No. 06-2038

United States Court of Appeals
For the First Circuit

WESLEY SPRATT
Plaintiff - Appellant

v.

RHODE ISLAND DEPARTMENT OF CORRECTIONS;
A.T. WALL, Director, Rhode Island Department of Corrections
Defendants - Appellees

Appeal From Judgment in a Civil Case
Entered in the United States District Court
for the District of Rhode Island

Brief of the Plaintiff - Appellant Wesley Spratt

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Plaintiff-Appellant Wesley Spratt believes that oral argument would be appropriate and beneficial. This case presents substantial issues concerning the proper application of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc, et seq. Spratt believes that the appeal presents matters of first impression in this Circuit and which have not been addressed elsewhere.

JURISDICTIONAL STATEMENT

The jurisdiction of the district court was based upon federal civil rights claims pursuant to 28 U.S.C. §§ 1331 and 1343. (Record Appendix "RA" 12). Plaintiff-Appellant Wesley Spratt ("Spratt"), initially proceeding pro se, filed a civil rights complaint against Defendant-Appellees Rhode Island Department of Corrections and its Director, A.T. Wall ("the Department"),[1] identifying violations of the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb ("RFRA"). Without objection, his complaint was deemed amended to have asserted his civil rights claims under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, et seq. ("RLUIPA") (text in Addendum "ADD" 11).

Judgment, which resolved all outstanding claims, was entered in favor of the Department on June 6, 2006 (ADD1), and Spratt filed his appeal on June 30, 2006. (RA9). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

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[1] The sole active defendant is Director A. T. Wall, in his official capacity.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Issue 1: A blanket ban on all inmate preaching regardless of supervision and without consideration of the individual religious claimant does not satisfy the requirements of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc, et seq.

Issue 2: The District Court erred in granting summary judgment to the Department of Corrections.

a. The district court acknowledged, but did not correctly apply, "strict scrutiny" analysis to assess the Department's position in support of summary judgment.

b. The record below contained substantial dispute of material fact precluding summary judgment in favor of the Department and it was error for the district court to disregard facts in controversy in granting summary judgment to the Department.

Issue 3: The Department failed to present competent evidence to meet its burden of proffer and proof under RLUIPA and the district court erred in denying summary judgment to the Plaintiff - Appellant Spratt.

a. The district court abused its discretion in giving any consideration to the affidavit of the Department's claimed expert witness.

b. Neither the affidavit of the Department's expert witness nor other admissible materials under Rule 56 provided an evidentiary basis for the trier of fact to find for the Department on its affirmative defenses.

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings

Wesley Spratt is an inmate incarcerated at the Maximum Security facility of the Adult Correctional Institutions of the State of Rhode Island ("ACI"). Spratt had been

preaching, under the direct supervision of an ordained minister and without incident, to an inmate congregation during weekly Christian services for seven years when the Department, in October 2003, abruptly barred him from continuing and confirmed that he would be disciplined if he persisted. (ADD7; RA14-20, 32-34). Spratt immediately sought reconsideration by the Department (RA37, 40), but his request was denied. (RA38, 43).

Spratt, proceeding pro se,[2] commenced this action against the Department on March 31, 2004. (RA11). In June 2004, Spratt filed a motion for summary judgment, supported by a declaration and exhibits. (RA26-45). In August 2004, the Department objected to Spratt's motion and filed a cross-motion for summary judgment. (RA46). The Department accepted as undisputed all of the factual submissions presented by Spratt.[3] (RA56-57).

The motions were referred to a Magistrate Judge. In January 2005, the Magistrate Judge recommended that the district court grant summary judgment to the Department on all claims except Spratt's claim under §3 of RLUIPA, 42 U.S.C.

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[2] Spratt, proceeding in forma pauperis, unsuccessfully moved for the appointment of counsel to represent him. (RA1-2).

[3] The Department informed the district court that, although it disagreed with some of Spratt's factual contentions (it did not identify which ones), it did not consider them material and therefore accepted Spratt's version of the facts as undisputed for purposes of resolving Spratt's motion for summary judgment. (RA56, 57).

§2000cc-1 (ADD12), protecting the religious exercise of institutionalized persons.[4] In addition, because the United States Supreme Court had agreed to resolve a facial challenge to the constitutionality of §2000cc-1 in Cutter v. Wilkinson, 543 U.S. 924 (2004)(granting certiorari), decided, 544 U.S. 709 (2005), the Magistrate Judge further recommended that Spratt's RLUIPA claim be stayed pending the outcome in Cutter. Spratt v. Wall, 2005 U.S. Dist. LEXIS 1783, *14-15 (D.R.I. 2005), adopted (D.R.I. 2005), appeal dis'd, No. 05-1583 (1st Cir. 2006).[5] (RA59).

In May 2005, the Supreme Court unanimously upheld the constitutionality of §2000cc-1 (relating to institutionalized persons), rejecting a facial challenge based on the Establishment Clause. Cutter v. Wilkinson, 544 U.S. 709 (2005) ("Cutter"). With Cutter decided, the Magistrate Judge directed the parties to submit "any further documentation and/or arguments" within ten days, and the court would then take the parties' summary judgment motions under advisement. (RA65). Spratt and the Department each responded with additional legal argument. (RA6).

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[4] After Spratt's complaint was deemed amended to assert an RLUIPA claim instead of a claim under RFRA, Spratt and the Department each filed a second summary judgment motion which restated and incorporated their earlier submissions. (RA4, referring to docket entries ["#"] 20, 23, 24).

[5] Spratt objected to the Magistrate Judge's report and recommendation after the district court adopted it. The court, after reconsideration, once again adopted the Magistrate Judge's report and recommendation by order of April 1, 2005. (RA5). Spratt appealed the order to this Court, Spratt v. Wall, No. 05-1583, which dismissed the appeal for lack of appellate jurisdiction. (RA8).

The Magistrate Judge then issued another order, directing the parties to address whether the Department is subject to RLUIPA, 42 U.S.C. § 2000cc-1(b)(1) (ADD12), as "a program or activity that receives Federal financial assistance." (RA 6 [#44]). In response, the Department acknowledged that it received such funding and is subject to RLUIPA.[6] (RA67-68).

After this submission, the Magistrate Judge issued another order, calling for an additional submission by the Department. The Magistrate Judge specifically alerted the Department – the party bearing the burden of proffer and proof on this issue[7] – to a critical gap in its motion and opposition papers and directed the Department to "detail, by way of affidavit or otherwise, how the restriction on the plaintiff's supervised preaching 'is the least restrictive means' of furthering the Department of Corrections' security interest."[8] (RA69, citation omitted).

The Department submitted the affidavit of Jake Gadsden, Jr., the Assistant

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[6] This concession was hardly surprising: in Cutter, the United States had represented that "[e]very state . . . accepts federal funding for its prisons." 544 U.S. at 716 n.4 (citation omitted).

[7] RLUIPA squarely places the burden of persuasion, §2000cc-2(b), upon the government to "demonstrate" that a burden triggering RLUIPA "is the least restrictive means of furthering [a] compelling governmental interest," §2000cc-1(a)(2), and makes clear that the government's burden to "demonstrate" means to "meet[] the burdens of going forward with the evidence and of persuasion." §2000cc-5(2). (ADD12, 15).

[8] That this was a potentially fatal omission by the Department became clear once the Magistrate Judge's report and recommendation was issued.

Director for Institutions and Operations for the Department, to justify the Department's ban on all forms of inmate preaching as the least restrictive means to further prison security. (ADD23). Among other things, Gadsden opined that any inmate who leads the congregation in religious services, even under supervision, becomes a leader sanctioned by the administration, or will be perceived as one, and this leadership status creates a threat to institutional security. (ADD23-24). In reaching his opinion, Gadsden provided no actual examples of such experience, either as to Spratt (who had been preaching for seven years at the ACI) or elsewhere.

Spratt filed a response (RA133) in which he factually disputed Gadsden's opinion that his preaching represented a security risk (RA134) and identified specific practices at the ACI governing non-religious inmate interactions which were at odds with the stated concern. (RA139; also RA18). Spratt also filed an affidavit controverting Gadsden's opinion.[9] Spratt stated that he had "preached the Word of God . . . for 7 years straight without any incidents of any kind," that he was subject to discipline as any other inmate, that he was not, and had never been, a gang member, and had never held any authority nor been perceived as a person of authority. "So any perceived authority that Jake Gadsen [sic] affidavit speaks of is exaggerated and speculation because the plaintiff has none." (RA72).

[9] Spratt's affidavit was submitted to the district court in support of his objection to the report and recommendation of the Magistrate Judge. (RA9, 72).

The Disposition Below

On November 21, 2005, two weeks after receiving the Gadsden affidavit, the Magistrate Judge issued his report and recommendation that summary judgment be granted to the Department and that Spratt's motion be denied. Spratt v. Wall, 2005 U.S. Dist. LEXIS 33266 (D.R.I. 2005)("R&R")(ADD4). Because the R&R was adopted by the district court, Spratt v. Wall, 2006 U.S. Dist. LEXIS 37254 (D.R.I. 2006) (ADD2), we review it in some detail here, and in further detail in argument below.

The Magistrate Judge recommended summary judgment be granted to the Department on the basis that the Department had established that a complete ban on inmate preaching, no matter how supervised, satisfied the requirements of RLUIPA. In reaching his R&R, the Magistrate Judge accepted, as undisputed, that Spratt had been preaching at Maximum Security of the ACI on a weekly basis for seven years under the supervision of an ACI chaplain, and that Spratt's supervised preaching had not caused any incident or disciplinary issue. R&R at *3-4 (ADD7).

After reviewing the statutory and legal precedents, the Magistrate Judge concluded that Spratt had met his burdens under RLUIPA. Spratt had established that his "preaching easily qualifies as a religious exercise within the meaning of RLUIPA." R&R at *8 (ADD8). Further, Spratt had demonstrated that the ban on preaching "substantially burdened" his religious exercise within the meaning of

RLUIPA.[10] R&R at *12-13 (ADD9).

Because Spratt had met his burdens of proof, the Magistrate Judge then considered whether or not the Department had met its burden of proof to demonstrate that the ban furthered a compelling interest by the least restrictive means. The Magistrate Judge looked no further than the Gadsden affidavit and declared that "it is undisputed that there are no means to accommodate the plaintiff's preaching while, at the same time, maintaining institutional security." R&R at *15-16 (ADD10). In reaching this conclusion, the Magistrate Judge candidly acknowledged that he was deferring to Gadsden's judgment.[11] R&R at *16 (ADD10).

Spratt objected to the Magistrate Judge's R&R. (RA7). In support of his objection, Spratt, now represented by counsel,[12] filed a further memorandum of law, Spratt's affidavit, discussed above, and a copy of the relevant policy of the Federal

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[10] The Department had disputed Spratt's claim that its ban substantially burdened his religious exercise before the Magistrate Judge but, significantly, did not file an objection to the R&R or present this argument to the district court. (RA 8[#64], 110-111).

[11] The Magistrate Judge did not discuss Gadsden's credentials, expertise, or explore whether he had provided factual foundation to reach the stated conclusion. Nor did the Magistrate Judge discuss any of the other facts in the record which, at the very least, controvert this conclusion. These issues are discussed in detail in argument.

[12] The Rhode Island Affiliate of the American Civil Liberties Union secured counsel to represent Spratt.

Bureau of Prisons,[13] to demonstrate that the Department's total ban on supervised inmate preaching does not in fact further the stated compelling interest by the least restrictive means. (RA7, 72, 74).

The Department did not object to the R&R and did not challenge its conclusions that the Department's ban substantially burdened Spratt's religious exercise. Before the district court, the Department instead limited its arguments to the issues of compelling interest and least restrictive means. (RA 8[#64], 110-111).

After hearing oral argument (RA96), the district court issued a brief decision adopting the R&R in full, commenting "that while the issue is somewhat of a close call, the Magistrate Judge's R&R on balance represents both a fair and reasonable interpretation of the RLUIPA claim." 2006 U.S. Dist. LEXIS 37254 at *3 (emphasis added)(ADD2).

[13] The Federal Bureau of Prisons Program Statement, "Religious Beliefs and Practices," permits inmates to present "[s]ermons, original oratory, teachings and admonitions" so long as they are in English, and allows inmates to lead religious programs under "constant staff supervision." (ADD21-22). Excerpts from the Program Statement are included in the Addendum to this brief (ADD19-22), and the complete document is reproduced in the Record Appendix. (RA74).

STATEMENT OF FACTS[14]

Wesley Spratt is serving a life sentence at the ACI.[15] He began his incarceration in December 1995, first assigned to the Intake Service Center. He was reassigned to Maximum Security[16] in 1997, where he has remained. (RA13-14).

Spratt is a Christian. He believes that he has been given a gift and called by God to "preach[] God's Word, encouraging God's people to follow christ to keep the faith, to turn from sin, to confess their sins and to stay ready because one day Jesus

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[14] The facts are recited in the light most favorable to Spratt as the non-moving party on the Department's motion for summary judgment, and also on Spratt's motion for summary judgment, in that the Department formally declined to dispute the factual underpinnings of Spratt's motion. (RA56-57).

We do not distinguish between facts detailed in Spratt's complaint, affidavit, declaration, or memoranda for three reasons: one, the Magistrate Judge announced that he was considering all of Spratt's submissions liberally, as a pro se litigant, citing Haines v. Kerner, 404 U.S. 519 (1972); two, the Department expressly declined to dispute or controvert Spratt's factual recitations, either in its answer (which left Spratt "to his proof," RA23) or its response to Spratt's motion for summary judgment (RA56-57); and three, the record below does not indicate that any factual assertion was rejected, either by the Magistrate Judge or the district court, on grounds that it was technically deficient.

[15] State v. Spratt, 742 A.2d 1194, 1197 (R.I. 1999). Following a conviction for murder and other offenses, Spratt was sentenced to life without parole, to be followed by three sentences totaling 40 years, all to be served consecutively and without parole.

[16] Despite its name, "Maximum" is not the highest security facility at the ACI. That distinction belongs to the "High Security Center." (Compare descriptions at the Department's website, http://www.doc.ri.gov/institution_op/institution_ops.htm, accessed October 28, 2006.)

is coming." (RA18). To fulfill his calling, Spratt held daily bible studies in the Intake Service Center. (RA13). At Maximum, Spratt began preaching every week to an inmate congregation, first under supervision of Sr. Mary Ann Langavin, and then under the supervision of Rev. James Turnipseed,[17] until he was prohibited from preaching by the Department in October 2003. (RA14, 16).

Spratt's preaching did not violate any published rule or policy of the Department. The Department's pertinent policy, Policy 326.01-2DOC "Religious Programs and Services," provides that:

> Inmate services and religious programs are scheduled, supervised and directed by Institutional Chaplains.
> (RA38).

All religious services in which Spratt preached were supervised, attended, and directed by outside clergy,[18] who supported Spratt's continued preaching and "praised

[17] Spratt "preach[ed] God's word under the tutelage and supervision of Rev. Turnipse[ed], spliting [sic] the Friday night service and receiving pointers from Rev. Turnipse[ed] . . . I have reached out to just about every inmate in this security except a few of the new one's who I've yet to meet." (RA41).

[18] Services would either take place in the prison chapel or in the dining room. Services in the dining room were further monitored by camera. Spratt's preaching was well-known to prison administration. Indeed, Spratt reported to the "classification board" each year that he was "preach[ing] in the chapel on Friday nights." (RA14).

[his] preaching abilities,"[19] See R&R at*16n.5 (ADD10). Moreover, in seven years, Spratt's preaching had not been attended by any negative incident or discipline.[20] (RA19, 32, 72, 136). See R&R at *3-4 (ADD7).

On October 15, 2003, Spratt was informed by a lieutenant he could not preach based on "orders from the Deputy." (RA16). A new deputy warden, James Weeden, confirmed that it was his "decision to bar [Spratt] from preaching at religious services held here at Maximum Security." (RA16). In support of his decision, and in response

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[19] Rev. Turnipseed wrote that "Wesley Spratt has been expounding the scriptures in my chapel services for about five years without any negative incidents" and is "an excellent role model[,] . . . well-respected by his peers and is able to elicit support and cooperation in spreading the gospel of love, peace, and unity. He has proven that he is a reliable person who understands the importance of trust and responsibilities." (RA32).

Sandra E. Johnson of the Chaplaincy Team wrote that, in the four years she had observed Spratt preaching, he had "always preached the word of God and carried himself with dignity and respect for those around him." She supported his return to preaching. (RA33)

Supportive Services Volunteer Carlos Gomez wrote that, during the four years of his ministry, Spratt had "demonstrated great spiritual maturity, a commendable knowledge of the scriptures and excellent ability to expound the scriptures." Gomez stated that he had "been blessed by [Spratt's] anointed sermons and I believe his peers have been blessed too," closing that he "pray[ed] to God that Mr. Spratt is once again allowed to spread the Gospel of love, peace, and unity." (RA34).

[20] Nor did the Department cite to a single instance of a disciplinary event or issue arising out of Spratt's, or any other inmate's, supervised preaching at the ACI. Indeed, Gadsden's affidavit did not identify such an event anywhere else. (ADD23). Such a discussion, if available, with description of what actually happened, would likely have surfaced the sort of preventative measures to identify a "less restrictive means" than a total ban on supervised preaching.

to Spratt's request for an explanation for the prohibition (RA37), Weeden cited to Policy 326.01-2DOC quoted above and nothing else, warning "if you are observed preaching at services you will face disciplinary action." (RA38).

Spratt then wrote to the Director of the Department, seeking reversal of the decision. (RA40). In response, the Director stated the reason for the prohibition as follows:

> Because you are not an acknowledged member of the clergy, you do not have the right to proselytize or preach to the inmate population.[21] (RA43).

The Department has abandoned both of those reasons as the justification for its ban on all inmate preaching, instead relying solely on the 2005 affidavit of Jake Gadsden. (ADD23).

Aside from the description of events by Spratt as to how the ban was announced and imposed upon him,[22] there is nothing in the record to indicate, from

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[21] In court, the Department, sub silentio, disavowed this explanation: "While inmates at the RIDOC may participate in religious services and may even be ordained by clergy, they may not lead religious services or hold a position of perceived leadership." (ADD23).

[22] In his complaint and subsequent submissions, Spratt has provided a description of events supporting the inference (and his belief) that the decision to bar him from preaching was not the result of a thoughtful policy imposed from the top down, but rather an ad hoc decision by a line correctional officer who had displayed animus, either racially motivated or anti-Christian, towards Spratt and an Hispanic inmate who were assisting in preaching. "It started with this officer and it was he that ordered me not to preach at the services and the Warden backs the officer's play." (RA 41, also RA14-15, 19-20).

the Department's perspective, how the ban was adopted, who participated in the development of the ban, whether it is the result of an ad hoc decision or a thoughtful, deliberative process, when it was created, whether it is in writing and, if so, where it appears, or whether any alternatives, which permit supervised preaching in any form, were considered.

Spratt has not been allowed to preach since October 2003. He "has been forced to sit in the congragation [sic] with his mouth closed, unable to exercise his gift of expounding the scriptures (preaching) because if he speaks he will face disciplinary action (be sent to segregation)." (RA136).

SUMMARY OF THE ARGUMENT

The judgment below is based upon the invalid premise that a total ban on inmate preaching, regardless of the nature or degree of supervision, meets the demanding standards of RLUIPA.

RLUIPA was enacted to protect institutionalized individuals from unnecessary and arbitrary restrictions on their practice of religion. Here, inmate Spratt had preached to inmate congregations under the supervision and attendance of chaplains and ministers for seven years, on a weekly basis, without incident, when the Department abruptly banned him from preaching on pain of discipline. The Department's ban substantially burdened Spratt's religious exercise, triggering "strict scrutiny" analysis under the standards of RLUIPA. The Department was required to

demonstrate that its ban on Spratt's preaching serves a compelling interest and that no less restrictive alternative will suffice.

The court below disregarded the existence of facts controverting the Department's position, which precluded the grant of summary judgment in its favor. The court instead, and erroneously, applied a highly deferential and uncritical review of the Department's position in granting it summary judgment. This was error.

To the contrary, the Department's submission in support of its affirmative defense was insufficient as a matter of law and fact. The Department bears the burden of proffer and proof on its affirmative defense. The Department relied exclusively on a purported expert witness affidavit. The district court abused its discretion in considering the affidavit at all, since it failed to satisfy the requirements for admissibility as an expert opinion under Rule 56(e), Fed.R.Civ.P., and Rule 702, Fed.R.Ev., and controlling precedents. Even as admitted, the affidavit was insufficient to create a genuine issue of material fact, under RLUIPA's demanding standards, that the challenged restriction as applied to Spratt is narrowly tailored to maintain institutional security and that there are no less restrictive alternatives.

Accordingly, the district court erred in denying Spratt's motion for summary judgment, and the judgment below must be reversed.

ARGUMENT

The district court erred in concluding that the Department's total ban on inmate preaching could be applied to Spratt without violating RLUIPA.

I. The Department's interference with Spratt's preaching is premised on its right to ban all inmate preaching at its institution, no matter how restricted or supervised, and must be resolved under the standards applicable to RLUIPA.

In order to affirm the judgment below, the Court would be required to conclude that RLUIPA supports an absolute ban on inmate preaching, no matter how restricted or supervised, and that the evidence developed below is so clear on this issue that the Department was entitled to summary judgment.

Before turning to the evidence and the standards of review, we believe it makes sense to review the history of RLUIPA and recent decisions of the Supreme Court which, it is submitted, directly bear on the appropriate analysis.

A. RLUIPA and RFRA represent a sea change in correctional jurisprudence, requiring a brief review of the history of their adoption.

"RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with [the Supreme] Court's precedents." Cutter, 544 at 714. After the Supreme Court ruled in Employment Div., Dep't of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990)("Smith"), that Oregon could deny unemployment benefits to persons fired

from their jobs because of their religious use of peyote, without transgressing the Free Exercise Clause of the First Amendment, Congress responded by enacting the RFRA, 42 U.S.C. § 2000bb, et seq., to legislatively overrule that decision. However, in City of Boerne v. Flores, 521 U.S. 507 (1997), the Court determined that the RFRA could not constitutionally be applied to the States. The RFRA continues to apply to the federal government.

In response, Congress enacted RLUIPA, which subjects federally-funded programs of state and local governments to its terms in two aspects of religious exercise: restrictions on religious exercise imposed by land use regulations (§2, 42 U.S.C. §2000cc) and restrictions imposed upon institutionalized persons (§3, 42 U.S.C. §2000cc-1) (ADD11-12). Cutter, 544 U.S. at 714-715.

"Before enacting § 3, Congress documented, in hearings spanning three years, that 'frivolous or arbitrary' barriers impeded institutionalized persons' religious exercise." Cutter, 544 U.S. at 716. The Court cited to and quoted from the Joint Statement of cosponsors Senators Hatch and Kennedy addressing the purpose of §2000cc-1:

> Far more than any other Americans, persons residing in institutions are subject to the authority of one or a few local officials. Institutional residents' right to practice their faith is at the mercy of those running the institution, and their experience is very mixed. It is well known that prisoners often file frivolous claims; it is less well known that prison officials sometimes impose frivolous or arbitrary rules. Whether from indifference, ignorance, bigotry, or lack of

> resources, some institutions restrict religious liberty in egregious and unnecessary ways.
> 146 Cong. Rec. S7774-7775 (July 27, 2000) (portions quoted in Cutter, supra) ("Joint Statement").

The Joint Statement incorporated earlier congressional findings underpinning the adoption of the RFRA that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements." Joint Statement at S7775 (quoting S. Rep. 103-111 at 10, reprinted in 1993 U.S.C.C.A.N. 1892, 1900 (1993)("RFRA Report"). RLUIPA "protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." Cutter, 544 U.S. at 721.

RLUIPA mandates that its protections "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution." 42 U.S.C. § 2000cc-3(g) (ADD13). "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, unless the burden furthers a compelling governmental interest, and does so by the least restrictive means." Cutter, 544 U.S. at 712, quoting 42 U.S.C. § 2000cc-1(a)(1)-(2) (internal quotations omitted) (ADD12).

RLUIPA, like the RFRA, imposes a "strict scrutiny" analysis commensurate with that required to justify a race-based restriction. Thus, once the individual

establishes that the government has substantially burdened his religious exercise, the challenged restriction will not stand unless the government can demonstrate[23] that the restriction actually serves a compelling interest and that there is no other means of serving that interest which will be less burdensome on the religious exercise. Addressing identical language in the RFRA, 42 U.S.C. §§2000bb-1(b), 2000bb-(3), the Court observed, "[r]equiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." City of Boerne, 521 U.S. at 534.

B. Two recent decisions of the Supreme Court are instructive on the proper application of RLUIPA to a prison restriction.

The Court's recent decisions in Johnson v. California, 543 U.S. 499 (2005), and in Gonzalez v. O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. --, 126 S.Ct. 1211 (2006), are instructive on the proper application of the RLUIPA standard here.[24]

In Gonzalez, a New Mexican church with roots in the Amazon rainforest brought suit under the RFRA against the federal government to enjoin it from interfering with its importation of a sacramental tea made from two Amazon-region plants, one of which contains a hallucinogen prohibited by the Controlled Substances

[23] "The term 'demonstrates' means the burdens of going forward with the evidence and of persuasion." §2000cc-5(2) (ADD15).

[24] Gonzalez, issued after the R&R; was briefed and argued to the district court. (RA8 [#68], 128).

Act, 21 U.S.C. §801, et seq. ("CSA"). After the district court granted a preliminary injunction and the Tenth Circuit affirmed, the government urged the Supreme Court to rule that the RFRA could not be applied to permit exceptions to uniform enforcement of the CSA. The Supreme Court, in a unanimous decision, disagreed and affirmed the grant of preliminary injunction to the church.

In the district court, the government had conceded that application of the CSA substantially burdened the church members' religious exercise, 126 S.Ct. at 1217, and limited its focus to its position that nothing short of a blanket prohibition could achieve its compelling governmental interests. 126 S.Ct. at 1217-18.

In the district court, both sides developed evidence in support of their respective positions. However, after hearing, the district court found that the evidence supporting and refuting the existence of the government's claimed compelling interests was "virtually balanced" and "in equipoise," so that the government failed to satisfy its burden of proof.[25] 126 S.Ct. at 1218. The Supreme Court agreed, rejecting the government's argument that "evidentiary equipoise is an insufficient basis for issuing a preliminary injunction against enforcement of the Controlled Substances Act." 126 S.Ct. at 1219.

The Court made clear that the "strict scrutiny" test incorporated in the RFRA

[25] Because the government failed to establish the first prong of its affirmative defense, Gonzalez does not address application of the second "least restrictive means" prong of the defense. 126 S.Ct. at 1219.

is no less demanding because it is imposed by statute than by constitutional mandate.

> Here the burden is placed squarely on the Government by RFRA rather than the First Amendment, see 42 U.S.C. § § 2000bb-1(b), 2000bb-2(3), but the consequences are the same. Congress' express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test, including at the preliminary injunction stage. 126 S.Ct. at 1220.

In the Supreme Court, the government contended that the need for uniform enforcement of the CSA precluded consideration of the church's individual circumstances under the RFRA. 126 S.Ct. at 1220. The Court disagreed, noting that it had "reaffirmed just last Term the feasibility of case-by-case consideration of religious exemptions to generally applicable rules" under RLUIPA in Cutter. 126 S.Ct. at 1223-1224.

> RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person" – the particular claimant whose sincere exercise of religion is being substantially burdened. 42 U.S.C. § 2000bb-1(b). RFRA expressly adopted the compelling interest test "as set forth in Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) and Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972)." 42 U.S.C. § 2000bb(b)(1). In each of those cases, this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants. 126 S.Ct. at 1221.

Reviewing its past precedents, the Court concluded that the RFRA (which

applies the same standard as RLUIPA, 126 S.Ct. at 1224) requires an inquiry which examines the compelling interest in the context of its application to the particular religious claimant. To paraphrase the Court, the government's "mere invocation of the general characteristics" of the harms to be avoided by a compelling interest is not sufficient to satisfy its burden under RFRA/RLUIPA. The focus must be particularized: whether the application of the general prohibition to this individual or church is necessary to preserve or further the asserted compelling interest. 126 S.Ct. at 1221. "RFRA, however, plainly contemplates that courts would recognize exceptions – that is how the law works." 126 S.Ct. at 1222 (emphasis in original; citations omitted).

In Johnson, the Court held that "strict scrutiny" applies to test a constitutional challenge to California's "unwritten policy of racially segregating prisoners in double cells . . . for up to 60 days each time they enter a new correctional facility." 543 U.S. at 502. The Court rejected California's assertion that racial categories in a prison context should be excepted from "strict scrutiny" and instead analyzed under the highly deferential standard of Turner v. Safley, 482 U.S. 78 (1987). Johnson, 543 U.S. at 509. "Turner is too lenient a standard to ferret out invidious uses of race. . . Turner would allow prison officials to use race-based policies even when there are race-neutral means to accomplish the same goal, and even when the race-based policy does not in practice advance that goal." Johnson, 543 U.S. at 513 (citation omitted).

"Strict scrutiny does not preclude the ability of prison officials to address the compelling interest in prison safety. Prison administrators, however, will have to demonstrate that any race-based policies are narrowly tailored to that end." 543 U.S. at 514 (citation omitted).

On remand, California abandoned the policy without a trial. Stiglbauer, A Case for Strict Scrutiny, 27 Whittier L. Rev. 1097, 1119 and n. 207 (2006).

With these two cases in mind, we turn to the application of RLUIPA to the Department's ban on inmate preaching at the ACI.

II. The elements of proof and the standard of review applicable to the issues presented.

Spratt appeals from the grant of summary judgment to the Department and from the denial of his motion for summary judgment. This Court reviews the district court's summary judgment decisions de novo. The evidence must be construed "in the light most flattering to the nonmovants . . . and indulge all reasonable inferences in their favor." Iverson v. City of Boston, 452 F.3d 94, 98 (1st Cir. 2006)(citations omitted).

> Summary judgment is appropriate only where the record, construed in the manner limned above, discloses "no genuine issue of material fact" and demonstrates that "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is genuine if "it may reasonably be resolved in favor of either party" at trial, Garside [v. Osco Drug, Inc.], 895 F.2d [46] at 48 [(1st Cir. 1990)], and material if it "possess[es] the capacity to sway the outcome of the litigation under the applicable law," Cadle Co. v. Hayes, 116 F.3d 957,

> 960 (1st Cir. 1997) (citation and internal quotation marks omitted). The nonmovant may defeat a summary judgment motion by demonstrating, through submissions of evidentiary quality, that a trialworthy issue persists. Celotex Corp. v. Catrett, 477 U.S. 317, 322-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Garside, 895 F.2d at 48. Withal, a measure of factual specificity is required; "a conglomeration of 'conclusory allegations, improbable inferences, and unsupported speculation' is insufficient to discharge the nonmovant's burden." DePoutot, 424 F.3d at 117 (quoting Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990)).
> Iverson, 452 F.3d at 98.

"Neither party may rely on conclusory allegations or unsubstantiated denials . . . to demonstrate either the existence or absence of an issue of fact." Kiman v. New Hampshire Dep't of Corrections, 451 F.3d 274, 282 (1st Cir. 2006)(internal quotations, citations omitted). The fact that the parties have filed cross-motions for summary judgment does not mean that either motion will be granted. Each party has its own separate burden, and may rely on different facts in support of its motion. Kiman, 451 F.3d at 282 n.6.

In an RLUIPA case, Spratt bears the burden of proof to establish that the challenged restriction has substantially burdened his religious exercise. Once he has done so, the Department bears the burden of proffer and proof to establish both prongs of its affirmative defense: that application of the restriction to Spratt in fact furthers a compelling governmental interest and that there is no less restrictive means to further that interest.

Where, as here, "the moving party will bear the burden of persuasion at

> trial, that party must support its motion with credible evidence – using any of the materials specified in Rule 56(c) – that would entitle it to a directed verdict if not controverted at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 331, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (Brennan, J., dissenting on other grounds).
> Winnacunnet Cooperative School District v. National Union Fire Ins. Co., 84 F.3d 32, 35 (1st Cir. 1996).

Spratt also challenges the district court's reliance upon the Gadsden affidavit, either as supporting the Department's motion or as creating a factual dispute to defeat Spratt's motion for summary judgment. The district court's decision to consider opinions presented in an expert witness affidavit is governed by an abuse of discretion standard. See, e.g., Schubert v. Nissan Motor Corp., 148 F.3d 25, 29-30 (1st Cir. 1998). We discuss these elements below. Even assuming arguendo that the court did not abuse its discretion in admitting the Gadsden affidavit for consideration, the "evidence" contained therein is tested as part of the de novo review of summary judgment outlined above.

III. Undisputed evidence established that the challenged ban substantially burdened Spratt's religious exercise.

As recounted above, Spratt bears the burden of proof on the first two elements of the RLUIPA analysis: one, that he engaged in religious exercise, and two, that the challenged restriction substantially burdens his religious exercise.[26] The district court

[26] In the district court, the Department paid scant attention to these issues, initially arguing, without citation to any authority, that Spratt's religious exercise has not been "substantially burdened" because he remains free to attend religious services; "he simply may not lead them." (RA51). On Spratt's appeal of the R&R,

correctly determined that Spratt had established each element on the basis of undisputed fact.

> [T]he "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.
> Smith, 494 U.S. at 877 (parts quoted in Cutter, 544 U.S. at 720).

These two determinations do not bear further review. First, the Department did not dispute the underlying facts supporting these determinations. There is no question of the genuineness or sincerity of Spratt's religious practices or his belief that he has received a calling from God to preach, which he believes must be fulfilled. Nor is there any question that the Department's ban forced Spratt to stop preaching–which he had done weekly for seven years–a permanent prohibition now in place for more than three years.

Second, these undisputed facts more than meet the requirements of RLUIPA to demonstrate a "religious exercise,"[27] which has been "substantially burdened."[28]

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the Department informed the district court that it was not pressing the issue. (RA110-111).

[27] RLUIPA defines "religious exercise" as "any exercise of religion, whether or not compelled by or central to, a system of religious belief." §2000cc-5(7)(A). (ADD15). The RFRA's definition was amended to incorporate RLUIPA's definition. See, e.g., Adkins v. Kaspar, 393 F.3d 559, 567 and n.34 (5th Cir. 2004), cert. denied, 545 U.S. 1104 (2005).

It does not appear that the First Circuit has yet had occasion to address these issues under the RFRA or RLUIPA. Cf. Brown v. Hot, Sexy and Safer Productions,

R&R at *8 (ADD8).

Third, appellate consideration of these issues is foreclosed by the Department's waiver of review. The Magistrate Judge decided both issues in favor of Spratt. The Department filed no objection to the R&R, nor did it argue either of these issues to the district court as alternative grounds to support summary judgment in its favor. Appellate review is therefore unwarranted and has been waived. See, e.g., Henley Drilling Co. v. McGee, 36 F.3d 143, 150-51 & n.19 (1st Cir. 1994); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

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68 F.3d 525 (1st Cir. 1995), cert. denied, 516 U.S. 1159 (1996)(considering retroactivity of RFRA).

[28] See, e.g., Guru Nanak Sikh Society v. County of Sutter, 456 F.3d 978, 989 (9th Cir. 2006); Warsoldier v. Woodford, 418 F.3d 989 (9th Cir. 2005); Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 899-900 (7th Cir. 2005); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004), cert. denied, 543 U.S. 1146 (2005)("a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly"); Jolly v. Coughlin, 76 F.3d 468, 477 (2d Cir. 1996)(RFRA). See also Adkins, 393 F.3d at 568-569 (collecting cases); McEachin v. McGuinnis, 357 F.3d 197, 202-203 (2d Cir. 2004)(collecting cases under First Amendment analysis).

Adkins' pronouncement that a government restriction that "merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed," 393 F.3d at 570 (footnote omitted), appears inconsistent with RLUIPA's express subjection of "rule[s] of general applicability" to its terms. §§2000cc(a)(2)(A), 2000cc-1(a). (ADD11-12).

IV. The Department failed to demonstrate the absence of a genuine dispute concerning its affirmative defense and was not entitled to summary judgment in its favor.

Spratt having met his burden of proof, the burden of proffer and proof then shift to the Department to establish that nothing short of a total ban on inmate preaching would serve its stated interest in prison security. §§2000cc-2(b), 2000cc-5(2) (ADD12, 15).

In this case, the Department faces a heavy burden. It claims that it is entitled to summary judgment to enforce an absolute ban on inmate preaching, throughout its facilities, regardless of the inmate or the availability or degree of supervision.[29] In mounting this affirmative defense, the Department has accepted all of Spratt's factual presentation as undisputed and has offered no evidence specific to Spratt (or even to inmate preachers or preaching at the ACI in general) to support its position. It has provided no evidence concerning the origins of the prohibition, how it was formulated or when. It has offered nothing to describe, identify or explain the circumstances or past incidents (if any) precipitating its adoption or implementation,

[29] The Department presented its ban as applicable to all inmates and all facilities, regardless of inmate classification or individual circumstances. (ADD23, RA125). It did not claim that it had been adopted with any reference to Spratt or his particular circumstances.

Spratt never conducted an inmate congregation on his own; an ACI chaplain always attended and officiated. The Department, in mounting its position, equated "preaching" with "leading," regardless of the circumstances.

or considerations of alternative measures less restrictive than a complete ban. Spratt, in contrast, has produced evidence, which the Department chose not to controvert, supporting the inference that the ban was the result of an ad hoc decision, announced and implemented without consultation or thought. Spratt produced evidence, undisputed, that the Department raised two earlier justifications for the ban – a policy which was not violated and a requirement which has been disavowed – before settling on its current rationale, all of which support the inference that the current explanation is nothing more than a post-hoc rationalization based on exaggerated fears and speculation. See Joint Statement at S7775 (ADD17).

A. The Department failed to demonstrate the absence of a factual dispute concerning its claim that the ban on Spratt's preaching was narrowly tailored to maintain institutional security.

The Department has identified "institutional security" as the compelling interest served by its ban on inmate preaching. While "prison security is a compelling state interest," Cutter, 125 S.Ct. at 2124 n.13, "prison officials 'cannot merely brandish the words "security" and "safety" and expect that their actions will automatically be' insulated from scrutiny." Farrow v. Stanley, 2005 U.S. Dist. LEXIS 24374, at *28 (D.N.H. 2005), quoting Campos v. Coughlin, 854 F.Supp. 194, 207 (S.D.N.Y. 1994)(other citations omitted). See also RFRA Report at 10, 1993 U.S.C.C.A.N. at 1899, cited and quoted with approval in Joint Statement at S7775

(ADD17).[30]

Gonzalez and Cutter require a particularized, case-by-case inquiry into the bona fides of the interest: does the restriction as applied to this religious claimant in fact serve the compelling interest (or, conversely, will the grant of an exemption to this individual undermine the stated interest)? The Department attempted no such showing here, and the evidence is undisputed that there were no incidents, let alone security breaches, associated with Spratt's preaching. "[T]o satisfy RLUIPA's higher standard of review, prison authorities must provide some basis for their concern that [] violence will result from any accommodation of [the inmate's] request." Murphy v. Missouri Department of Corrections, 372 F.3d 979, 988-989 (8th Cir. 2004), cert. denied, 543 U.S. 991(2004)(citation omitted).

In Gonzalez, the Court cited the CSA's exemption of the religious use of peyote as refuting the government's claim that an exemption for plaintiff church would undermine its compelling interests. Similarly, here, the Department has no

[30] In enacting the RFRA, Congress announced its intent "to restore the traditional protection afforded to prisoners to observe their religions" prior to the deferential "reasonableness" standard applied in O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987). RFRA Report at 9, 1993 U.S.C.C.A.N. at 1899. In expressing its intent that "only regulations based upon penological concerns of the 'highest order' could outweigh an inmate's claims," the Report quoted at length from Weaver v. Jago, 675 F.2d 116, 119 (6th Cir. 1982)(citations omitted), to underscore Congress' intent "that the state must do more than simply offer conclusory statements that a limitation on religious freedom is required for security, health of [sic] safety in order to establish that its interest are of the 'highest order.'" RFRA Report at 10, 1993 U.S.C.C.A.N. at 1899 (footnote omitted).

objection to Spratt stepping forward to recite prayers, read passages from the Bible or other religious readings, so long as he does not add commentary or interpretation. (RA113). It is difficult to see how the Department's claimed concerns–that an inmate who preaches will be viewed as a leader or may engage in code or hidden signals (ADD23-24)–would not also arise under that scenario. Conversely, it is undisputed that inmates, including Spratt, are permitted to gather in the prison yard and engage in discourse without close monitoring.[31] (RA18, 139). The readily apparent overinclusiveness and underinclusiveness of the Department's absolute ban on any form of inmate preaching undermines its assertion that the ban, as applied to Spratt's supervised preaching, is narrowly tailored (if tailored at all) to serve its compelling interest. See Gonzalez, 125 S.Ct. at 1220.

B. The Department failed to demonstrate the absence of a factual dispute concerning its claim that the ban on Spratt's preaching was the least restrictive means to maintain institutional security.

Nor has the Department met its burden of establishing that a complete ban on inmate preaching, no matter how supervised, is the "least restrictive means" to

[31] As described by Spratt and not disputed by the Department, the prison yard is large enough to include two basketball courts, a baseball field, a track and 18 picnic benches with the entire prison population out during recreation while monitored by three officers from two locations. There are two cellblocks which hold 90 inmates, supervised by two officers. "If any so called gang members want to talk any gang nonsence [sic], they have the entire day and late rec at night to do so. . . .The last place in the world any so called gang members want to hold any so called meeting is in the church of the Lord Jesus Christ. The[y're] not stupid and bringing that crap into the church is a quick way to end up in segregation." (RA139).

maintain institutional security. "A governmental body that imposes a 'substantial' burden on a religious practice must demonstrate, and not just assert, that the rule at issue is the least restrictive means of achieving a compelling governmental interest." O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003)(emphasis in original).

There is no evidence here that the Department engaged in a deliberative process or considered any alternatives before its abrupt about-face in 2003. If there were legitimate or genuine concerns which arose at the time, the court was not made aware of them. "We do not require evidence that racial violence has in fact occurred in the form of a riot, but we do require some evidence that [the prison's] decision was the least restrictive means necessary to preserve its security interest." Murphy, 372 F.3d at 989 (citation omitted). In the absence of evidence that the institution had "seriously considered any other alternatives," the Eighth Circuit in Murphy concluded that the institution had not met this burden. Accord Warsoldier, 418 F.3d at 999 ("CDC cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice [citations omitted]"); Sample v. Lappin, 424 F.Supp.2d 187, 195 (D.D.C. 2006).

In contrast, the Federal Bureau of Prisons permits supervised preaching.[32] Evidence that the Federal Bureau of Prisons has been able to "manage[] the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners" while accommodating inmates' religious exercise in supervised preaching, undercuts the Department's claim that no less restrictive alternative exists. Warsoldier, 418 F.3d at 1000-1001, quoting Cutter, 125 S.Ct. at 2124.

Nor does it appear that this issue has been addressed by other courts applying RLUIPA. The Department, below, acknowledging the absence of RLUIPA precedent (RA129-130), cited to a number of pre-RLUIPA cases in which bans on unsupervised inmate-led religious services were upheld. See, e.g. Anderson v. Angelone, 123 F.3d 1197, 1198-1199 (9th Cir. 1997)(collecting cases); Benjamin v. Coughlin, 905 F.2d 571 (2d Cir. 1990), cert. denied, 498 U.S. 951 (1990) ; Hadi v. Horn, 830 F.2d 779 (7th Cir. 1987); Morrison v. Cook, 1999 U.S.Dist.LEXIS 14215 (D.Or. 1999), adopted, 1999 U.S. Dist. LEXIS 14233 (D.Or. 1999). However, none of these cases addressed the propriety of a ban on inmate participation in preaching under the supervision and attendance of a Department chaplain or minister. Moreover, each of

[32] Spratt submitted the pertinent policy to the district court in support of his objection to the R&R. See Fed.R.Ev. 803.

those cases was decided under the highly deferential Turner/O'Lone standard expressly repudiated by Congress in adopting the RFRA and RLUIPA. RFRA Report at 9, 1993 U.S.C.C.A.N. at 1899; Joint Statement at S7775 (ADD17). Thus, reliance on pre-RLUIPA cases employing the highly deferential Turner/O'Lone standard is misplaced. Warsoldier, 418 F.3d at 997-998.

C. The Department bore the burden of proof on its affirmative defense and was not entitled to summary judgment unless its demonstration was uncontroverted.

The Department, as the party with the burden of proof, was not entitled to have its motion for summary judgment entertained in the first place unless it presented "credible evidence -- using any of the materials specified in Rule 56(c) -- that would entitle it to a directed verdict if not controverted at trial." Winnacunnet Coop'v School District, quoted supra. The Department presented no evidence with its motion for summary judgment–only argument and speculation. (RA46-56).

The Department's belated proffer of the Gadsden affidavit, even if admissible, did not satisfy its burden of proof.

D. The court below erred in treating the Department's showing as uncontroverted and in its application of the strict scrutiny test to measure the Department's proffer.

Below, the Department identified its compelling interest as institutional security. The Magistrate Judge, citing the Gadsden affidavit, declared the evidence "undisputed that the prison administration's authority is compromised when inmates

are given positions of authority or perceived authority, such as an inmate who is allowed to preach." R&R at *13-14 (ADD9).

In fact, the record below contained ample evidence to controvert this so-called "undisputed fact." Spratt preached under supervision on a weekly basis for seven years without any evidence of an incident, let alone compromise or diminution of administration authority. In his affidavit, Spratt denied that he had a position of authority or that he had received any treatment as if he held authority. (RA72). The Department did not offer a single instance of an inmate-preacher, either at the ACI or elsewhere, achieving a position of authority or compromising security.

Spratt developed evidence in the record that institutional practices permit a wide variety of inmate interactions which may threaten institutional security but are not banned, as well as the Department's security measures to address any unrest (RA18, 139).

The Magistrate Judge also credited the Department's unsupported legal argument referring to inmates or groups wielding authority in the 1970s as contributing to prison unrest at that time. R&R at *14 (ADD9). The Department had not even bothered to provide an evidentiary basis for this contention, and it cannot serve as a basis to support the grant of summary judgment for it. Moreover, there is no discernible connection between "inmate groups who wielded authority" (how did they acquire it, what were they doing) thirty years ago and Spratt's supervised

preaching without incident. It was error for the court to rely on this "fact" to support its decision.[33]

Finally, the Magistrate Judge declared that "[i]t is plainly evident here that allowing the plaintiff to be in a position of authority, or perceived authority creates a security concern." R&R at *14-15 (ADD10). In the Magistrate Judge's view, this was sufficient to satisfy RLUIPA's requirement that the Department demonstrate that the ban furthered its interest of maintaining institutional security.

Respectfully, this is circular reasoning. There is no evidence that the institution was less secure while Spratt was preaching for seven years than after it forced him to stop. There was no security breach or compromise in fact by Spratt's preaching. RLUIPA, as the Court's decisions in Gonzalez and Cutter make clear, requires a particularized, focused review. And Johnson makes clear that strict scrutiny, and not the highly deferential test of Turner, applies here.

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[33] At oral argument, the district court correctly observed that the "problem in the 70s was primarily of [severe] overcrowding," and questioned "what is the tie from that event to somebody expounding on scripture in a supervised ceremony?" (RA116). Department's counsel represented that there were inmate groups engaging in business activities and running the prison. (RA117). Counsel did not explain how those purported examples of actual usurpation of prison authority relate to supervised inmate preaching by Spratt in 2003.

RLUIPA does not countenance such leaps in logic to justify restrictions on religious exercise. Indeed, the Joint Statement, quoted above, makes clear that it was enacted precisely to combat restrictions based on "speculation, exaggerated fears, or post-hoc rationalizations." Joint Statement at S7775, quoting RFRA Report at 10, 1993 U.S.C.C.A.N. at 1900. (ADD17).

In a prison, everything is (or should be) a security "concern." But on that logic, any congregation of inmates for religious worship would or could pose a "concern," justifying a complete ban of all forms of group worship in any prison setting.

Turning to the "least restrictive means" prong of the Department's affirmative defense, the Magistrate Judge again uncritically accepted Gadsden's conclusory statement that nothing short of a total ban on inmate preaching would prevent a compromise of security, terming it "undisputed that there are no means to accommodate the plaintiff's preaching while, at the same time, maintaining institutional security." R&R at *15-16 (ADD10).

The Magistrate Judge simply repeated Gadsden's conclusions and deferred to his judgment. In effect, the Magistrate Judge applied the highly deferential Turner standard instead of undertaking the searching inquiry mandated by RLUIPA. The Magistrate Judge did not examine options or alternatives to a complete ban, which is not surprising, since no such discussion appears in the Gadsden affidavit. At oral argument on Spratt's appeal of the R&R, the Department claimed that allowing Spratt to preach, even under supervision, accorded him a position of authority in the eyes of other inmates, and that there was no way to avoid this perception.[34] (RA120-121).

[34] The Department's logic is obscure: there is no evidence or element of selection or preference in the history of Spratt's preaching, nor is there any basis to suppose that the Department could not ensure (thereby avoiding any appearance of preference) that everyone who sought to preach under supervision would get that opportunity.

The Department called this a breach of security, comparable to leaving a gate open. (RA121).

Despite the Magistrate Judge's declaration that this evidence was "undisputed," substantial evidence in the record controverted these claims, at the very least precluding summary judgment for the Department. Spratt had preached only under supervision of the ACI clergy, and often with institutional cameras in place. These were obvious alternatives to a complete ban. Spratt also introduced the policy of the Federal Bureau of Prisons, as evidence demonstrating the existence of alternatives to a complete ban.

At oral argument, the district court appeared to recognize the problems with the Department's position, which, at bottom is based upon "a generalized impression that, well, if people preach, they become leaders. If they become leaders, it could lead to a security problem." (RA115). The district court observed that the very fact that Spratt had preached for seven years without incident was evidence controverting the Department's claimed security risk, and the absence of any evidence that other inmates treated Spratt as a leader undermined the inevitability of the connection that the Department was asserting. (RA122). "The problem is we don't have any of that.

Uncritical acceptance of the Department's position – that what others may think or perceive alone justifies restrictions on religious exercise – could support prohibition on worship by members of unpopular religions through "a form of hecklers' veto." See O'Bryan, 349 F.3d at 401.

All we have is a warden saying, well, preachers could become leaders, therefore, no preachers." (RA123).

In response to the Department's claim that there are no alternatives to a total ban, the district court observed that "there are a lot of ways I could just think of off the top of my head that would be less restrictive . . . [and would] dilute his role as a leader." (RA124-125).

In the end, despite its pointed challenge to the Department's position, and its recognition of the heavy burden imposed on the Department by RLUIPA, the district court adopted the Magistrate Judge's R&R without providing any additional analysis, other than to comment that "the issue is somewhat of a close call." 2006 U.S. DIST. LEXIS 37254 at *3 (ADD2).

As the Gonzalez case instructs, the Department is not entitled to judgment on a "close call" where it bears the burden of proof. In the summary judgment context, a "close call," at the very least, mandates denial of the Department's motion and remand for trial.

V. The Department failed to provide evidence sufficient to raise a genuine issue of material fact in support of its affirmative defense, entitling Spratt to summary judgment in his favor.

In the foregoing discussion, Spratt has demonstrated that the Department was not entitled to summary judgment on this record. Here Spratt submits that the Department failed to proffer competent evidence in support of its affirmative defense,

and that the district court therefore erred in denying Spratt's motion for summary judgment.

A. The Department's affirmative defense rested upon the information contained in an inadequate "expert" affidavit.

Because the Department's entire affirmative defense rested upon the narrow shoulders of the Gadsden affidavit, we examine it in detail. It is a bare five paragraph, one and one-half page document.

In paragraphs 1 and 2, Gadsden sets forth his credentials, which consist of his current and former correctional appointments. There is no mention of academic credentials (high school or otherwise). There is no mention of <u>any</u> particularized training (either given or received) in the areas of penology, correctional standards, accommodations of religious practices, studies of inmate populations, or the like.[35]

In paragraph 3, Gadsden declares that inmates at the Department "may participate in religious services and may even be ordained by clergy, [but] they may not lead religious services or hold a position of perceived leadership." The policy as set forth by Gadsden is not memorialized in any way. There is no mention of the origins of this policy or rule, who created it, when it was developed or instituted, or the source of Gadsden's knowledge concerning it. We do know, from paragraph 1, that Gadsden has served as Assistant Director For Institutions and Operations for the

[35] Rule 702, Fed.R.Ev., permits a witness to give opinion evidence <u>if</u> "qualified as an expert by knowledge, skill, experience, training, or education."

Department since September 2001, that is, two years before Spratt was banned from preaching. Evidence in the record indicates that the ban was adopted and applied specifically to Spratt in October 2003 by, or with the approval of, Deputy Warden Weeden. But Weeden is not mentioned in the Gadsden affidavit, nor has the Department offered any evidence, from its perspective, as to how the ban was developed or implemented.

In paragraph 3, Gadsden states his opinion that any inmate who preaches will necessarily acquire a position of leadership, either in actuality or as perceived by other inmates and may misuse that position, thereby creating conditions which may threaten security. The paragraph is full of generalizations, speculation, and conclusions, but contains no specifics to support them, either by example or actual experience, concerning Spratt or any other inmate who has preached at the ACI or elsewhere, with or without supervision.

Gadsden does not state that he has any personal knowledge of these circumstances, and he does not cite to any literature in his field or other authoritative studies or information upon which he has reached these conclusions.[36]

In paragraph 4, Gadsden states his conclusion–the ultimate legal

[36] Rule 702, Fed.R.Ev., requires that, to be admissible, expert testimony must be "based upon sufficient facts or data, . . . the product of reliable principles and methods, and [a showing that] the witness has applied the principles and methods reliably to the facts of the case."

conclusion–that there are no less restrictive means to permit Spratt to preach, because no matter what the inmate does, institutional security is threatened by the perceived leadership position acquired by the inmate through preaching. This conclusion necessarily depends upon acceptance of Gadsden's assertion that anyone who preaches necessarily becomes an inmate leader and that the Department has no resources available to it to offset or prevent that status. Once again, Gadsden does not cite to any personal experience or authoritative studies to support his conclusions.

In paragraph 5, Gadsden claims that "a situation in the Texas Correctional system . . . bears out my position." Gadsden acknowledges that he has no personal knowledge of these events, and that whatever he knows came from thirdhand information from "contacts with peers" whose identities and credentials remain a mystery.

Gadsden's description of the Texas experience–as vague as it is–bears absolutely no relationship to supervised inmate preaching. He suggests only that Texas once had a system where it conferred actual authority on certain inmates, found that inmates were abusing the system, and therefore ended it. The two situations are so disparate that no analogy can fairly be drawn. As described by Gadsden, the "trustee" was not a religious leader and there was no preaching involved.[37]

[37] It appears that Gadsden is, albeit inartfully, referring to the discredited and judicially-prohibited "building tender" program detailed in a series of federal court decisions finding systemic constitutional violations in the Texas correctional system.

B. Consideration of the Gadsden affidavit was an abuse of discretion.

The district court abused its discretion in considering the Gadsden affidavit. [38] It is clear that Gadsden was offered as an expert witness, since nothing in his affidavit purports to provide information, based on personal knowledge, as to Spratt, his preaching, or the history of the development of the Department ban on inmate preaching. Rule 56(e), Fed.R.Civ.P., requires that affidavits on summary judgment

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As later described by the court, Texas employed a "'building tender' system in which certain inmates were used as auxiliary guards to assist the civilian security forces in controlling prison units. This system had been established despite the existence of a Texas statute expressly prohibiting the use of inmates in a supervisory or administrative capacity over other inmates and forbidding any inmate to administer disciplinary action to another prisoner." Ruiz v. Johnson, 154 F. Supp. 2d 975, 989-990 (S.D. Tex. 2001)(citations omitted), appeal dis'd, 273 F.3d 1101 (5th Cir. 2001). The program was abolished by court order. For examples of the actual authority conferred by prison administrators upon building tenders to oversee and supervise inmates (including issuance of keys and weapons), see, e.g., Ruiz v. Estelle, 666 F.2d 854, 1294-1297 (5th Cir. 1982), modified, 679 F.2d 1115 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983).

In contrast, "trustee" or "trusty" inmate status (i.e., inmate classification according additional privileges, responsibility, or more desirable work assignments) appears to continue in use in prisons in various parts of the country, including Texas. For references, see, e.g., United States v. Brown, 441 F.3d 1330, 1343 (11th Cir. 2006); Panaro v. City of N. Las Vegas, 432 F.3d 949, 950-951 (9th Cir. 2005); Johnson v. Nwankwo, 2004 U.S. Dist. LEXIS 14178 (N.D. Tex. 2004); Cline v. Tex. Bd. of Crim. Justice, -- S.W.3d –, 2006 Tex. App. LEXIS 3049 at *2 n.2 (Tex. App. 2006), petition for review denied, -- S.W.3d –, 2006 Tex. LEXIS 936 (Tex., 2006), citing Texas Gov't Code Ann. §498.003(b)(2004) (defining good time calculations for time served in "trusty" classification).

[38] Spratt repeatedly and strenuously challenged the sufficiency of the Gadsden affidavit below (RA7 [docket#61],73, 137), and preserved this issue for appellate consideration. Perez v. Volvo Car Corp., 247 F.3d 303, 314-315 (1st Cir. 2001).

"shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." While a party may rely upon an expert witness affidavit to support or oppose summary judgment, more must be provided "than a conclusory assertion about ultimate legal issues." Hayes v. Douglas Dynamics, Inc., 8 F.3d 88, 92 (1st Cir. 1993), cert. denied, 511 U.S. 1126 (1994)(citations omitted).

In applying the Rule 56(e) paradigm to an expert affidavit, Rule 702 of the Federal Rules of Evidence and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), must also be considered. Rule 702 and Daubert require that the court make at least a preliminary assessment of the admissibility of expert opinion before considering it as competent evidence. Daubert applies to non-scientific, as well as scientific, expert opinion. Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 152 (1999). "While the Daubert standard does not have to be recited mechanically, it is nonetheless crucial that a Daubert analysis of some form in fact be performed." Naeem v. McKesson Drug Co., 444 F.3d 593, 608 (7th Cir. 2006)(internal quotation, citations omitted).[39]

[39] While Naeem reviewed admissibility of expert testimony at trial, this Court has recognized that expert credentials and competence are also subject to assessment under the Rule 702/Daubert standard at the summary judgment stage. See, e.g. Poulis-Minott v. Smith, 388 F.3d 354 (1st Cir. 2004); Cortes-Irizarry v. Corp. Insular de Seguros, 111 F.3d 184, 188 (1st Cir. 1997)(acknowledging the applicability of Daubert at the summary judgment stage, but cautioning that it should not be applied to "exclude debatable scientific evidence without affording the proponent . . .

There is nothing to suggest that either the Magistrate Judge or the district court conducted a Rule 56(e) assessment of the admissibility of the Gadsden affidavit before relying upon its contents.[40] Neither the Magistrate Judge nor the district court squarely addressed or analyzed Gadsden's credentials or the foundation for his opinions before accepting and relying upon them as undisputed. Even a cursory consideration of the requirements of admissibility should have demonstrated that the Gadsden affidavit was not sufficient for consideration as expert opinion. "[E]xperts' work is admissible only to the extent that it is reasoned, uses the methods of the discipline, and is founded on data. Talking off the cuff – deploying neither data nor analysis – is not an acceptable methodology." Naeem, 444 F.3d at 608, quoting Lang v. Kohl's Food Stores, Inc., 217 F.3d 919, 924 (7th Cir. 2000).

While a conclusory declaration that "Gadsden is qualified to provide an expert opinion" is "not sufficient to show that a Daubert analysis was performed adequately," Naeem, 444 F.3d at 608 (citation omitted), even that superficial effort was not undertaken here. "When a district court fails to consider an essential Daubert factor, . . . it has abused its discretion." Naeem, 444 F.3d at 608 (citation omitted).

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adequate opportunity to defend its admissibility.")

[40] In Poulis-Minott, this Court declined to fault the court below in failing to rule explicitly on the qualifications of an expert where it was clear that "the Magistrate Judge scrupulously considered each paragraph [of the expert affidavit] in question" and recited the experts' qualifications in his recommended decision. Even so, the Court observed that "the use of greater clarity in addressing the qualifications of the experts in this case would have been preferable." 388 F.3d at 359-360.

The Gadsden affidavit should not have been considered a part of the summary judgment analysis on either party's motion.

C. The Gadsden affidavit failed to provide legally sufficient evidence to support the Department's affirmative defense and the district court erred in denying Spratt's motion for summary judgment.

Even if admissible, the Gadsden affidavit fails to provide legally sufficient evidence to fulfill the Department's burden to demonstrate that preventing Spratt from preaching under supervision in fact serves the Department's interest in maintaining institutional security and that nothing short of a total ban would suffice.

> Where an expert presents "nothing but conclusions -- no facts, no hint of an inferential process, no discussion of hypotheses considered and rejected", such testimony will be insufficient to defeat a motion for summary judgment. Mid-State Fertilizer v. Exchange Natl. Bank, 877 F.2d 1333, 1339 (7th Cir. 1989). See also Evers v. General Motors, 770 F.2d 984, 986 (11th Cir. 1985); Bulthuis v. Rexall Corp., 789 F.2d 1315, 1318 (9th Cir. 1985). Although an expert affidavit need not include details about all of the raw data used to produce a conclusion, or about scientific or other specialized input which might be confusing to a lay person, it must at least include the factual basis and the process of reasoning which makes the conclusion viable in order to defeat a motion for summary judgment.
> Hayes, 8 F.3d at 92.

As discussed above, Gadsden's affidavit provided nothing but speculation, wild leaps of logic, circular reasoning, and conclusory statements to explain the basis for his opinion. It does not qualify as competent evidence of the existence of fact, disputed or undisputed, that Spratt's continued preaching under supervision implicated the Department's compelling interest in maintaining institutional security.

It simply declared that this was so. In contrast, Spratt submitted undisputed evidence that the ban was a reflexive spur-of-the-moment decision imposed by a new warden with no knowledge of the history of Spratt's preaching at Maximum.

Gadsden's affidavit has no probative value and therefore can neither support nor defeat summary judgment. "[A] party may not avoid summary judgment solely on the basis of an expert's opinion that fails to provide specific facts from the record to support its conclusory allegations." Evers v. General Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985), cited with approval in Hayes, 8 F.3d at 92. See also Weigel v. Target Stores, 122 F.3d 461, 468 (7th Cir. 1997) (expert's "naked conclusion unsupported by any factual foundation"was insufficient to defeat summary judgment). See also SMS Sys. Maintenance Servs. v. Digital Equip. Corp., 188 F.3d 11, 25 (1st Cir. 1999), cert. denied, 528 U.S. 1188 (2000). "[A]n expert's opinion based on 'unsupported assumptions' and 'theoretical speculations' is no bar to summary judgment." Weigel, 122 F.3d at 468, quoting American Int'l Adjustment Co. v. Galvin, 86 F.3d 1455, 1464 (7th Cir. 1996)(Posner, C.J., dissenting).

The Department having failed to offer any competent evidence to support its burden of proof, Spratt was entitled to summary judgment and the district erred in denying his motion.

CONCLUSION

As of this writing, three years have passed since Wesley Spratt was able to expound upon the scriptures under the watchful eye of an ACI chaplain. "Preaching" is not inherently or presumptively dangerous; it involves no contraband. Its prohibition here results not from application of a neutral restriction which has the unintended effect of interfering with a religious practice, but from a restriction aimed at the religious practice itself. RLUIPA commands a critical and skeptical assessment of such a blanket prohibition: that is the essence of "strict scrutiny."

> Prisoners are persons whom most of us would rather not think about. Banished from everyday sight, they exist in a shadow world that only dimly enters our awareness. They are members of a "total institution" that controls their daily existence in a way that few of us can imagine[.]
>
> * * *
>
> . . . Mere assertions of exigency have a way of providing a colorable defense for governmental deprivation, and we should be especially wary of expansive delegations of power to those who wield it on the margins of society. Prisons are too often shielded from public view; there is no need to make them virtually invisible.
>
> O'Lone v. Estate of Shabazz, 482 U.S. at 354, 358 (Brennan, J., dissenting).

Based upon the express dictates of RLUIPA and Supreme Court precedent applying the strict scrutiny analysis, Spratt is entitled to judgment in his favor and an immediate restoration of his right to preach under supervision. Accordingly, Spratt respectfully prays that the judgment of the district court be reversed with directions

to enter summary judgment for Spratt and to order that Spratt be restored forthwith in his ability to preach under supervision. See Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d at 901.[41]

In the alternative, Spratt respectfully prays that this Court reverse the entry of summary judgment for the Department and remand the matter for discovery and trial on the merits.

Respectfully submitted,
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October 31, 2006

[41] Declining to countenance further delay, the Seventh Circuit (Posner, J.) remanded with instructions to grant the relief sought by plaintiff church, with a stay of 90 days to permit the parties to negotiate the language of a restriction on non-religious use of the property.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 12,486 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Appellant's Brief and one copy of the Appendix were forwarded by regular mail, postage prepaid, on the ___ day of October, 2006 to the offices of:

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40 Howard Avenue, Cranston, RI 02920

_____

ADDENDUM

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