urban Believers v. City of Chicago, 343 F.3d 752, 761 (7th Cir. 2003) (quoting Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996)).

As noted by Gladson, if a prisoner "fails to put forth evidence that his ability to practice his religion has been substantially burdened, then the court need not apply the *Turner* test to the Free Exercise claim and the strict scrutiny test to the RLUIPA claim." To do otherwise, to require the DOC to always use the least restrictive means even when the burden on an inmate's religious practice is *de minimus*, would unjustly overburden the DOC and create untenable complications in the operation of a correctional facility. For example, KSP has an inter-faith, non-denominational building where inmates of various religious traditions may congregate in order to conduct religious services in accordance with their beliefs; this building is officially named the "Institutional Religious Center" but is colloquially known around KSP as "the Chapel." In order to use the Chapel for religious services, inmates must schedule a time the building is open with KSP staff. As is often the case when scheduling one space amongst multiple groups, sometimes one religious group wants to use the Chapel when another group already has it reserved, as it is a first-come, first-served system. Normally, when such a scheduling conflict occurs, the KSP staff simply accommodate the later group by allowing that group to use the Chapel at a later time when the building is not in use, a practice in accordance with common sense and a practice that does not violate the Constitution or RLUIPA.

However, under the Plaintiff-Appellant's proposed substantial burden test, the KSP staff's simple scheduling decision would be subject to the strict scrutiny test imposed by RLUIPA. With the Plaintiff-Appellant's overbroad expansion of a "substantial burden," in our common scheduling conflict, the DOC would have to satisfy a costly and time-consuming strict scrutiny analysis that asking the second group of inmates to hold their services at a later time, when the building is available, is the least restrictive means to accommodate both groups' religious needs and that the DOC has a compelling state interest in allowing the Chapel to be scheduled for use by one religious group at a time. Such a result is overly burdensome and untenable, especially given the structure and restriction implicit in prison life.

Moreover, the Defendant-Appellees would note that if the Court is not permitted to "inquire into the religious necessity or importance of a particular act," merely asking one religious group to schedule their services at a later time would likely violate the Plaintiff-Appellant's expansive RLUIPA analysis and, if this honorable Court were to adopt the Plaintiff-Appellant's argument about the imposition of nominal damages against individual state actors, could subject the scheduling clerk to monetary damages she would have to pay out of her own pocket. (Appellant's brief, Document # 006111854116, pg. 57). This is because the mere act of informing inmates that the Chapel is in use and asking them to reschedule could arguably pressure adherents to change their behavior via a state act that did not prohibit a particular act but merely coerced it, through incidental burdens. Id.

Similarly, while the Plaintiff-Appellants claim that it was error for the District Court to rely upon the Federal Bureau of Prisons' *Inmate Religious Beliefs and Practices* manual to determine what benefits and privileges are afforded inmates due to their religious beliefs and whether the

deprivation of those privileges would be a substantial burden on an inmate's religious practice, the Defendant-Appellees would simply note that, absent a reference to such a guide, the system of religion expression in a prison would quickly become unworkable. While inmates are not bound to practice the orthodox version of their faith, to adopt the Plaintiff-Appellant's expansive reading of RLUIPA's requirements would require every prison and every correctional employee to satisfy a strict scrutiny RLUIPA analysis for every inmate demand claimed to be related to their professed faith. For example, an inmate would be entitled to a strict scrutiny RLUIPA analysis for claims that, contrary to the *Inmate Religious Beliefs and Practices* manual or any traditional understanding of the core religious tenants, his sincerely-held version of the Native American faith demands a Jacuzzi in his cell, Papa John's pizza delivered to him semi-weekly at his own expense, and daily conjugal visits with his wife "to be fruitful." It is unworkable, unjust, and illogical to subject the DOC to a strict scrutiny RLUIPA analysis to address whether an individual inmate's Native American faith requires him to eat Papa John's twice a week. In such a case, the Court clearly has more responsibility than the "narrow function" to determine whether that inmate holds an "an honest conviction" about his religious entitlement to particular type of pizza. Thomas v. Review Bd. Of ind. Empl. Sec. Div., 450 U.S. 707, 716 (1981). In order for RLUIPA to be anything more than a vehicle inmates use to gain previously unavailable benefits in the name of religion, the Court and the DOC must be able to define the rough outlines of reasonable religious expression and to determine whether the denial of a particular act or benefit is a substantial burden on that inmate's genuine religious beliefs.

Further, pursuant to Plaintiff-Appellant's nominal damages argument, it is patently unjust that any member of DOC staff who denies that inmate's religious request for Papa John's pizza

would be potentially subject to damages in her individual capacity for violating the inmate's sincerely held religious beliefs. Such a system is clearly unworkable and is an unreasonable perversion of the religious protections embodied in RLUIPA. As a practical matter, a prison simply cannot function if prison officials can be held hostage by every inmate's outlandish religious requests. Accordingly, while it is settled that inmates are not bound by the strict orthodox version of their professed faiths, prison officials and reviewing courts should be entitled to rely on guides such as the *Inmate Religious Beliefs and Practices* manual to confidently analyze requests for benefits in a correctional setting, especially, as is the case here, in maximum-security facilities housing death row inmates.

Thus, the Defendant-Appellees respectfully submit that the District Court correctly determined that the non-provision of certain foods was not a substantial burden on the death row inmate's religious practices and, accordingly, was not subject to the strict scrutiny test set out in RLUIPA.

## CONCLUSION

For the reasons set out above, the Defendant-Appellees respectfully request that this honorable Court affirm the judgment below.

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 38 pages and 9,674 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: December 19, 2013

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 19, 2013, I caused true and correct copies of the foregoing brief of Defendants-Appellees to be served on the following via the Electronic Case Filing (ECF) service:

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**DESIGNATION OF APPENDIX CONTENTS**

Pursuant to Sixth Circuit Rule 28(d) Appellee hereby designates the following additional filings in the District Court's records as items to be included in the Joint Appendix.

| DESCRIPTION OF ENTRY | DOCKET ENTRY | PAGE ID# RANGE |
|---|---|---|
| Answer | Dkt. No. 14 | Page ID# 346 |
| Order | Dkt No. 52 | Page ID# 769 |
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