No. 10-30982

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HENRY LEONARD
Plaintiff-Appellee,
v.
STATE OF LOUISIANA, *et al*.,
Defendants-Appellants.

On appeal from the United States District Court for the
Western District of Louisiana, Shreveport Division
No. 5:07-CV-00813, Hon. Donald E. Walter

Brief *Amicus Curiae* of The Becket Fund for Religious Liberty in Support of Appellee

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CERTIFICATE OF INTERESTED PERSONS

In the appeal *Henry Leonard* v. *State of Louisiana*, *et al*. (No. 10-30982), the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 and the second sentence of Rule 29.2 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Appellee in accordance with Fed. R. App. P. 29. The Becket Fund is a non-profit, non-partisan law firm that advocates for the free public expression of all religious traditions, both in the United States and around the world. The Becket Fund has represented Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, as well as government entities.

In particular, *amicus* has litigated, either as lead counsel or as *amicus curiae*, numerous cases defending the religious exercise rights of prisoners under the Religious Land Use and Institutionalized Persons Act (RLUIPA). For example, the Becket Fund filed an amicus brief in *Sossamon* v. *Texas*, a Fifth Circuit case currently pending before the Supreme Court (No. 08-1438), and represented the prisoners in *Benning* v. *Georgia*, 391 F.3d 1299 (11th Cir 2004), and *Smith* v. *Allen*, 502 F.3d 1255 (11th Cir. 2007)—two of the Eleventh Circuit cases underlying the circuit split at issue in *Sossamon*. And it currently represents the Jewish prisoner plaintiff seeking kosher dietary accommodations in *Moussazadeh* v. *TDCJ*, 364 F. App'x 110 (5th Cir. 2010), currently pending in the Southern District of Texas (No. 3:07-cv-00574). The Becket Fund also frequently represents other plaintiffs in free exercise cases within the Fifth Circuit and around the country. *See*, *e.g.*,

Merced v. *Kasson*, 577 F.3d 578, 591 (5th Cir. 2009) (Texas Religious Freedom Restoration Act); *Elijah Group* v. *City of Leon Valley*, No. 10-50035 (5th Cir., argued Dec. 8, 2010) (RLUIPA land use provisions).

The Becket Fund submits this brief because it is concerned that the arguments advanced by the State of Louisiana in this appeal, if credited, would greatly reduce protections for the religious liberties of prisoners, houses of worship, and other litigants within the Fifth Circuit.

Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief *amicus curiae*.

INTRODUCTION

Amicus is sympathetic to the Louisiana Department of Correction's ("DOC") attempts to stamp out racism and anti-Semitism. *See* State Br. 1–5. But hard cases should not be allowed to make bad law. The Court should not allow the ugliness of a particular system of belief to sway it into eroding the robust protections of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") for all. Congress passed RLUIPA to protect the religious exercise of prisoners and houses of worship "to the maximum extent permitted by the terms of [the] Act and the Constitution." 42 U.S.C. § 2000cc-3(g). The arguments in the DOC's brief would undermine the text and purpose of RLUIPA in two important ways.

First, the DOC argues that RLUIPA protects only the right to practice one's religion *generally*, not the right to engage in specific religious activities. State Br. 46–48. This argument is flatly contrary to RLUIPA's text, which defines "religious exercise" as "*any exercise of religion*, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (emphasis added). It is also contrary to this Court's precedent, which has repeatedly affirmed that "[t]he relevant inquiry is *not* whether governmental regulations substantially burden a person's religious free exercise *broadly defined*, but whether the regulations substantially burden *a specific religious practice*." *Merced* v. *Kasson*, 577 F.3d 578, 591 (5th Cir. 2009) (emphasis added).

Second, the DOC suggests that it can satisfy strict scrutiny simply by asserting a generalized interest in prison security—despite the fact that there is no evidence that *The Final Call* has ever caused security problems, and despite the fact that no other prison system in the country bans it. RLUIPA, however, requires more. It requires courts to "look[] beyond broadly formulated interests" and instead "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432 (2006) (applying RFRA). In other words, the DOC must show that *The Final Call* poses a concrete threat to prison security, and that preventing Leonard from reading it is the only way to avert that threat. The DOC has done neither.

Although the racist, anti-Semitic, rhetoric at issue here is utterly repugnant, this egregious language should not be used as an occasion to limit the protections that RLUIPA guarantees to all prisoners and houses of worship. *Amicus* therefore urges the Court to affirm the decision of the District Court.

ARGUMENT

I. RLUIPA protects specific religious practices, not just the practice of a religion as a whole.

The DOC claims that the District Court "mischaracterized Leonard's 'religious exercise'": according to the DOC, the relevant religious exercise is not the specific practice of "reading of *The Final Call*," but "the exercise of NOI" generally. State Br. 46. Elsewhere, the DOC characterizes the relevant religious exercise generally as "acquiring knowledge of [NOI] through study of its tenets." *Id.* at 47. Either way, the effect is the same: the DOC claims that Leonard has suffered no substantial burden because reading *The Final Call* is only one among many "various acts that constitute the 'exercise' of NOI." *Id.* at 47, 48–53.

This argument fails for two reasons. First, it is flatly contradicted by RLUIPA's text and this Court's precedent, both of which confirm that RLUIPA protects particular religious acts, not just the ability to practice a religion as a whole. Second, it would entangle this Court in the constitutionally forbidden task of assessing the centrality of plaintiffs' religious beliefs.

The proper analysis under RLUIPA is straightforward. Leonard claims a religious need to read *The Final Call*, and the DOC has precluded this activity entirely. That outright ban is—under RLUIPA's text and Fifth Circuit precedent—by definition a substantial burden on Leonard's religious exercise.

A. RLUIPA defines "religious exercise" to include particular religious practices.

RLUIPA requires strict scrutiny when the government imposes a "substantial burden" on an inmate's "*religious exercise*." 42 U.S.C. § 2000cc-1(a) (emphasis added). "[R]eligious exercise" is defined as "*any exercise* of religion, *whether or not compelled by, or central to*, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (emphasis added). Not surprisingly, the DOC makes no attempt to ground its argument in this statutory text. State Br. 46.

Nor can it. The term "any" denotes that there is *more than one kind* of "religious exercise." *See* Webster's 3d New International Dictionary 97 (defining "any" to mean "one indifferently out of *more than two*: one or some indiscriminately of whatever *kind*") (emphasis added). In particular, the text contrasts a religious exercise that is "compelled by, or central to, a system of religious belief" with one that is not. 42 U.S.C. § 2000cc-5(7)(A). Both are covered by the statute; but the very fact that the statute distinguishes between them indicates that "religious exercise" is referring to specific religious acts, not religion as a whole.

The same is true of the term "exercise." Particularly when used in the context of religion, "exercise" means "*an act* of religious practice esp. in worship"—not the practice of a religion as a whole. Webster's 3d New International Dictionary 795 (emphasis added). Similarly, the statute distinguishes "religious exercise" from "a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). If Congress had intended to protect only religion as a whole, it easily could have done so by limiting protection to "a system of religious belief." Instead, it chose to protect not just a "system of religious belief," and not just acts that are "compelled by, or central to" a system of religious belief, but "any exercise of religion" (*id.*)—that is, any "act of religious practice." Webster's 3d New International Dictionary 795.

Not surprisingly, every court to consider the issue has held that "religious exercise" refers not to the totality of a person's religious life, but to specific religious acts. The most notable example is this Court's decision in *Merced* v. *Kasson*, 577 F.3d 578 (5th Cir. 2009).[1] There, a local ordinance prohibited a Santeria priest

[1] Although *Merced* involved the Texas Religious Freedom Restoration Act (TRFRA), not RLUIPA, this Court has relied on TRFRA cases to interpret RLUIPA and vice versa. *Merced*, 577 F.3d at 589 ("[o]ur decisions interpreting RFRA and RLUIPA . . . provide guidance"); *A.A.* ex rel. *Betenbaugh* v. *Needville Indep. Sch. Dist.*, 611 F.3d 248, 259 (5th Cir. 2010) (quoting *Barr* v. *City of Sinton*, 295 S.W.3d 287, 296 (Tex. 2009)) ("[b]ecause TRFRA and its federal cousins—RFRA and RLUIPA—'were all enacted in response to *Smith* and were animated in their common history, language and purpose by the same spirit of religious freedom,' Texas courts 'consider decisions applying the federal statutes germane in applying the Texas statute'").

from killing four-legged animals in his home. *Id*. at 591. According to the priest, the ordinance imposed a substantial burden on the *specific practice* of killing four-legged animals to initiate new priests. *Id*. at 590–91. The city, however, argued that there was no substantial burden because the priest could still practice Santeria *generally*, including by conducting other types of animal sacrifice. *Id* at 591.

This Court rejected the city's argument, reasoning that "Merced's ability to perform some ceremonies does not mean the city's ordinances do not burden *other Santeria practices*." *Id*. (emphasis added). Specifically, the Court held that "[t]he relevant inquiry is *not* whether governmental regulations substantially burden a person's religious free exercise *broadly defined*, but whether the regulations substantially burden a *specific religious practice*." *Id.* (emphasis added).

Similarly, in *A.A.* ex rel. *Betenbaugh* v. *Needville Indep. School Dist.*, 611 F.3d 248, 265 (5th Cir. 2010) (another TRFRA case), this Court held that a public school's ban on visibly wearing long hair substantially burdened a Native American student's religious exercise. As in *Merced*, this Court focused not on the student's practice of Native American religious beliefs generally, but on the specific practice of wearing long hair: "While the District's policy and exemptions do not completely bar [the student's] free exercise, the bar is complete in the sense that he cannot wear his hair visibly long at all during the school day." *Id.*

This Court has also reached the same conclusion in the prison context, finding a substantial burden where a Native American prisoner was allowed to practice some aspects of his faith, but was not allowed to have long hair. *Diaz* v. *Collins*, 114 F.3d 69, 72–73 (5th Cir. 1997); *accord Longoria* v. *Dretke*, 507 F.3d 898, 903 (5th Cir. 2007) (prohibition on long hair was a substantial burden under RLUIPA); *Adkins* v. *Kaspar*, 393 F.3d 559, 567–68 (5th Cir. 2004) (holding that Sabbath and holy day activities "easily qualify as 'religious exercise' under . . . RLUIPA's generous definition").

Other Courts of Appeal confirm this distinction. For example, in *Spratt* v. *Rhode Island Department of Corrections*, 482 F.3d 33, 38 (1st Cir. 2007), the First Circuit considered whether a ban on inmate preaching constituted a substantial burden. The DOC argued that the inmate's "exercise of . . . religion in general is not being substantially burdened," because he "may still attend and participate in religious services[,] . . . [and] may pray, sing, or recite during such services just as every other inmate may." *Id.* But the First Circuit rejected this argument, concluding that "preaching is a form of religious exercise" that had been substantially burdened. *Id.*[2]

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[2] *See also*:

- *Greene* v. *Solano Cnty. Jail*, 513 F.3d 982, 987 (9th Cir. 2008) (rejecting the government's argument that "'religious exercise' is . . . the general practice of one's religion, rather than any particular practice within one's religion");

Supreme Court precedent is no different. As the Court noted in *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005), "[T]he 'exercise of religion' often involves not only belief and profession but the *performance of . . . physical acts* [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine." (emphasis added) (quoting *Emp't Div.* v. *Smith*, 494 U.S. 872, 877 (1990)). The focus on specific "physical acts" is borne out in the two leading cases on the substantial burden standard: *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Thomas* v. *Review Board*, 450 U.S. 707 (1981). The plaintiff in *Sherbert* was free to worship, fast, and participate in many other Seventh-day Adventist practices; government policies merely made it difficult for her to abstain from work on Saturdays. *Sherbert,* 374 U.S. at 403–04. The Court concluded that the burden on Sabbath-keeping was substantial even though the plaintiff could practice her faith in many other ways. *Id.*

Likewise, the plaintiff in *Thomas* was not prohibited from worshipping with other Jehovah's Witnesses, preaching about his faith, or refraining from violence. 450 U.S. 707. Government policy simply made it difficult for him to follow his

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- *Cutter* v. *Wilkinson*, 349 F.3d 257 (6th Cir. 2003), *rev'd on other grounds*, 544 U.S. 709 (2005) ("[A] specific act or practice qualifies as "religious exercise" under RLUIPA");
- *Meyer* v. *Teslik*, 411 F. Supp.2d 983, 989 (W.D. Wis. 2006) ("RLUIPA protects more than the right to practice one's faith; it protects the right to engage in specific, meaningful acts of religious expression in the absence of a compelling reason to limit the expression").

sincerely held religious belief that he should not help manufacture weapons. *Id.* at 717–18. Even though he could practice his faith—even his pacifism—in other ways, the Court concluded that the burden on his specific religious exercise was substantial. *Sherbert* and *Thomas* thus confirm that the focus of the substantial burden inquiry is on specific religious practices, not religion as a whole.

Here, the relevant "religious exercise" is not, as the DOC would have it, "the exercise of NOI" generally, or "acquiring knowledge of [NOI] through study of its tenets." State Br. 46–47. It is, as the District Court said, the specific practice of receiving and reading *The Final Call*. District Court Op., Rec. Doc. 64 ("Op.") at 20. The DOC does not seriously dispute that reading *The Final Call* is a religious exercise; indeed, it concedes that "NOI is a religion," that "Leonard is sincere about his beliefs," and that "*The Final Call* facilitates the exercise of NOI." State Br. 47–48.

Similarly, Leonard further testified that he needs *The Final Call* "in order to grow into Islam" and "to learn more about not only Islam at large but also the Nation of Islam and their tenets and practices." Rec. Doc. 47-6, p.4 at 13–16; p.7 at 1–9. Despite its inclusion of numerous noxious statements on race, *The Final Call* is theologically important for Leonard and other NOI adherents; the District Court held that denying Leonard access to *The Final Call* is akin to "restricting a Christian's religious readings to the Old Testament, or withholding a copy of *The Book*

of Mormon from a member of the Church of Jesus Christ of Latter Day of Saints." Op. at 16. This is more than enough to establish that receiving and reading *The Final Call* "easily qualify as 'religious exercise' under . . . RLUIPA's generous definition." *Adkins*, 393 F.3d at 567–68.

Nor is there any question that this religious exercise is substantially burdened by the DOC's complete ban of *The Final Call*—as opposed to providing a redacted version, or limiting the times and places that Leonard can possess it. As this Court explained in *Merced*: "[A]t a minimum, the government's *ban* of conduct sincerely motivated by religious belief substantially burdens an adherent's free exercise of that religion." 577 F.3d at 590; *Betenbaugh*, 611 F.3d at 264. Indeed, the DOC's ban on *The Final Call* doesn't just "influence[] [Leonard] to act in a way that violates his religious beliefs" or "pressure [Leonard] to significantly modify his religious behavior"; it prevents him from engaging in that behavior entirely. *Mayfield* v. *TDCJ*, 529 F.3d at 613.

The substantial burden inquiry is, as such, an objective one and does not involve the type of subjective analysis erroneously undertaken by Leonard in his brief. *See* Leonard Br. at 17–25. Leonard provides numerous details about the importance of *The Final Call* to NOI belief and its independent theological significance, stating for example that without the publication he would be "completely cut off from every material relating to his faith" and that *The Final Call* provides spiri-

tual fulfillment in ways that orthodox Islamic services cannot. *Id*. at 22–23. These sorts of details, while informative, are irrelevant to the substantial burden inquiry. The determination of whether a burden is substantial does not rely on Leonard's *subjective* feelings after imposition of the burden. Instead the Court must ask whether the burden imposed by the government—a fine, a penalty, or in this case an absolute prohibition—is *objectively* substantial. *See*, *e.g.*, *Sherbert*, 374 U.S. at 404 (burden was "forc[ing] [plaintiff] to choose between following the precepts of her religion and forfeiting benefits . . . . Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.") *Cf. Watchtower Bible & Tract Soc'y of N.Y., Inc.* v. *Vill. of Stratton*, 536 U.S. 150, 167 (2002) (prior restraint "*imposes an objective burden* on some speech of citizens holding religious or patriotic views") (emphasis added). In this objective assessment, an absolute prohibition constitutes a substantial burden on *any* activity, religious or not. By completely banning *The Final Call* from its prisons, the DOC has *by definition* substantially burdened Leonard's specific religious exercise of reading *The Final Call*.

B. Limiting RLUIPA to burdens on the practice of religion as a whole would require courts to make forbidden assessments of the centrality of plaintiffs' religious beliefs.

The DOC's argument is problematic not only because it contradicts RLUIPA's text, but also because it would entangle courts in the question of whether particular

religious practices are "central" to a plaintiff's faith. The DOC would have the Court go beyond simply determining whether reading *The Final Call* is a religious exercise that has been substantially burdened; instead, it proposes that the Court weigh "Leonard's broader ability to engage in NOI practices" against "the function played by *The Final Call* in NOI practice." State Br. at 52, 50. In other words, its analysis requires the Court to determine whether *The Final Call* plays a central "role . . . in NOI practice." *Id.* at 50.

This is precisely the sort of inquiry that RLUIPA is designed to prevent, and it is precisely the sort of inquiry the Supreme Court has foreclosed. As noted above, RLUIPA defines "religious exercise" as "any exercise of religion, *whether or not compelled by, or central to*, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (emphasis added). Congress took this language from Supreme Court precedent, which squarely rejects inquiries into centrality. As the Supreme Court explained in *Smith*: "It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying a 'compelling interest' test in the free speech field." *Smith*, 494 U.S. at 886–87. This is because such questions are "not within the judicial ken." *Hernandez* v. *Comm'r*, 490 U.S. 680, 699 (1989). As this Court put it: "The judi-

ciary is ill-suited to opine on theological matters, and should avoid doing so." *Merced*, 577 F.3d at 590.[3]

Although the DOC acknowledges this ban on centrality inquiries, State Br. 49, its brief is replete with centrality arguments:

- The brief criticizes or contradicts Leonard's and the expert witness's testimony about NOI belief. *Id*. at 50.

- It argues that Leonard should content himself with attending prayer services led by an imam of a more traditional Muslim sect (suggesting that prayer services are more important than reading *The Final Call*), even though there are "profound and distinct differences between the two." *Id*. at 40–41; Op. at 16.

- Indeed, the brief even argues that this Court must determine "the function played by *The Final Call* in NOI practice," arguing that its function "was, at most, to reiterate NOI's theological base in 'The Muslim Program,' and as a conduit for other NOI materials." State Br. 50.

In short, the DOC's brief would draw this Court into a theological debate over the religious significance of reading *The Final Call*.

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[3] *See also Lyng* v. *Nw. Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 457–58 (1988) ("[T]he dissent thus offers us the prospect of this Court's holding that some sincerely held religious beliefs and practices are not 'central' to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit . . . the dissent's approach would require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it *would cast the Judiciary in a role that we were never intended to play*.") (emphasis added); *Adkins* v. *Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) (noting the "Supreme Court's express disapproval of any test that would require a court to divine the centrality of a religious belief").

But neither the Court nor the DOC ought to tell Leonard whether *The Final Call* should play an important "function" in his religion. It is enough that *The Final Call* is undisputedly a religious publication; that Leonard undisputedly reads it as part of his religious exercise; and that Leonard's belief is undisputedly sincere. The only legitimate inquiry is whether a ban on that particular religious exercise is a substantial burden. As explained above, it is.

II. The DOC has failed to satisfy strict scrutiny.

Because the DOC has imposed a substantial burden on Leonard's religious exercise, it must satisfy strict scrutiny. Although courts apply RLUIPA with some deference to the professional judgment of prison administrators, strict scrutiny remains the "'most demanding test known to constitutional law.'" *Betenbaugh*, 611 F.3d at 267 (citation omitted). As the Supreme Court has cautioned, in the free exercise context, "[t]he compelling interest standard . . . is not watered down but really means what it says." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546 (1993) (internal quotations and alterations omitted).

Although the DOC cites a generalized interest in "security and order," it must do more under RLUIPA: It must prove that denying *The Final Call* to Leonard is the least restrictive means of furthering a compelling governmental interest ***in this particular case***. *See* 42 U.S.C. § 2000cc-1(a)(1) (emphasis added). Here, the DOC cannot demonstrate a compelling interest in banning *The Final Call*, because it has

permitted it to be distributed in its prisons for many years without any evidence of security problems. Moreover, the DOC cannot distinguish its interests from those of all other prison systems that, it admits, do not ban this publication. Finally, RLUIPA demands more than the DOC's efforts to dismiss two readily available alternatives to banning *The Final Call* entirely.

A. The DOC has failed to prove that its regulation actually "furthers" a compelling interest as applied "to the person" before the court.

Strict scrutiny requires the government to do more than merely invoke interests that are compelling in the abstract; it must show an interest of the highest order is endangered ***in this particular case***. *O Centro*, 546 U.S. at 430–32 (applying RFRA). The DOC's failure to do anything more than recite an abstract interest in "security and order" is insufficient as a matter of law. State Br. 54.

The DOC argues that RLUIPA's "compelling interest" test must be "balanced by a legislative expectation that 'courts entertaining complaints under [RLUIPA] would accord due deference to the experience and expertise of prison and jail administrators." State Br. 53–54 (quoting *Cutter*, 544 U.S. at 723). Therefore, it reasons, it is enough that courts have found that governments have an interest in "not facilitating inflammatory racist activity," *id*. at 54 (quoting *Cutter*, 723 n.11), and that publications that "would exacerbate tensions and lead indirectly to disorder" "*can* present a security threat." *Id*. (quoting *Thornburgh*, 490 U.S. at 416).

But the instruction that courts must "accord substantial deference to the professional judgment of prison administrators," *Cutter*, 544 U.S. at 723 does not relieve the government of the burden of explaining why, based on its "experience and expertise," *id*., a particular religious exercise poses a security risk. Like RFRA, which requires the government to demonstrate a compelling interest as applied "***to the person***," 42 U.S.C. § 2000bb-1(a) (emphasis added), RLUIPA requires such a demonstration "***on that person,***" 42 U.S.C. § 2000cc-1(a) (emphasis added). As this Court has explained, "[t]he government cannot rely upon general statements of its interests, but must tailor them to the specific issue at hand." *Merced,* 577 F.3d at 592. *See also Kikumura* v. *Hurley*, 242 F.3d 950, 962 (10th Cir. 2001) ("[A] court does not consider the [policy] in its general application, but rather considers whether there is a compelling government reason, advanced in the least restrictive means, to apply the [policy] to the individual claimant").

As the Supreme Court demonstrated in *O Centro*, not even paramount government interests relieve the government of the obligation of applying its general interest to the case at hand. The Supreme Court did not question the federal government's interest in preventing illegal drug use, but found that Congress, in adopting the strict scrutiny test, "contemplate[d] an inquiry more focused than the Government's categorical approach." *O Centro*, 546 U.S. at 430. Strict scrutiny required the government to demonstrate how the burden on religious exercise actually fur-

thered the interest as applied "to the person"; a "Government's mere invocation" of broadly defined interests could not "carry the day." *Id.* at 432.

Similarly, this Court held in *Merced* held that Euless did not have a compelling interest in public health and animal treatment ***as applied to the plaintiff***, where plaintiff had conducted animal sacrifices in the city for "sixteen years without creating health hazards or unduly harming any animals." 577 F.3d at 593–94; *Betenbaugh*, 611 F.3d at 269 (school failed to state compelling interest in preventing hygiene, safety, and school disruption issues where male student's long hair had never led to such problems). Likewise, in *Spratt*, the First Circuit upheld a prisoner's right to preach to other inmates. 482 F.3d at 42. Although the state claimed a compelling interest in maintaining prison security, the court noted that the government had failed to present evidence of similar security concerns at other prisons. *Id*. at 39. It also noted that the plaintiff had been preaching in prison for seven years without presenting any threat to prison security. *Id*. at 40. This "track record" cast "doubt on the strength of the link between his activities and institutional security." *Id*. *See also Warsoldier* v. *Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005) (faulting Cal. Dep't of Corr. for "offer[ing] no explanation why these prison systems are able to meet their indistinguishable interests without infringing on their inmates' right to freely exercise their religious beliefs").

In the present case, the DOC did not prove its strict scrutiny defense on summary judgment. The DOC had to show that permitting Leonard to receive *The Final Call* posed a concrete threat to prison safety. It cannot do so where, as the District Court found here, "the same material had been consistently allowed into the prison" for many years without incident."Op. at 20; Leonard Br. at 21–22, 30. *Cf. Merced*, 577 F.3d at 593–94; *Betenbaugh*, 611 F.3d at 269; *Spratt*, 482 F.3d at 40.

The DOC also failed to show that the publication, while including numerous racially inflammatory statements, incites the reader to imminent violence, or that such a risk exists for Leonard specifically. Indeed, given the fact that Leonard is not only housed in a separate building from the general prison population, but also housed in a single man cell within that separate building, such a risk is unlikely. Rec. Doc. 47-2 ¶¶ 3–4.

As in *O Centro* and *Merced*, the DOC in this case has failed to show that its policy furthers its general interests as applied "to the person." Since this requirement is absolute, the DOC's failure is fatal.

B. The DOC has failed to distinguish its interest from those of other states, none of which ban *The Final Call*.

Even if the DOC had attempted to apply its alleged interest to Leonard, it cannot satisfy strict scrutiny when, as the DOC does not dispute, "[n]o jurisdiction outside the State of Louisiana has banned *The Final Call*." Rec. Doc. 47-2 ¶ 29. As Leonard points out, Leonard Br. at 27–28, numerous courts have recognized that a

prison system cannot meet its burden if it fails "to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means." *Jova* v. *Smith*, 582 F.3d 410, 416 (2d Cir. 2009) (citation omitted). Because the DOC has conceded this fact, and has not distinguished its security interests from these other prison systems, its policy cannot survive strict scrutiny.

C. The DOC has failed to demonstrate that it considered and properly rejected less restrictive alternatives.

Finally, even assuming *arguendo* that the State's total ban on *The Final Call* actually furthers a compelling governmental interest, the DOC has failed to show that a total ban on *The Final Call* is the least restrictive means of furthering that interest. Therefore, the District Court correctly found that RLUIPA protects Leonard's right to receive *The Final Call* with "The Muslim Program," subject to the normal screening under its regulation. Op. at 20–21.

Under RLUIPA, a governmental restriction "cannot survive strict scrutiny" if "a less restrictive alternative is available." *World Wide St. Preachers Fellowship* v. *Columbia*, 245 Fed. App'x 336, 343 (5th Cir. 2007) (unpub.) (citing *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000)). In other words, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Merced*, 577 F.3d at 594–95 (quoting *Playboy*, 529 U.S. at

813); *see also Spratt*, 482 F.3d at 42 (defendant prison "must 'demonstrate, and not just assert, that the rule at issue is the least restrictive means of achieving a compelling government interest'") (citation omitted); *Shakur* v. *Schriro*, 514 F.3d 878, 890 (9th Cir. 2008) (to survive strict scrutiny, prison must "demonstrate[] that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice") (quoting *Warsoldier*, 418 F.3d at 999).

The DOC's brief acknowledges two primary alternatives to its outright ban on *The Final Call*: redacting the periodical of statements that it believes pose a security concern, or requiring that Leonard only view the periodical under controlled circumstances. The DOC's cursory treatment fails to prove to prove that these less restrictive alternatives are unworkable.

Redact "The Muslim Program." First, the DOC could redact *The Final Call* by simply tearing off the newspaper's back cover, where "What Muslims Believe" appears each month. The DOC has never claimed that *The Final Call* is ***itself*** a threat to prison security; rather, its concern is focused almost exclusively on this static summary of NOI leader Elijah Muhammad's program. *See, e.g.,* State Br. at 9, 11.

Redacting religious publications is a common and easily administrable solution. For example, Florida allows prisoners to receive religious material after redacting material it deems contrary to its security, order, or rehabilitative objectives. *Law-*

son v. *Singletary*, 85 F.3d 502, 512 (11th Cir. 1996). The Eleventh Circuit held that that this regulation survived strict scrutiny, noting that "it is hard to imagine a means more specifically or more narrowly addressed to the problem posed by passages of text which the Department has determined may lead to violence or disruption, or which otherwise pose a threat to security." *Id*.

The DOC, however, claims that redacting *The Final Call* was "not a tenable solution." Rec. Doc. 45-2 at 22. Rather, *The Final Call* "should be rejected in its entirety, without redaction" because the DOC "does not have the manpower" that redaction would require. *Id*.

The DOC's claim that redaction would be too much work does not withstand scrutiny. First, redaction would require no more manpower than the review its regulations already require. The DOC has conceded that, were "The Muslim Program" not an issue, it would review each issue of *The Final Call page by page* for specific inflammatory material. State Br. at 12–14; Rec. Doc. 45-2 at 18. It makes no sense for the DOC to agree on the one hand to undertake a searching review, but claim on the other hand that it "does not have the manpower" to perform the far simpler task of removing each issue's back cover.

Second, the DOC has not presented a single instance in which a court has found redaction under these circumstances "unreasonable." the DOC's only attempt to do so—*Borzych* v. *Frank*, 439 F.3d 388, 391 (7th Cir. 2006)—is easily distinguisha-

ble. In *Borzych*, the Seventh Circuit found redaction unduly burdensome because the books at issue "range in length from 175 to more than 500 pages, and their promotion of violence is thoroughgoing." 439 F.3d at 391. In contrast, here redaction would merely involve tearing the back page off a newspaper. Other than "The Muslim Problem," the DOC's thorough review of *The Final Call's* website uncovered *only two articles* it identifies as problematic. Rec. Doc. 45-2 at 18–20.

Restrictions on Possession and Display. Second, the DOC could allow Leonard to read the entire issue of *The Final Call*, but only under certain conditions. For example, the DOC could require that Leonard keep *The Final Call* in his cell and not share it with others. Or, it could only allow him to possess it while supervised.

The DOC rejects these alternatives too, but cannot cite a single case that found such inflexibility survives strict scrutiny. All three cases cited by the DOC—*Thornburgh* v. *Abbott*, 490 U.S. 401, 418–19 (1989); *Chriceol* v. *Phillips*, 169 F.3d 313, 317 (5th Cir. 1999); and *Stefanow* v. *McFadden*, 103 F.3d 1466, 1474–75 (9th Cir. 1996)—merely held that this accommodation was not required under *Turner's* deferential standard. State Br. at 56. The DOC's argument is not just inadequate; it also highlights the vast difference between *Turner's* rational basis scrutiny and RLUIPA's strict scrutiny.

RLUIPA's strict scrutiny standard "poses a far greater challenge than does *Turner* to prison regulations that impinge on inmates' free exercise of religion."

Freeman v. *TDCJ*, 369 F.3d 854, 858 n.1 (5th Cir. 2004). Under *Turner*, prison regulations are given great deference, and are upheld whenever they are "reasonably related to legitimate penological interests." *Freeman*, 369 F.3d at 860 (quoting *Turner*, 482 U.S. at 89); *see also Thornburgh*, 490 U.S at 418 (prison regulations upheld whenever alternatives would impose more than a *de minimis* cost). In contrast, strict scrutiny is "the most rigorous of scrutiny," and can be satisfied only if the law burdening religious exercise "[is] narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546.

Because the DOC's feeble attempt at an alternative means argument ignores the substantial difference between *Turner's* deferential review and RLUIPA's strict scrutiny, its account cannot be credited without rendering "strict scrutiny" meaningless. If RLUIPA were reduced deferential rational-relationship scrutiny, it would provide no safe haven to prisoners or houses of worship. The Court should therefore uphold RLUIPA by denying the DOC's appeal.

III. The DOC's Free Exercise arguments need not be addressed.

The DOC spends much of its brief on various arguments under the Free Exercise Clause. State Br. 19–44. However, because Leonard is entitled to all of the relief he seeks under RLUIPA, this Court need not address the constitutional questions. *Borzych*, 439 F.3d at 390 (because prisoner's "best argument rests on RLUIPA," "unnecessary" for court to discuss constitutional claims); *Konikov* v.

Orange Cnty., Fla., 410 F.3d 1317, 1319 n.1 (11th Cir. 2005) (per curiam) (unnecessary to reach plaintiffs' free exercise and other constitutional claims). It is the "special charge" of federal judges "to avoid constitutional questions when the outcome of the case does not turn on how we answer." *United States* v. *Emerson*, 270 F.3d 203, 272 (5th Cir. 2001); *see also Spector Motor Serv., Inc.* v. *McLaughlin,* 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

Moreover, this Court should especially reject DOC's invitation to wade into the alleged circuit split over *Turner* and *Smith* for two reasons. First, DOC did not raise the argument below, so it is waived. Leonard Br. at 32–33; *Celanese Corp.* v. *Martin K. Eby Const. Co.*, 620 F.3d 529, 531 (5th Cir. 2010) ("The general rule of this court is that arguments not raised before the district court are waived and will not be considered on appeal."). More importantly, even assuming *Smith* were the correct standard (and it is not), DOC's literature regulation is not "neutral and generally applicable." Rather, it requires a searching, case-by-case inquiry into whether each piece of literature is "racially inflammatory" or threatens security. State Br. 12–13 (Publications in Category 2, such as *The Final Call*, "are to be reviewed on case-by-case basis"). This is a quintessential example of what *Smith* and *Lukumi* called "a system of 'individualized governmental assessment," which is not the

same as a neutral and generally applicable law. *Lukumi*, 508 U.S. 520, 537 (1993) (quoting *Smith*, 494 U.S. at 884); *see also Merced*, 577 F.3d at 587 (*Smith* exempted only "neutral laws of general applicability" from strict scrutiny); Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith*,* Sherbert*, Hogwarts, and Religious Liberty*, 83 Neb. L. Rev. 1178 (2005) (discussing the doctrine of individualized assessments). Thus, even assuming *Smith* displaced *Turner*, the *Smith* analysis is not applicable here.

CONCLUSION

Although NOI beliefs are undoubtedly repugnant, their repugnance should not serve to narrow RLUIPA's protections for all prisoners. The judgment of the District Court should be affirmed.

Respectfully submitted,

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April 11, 2011

CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6380 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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