

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

ENAAM ARNAOUT and JOHN LINDH,)
on their own behalf and on behalf of a)
class of those similarly situated,)

Plaintiffs,)

v.)

No. 2:09-cv-215 JMS-WGH

WARDEN, FEDERAL CORRECTIONAL)
INSTITUTION, TERRE HAUTE,)
INDIANA,)

Defendant.)

Plaintiffs' Memorandum in Support of Motion for Summary Judgment

Introduction

The Communications Management Unit (“CMU”) is a self-contained, general population unit located within the Federal Correctional Institution in Terre Haute. Prisoners housed there are allowed out of their cells and are allowed to move freely through the unit, both inside and outside, from early in the morning to late in the evening with only one or two brief periods of time when they return to their cells for a formal count. During the time that they are allowed out of their cells they are allowed to congregate to talk, snack, play games, watch television, and exercise either inside or in an outdoor recreation area. The one thing they cannot do together, however, is pray, except for once a week. The majority of the prisoners in the unit are Muslim and they are therefore not allowed to pray together for the obligatory five daily prayers that the Koran requires Muslims to observe. The only exception to this is the once a week *Jum’ah* prayer that they are allowed to observe in congregation. Congregate daily prayer is deemed to be

required by many Muslims including plaintiff Lindh and a number of other residents of the CMU. At the very least, congregate prayer is strongly preferred because it magnifies the blessings and utility of prayer.

This action is brought by two Muslim prisoners who have been confined in the CMU.¹ As to them, and the other Muslim prisoners currently confined in the CMU and who will be confined there in the future, the denial of the right to congregate daily prayer substantially burdens religious exercise without justification and therefore violates the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000bb-1. There are no contested issues of material fact and summary judgment must be awarded to plaintiffs and to the class once it is certified.

The summary judgment standard

The standard for the grant of summary judgment is clear.

Under Fed.R.Civ.P. 56(c), summary judgment is warranted only if “there is no genuine issue as to any material fact and [] the moving party is entitled to judgment as a matter of law.”

The initial burden of production rests upon the moving party to identify “those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 . . . (1986) Once the moving party satisfies this burden, the nonmovant must “set forth specific facts showing that there is a genuine issue for trial.” Fed.R.Civ.P. 56(e). The nonmovant must do more, however, than demonstrate some factual disagreement between the parties; the issue must be “material.” . . . If no genuine issues of material facts exists, the sole question is whether the moving party is entitled to judgment as a matter of law.

Logan v. Commercial Union Insurance Co., 96 F.3d 971, 978 (7th Cir. 1996).

¹ The two plaintiffs in this action are Enaam Arnaout and John Lindh. Mr. Arnaout has recently been released from the CMU. However, Mr. Lindh remains in the unit and seeks to bring this action not only for himself but for a class of those similarly situated consisting of the current and future Muslim prisoners in the CMU. The motion for class certification remains pending. Because this action is still maintained by both Mr. Arnaout and Mr. Lindh the term “plaintiffs” will be used as appropriate. However, Mr. Arnaout’s specific facts will not be focused upon.

Statement of material facts not in dispute

The CMU was established to house prisoners who the government believes require increased monitoring of their communications in order to protect institutional and/or public safety. (Affidavit of Associate Warden Church, Exhibit 1 to Defendant's Objection to Plaintiffs' Motion to File Amended Complaint [Doc. No. 18-1] ["Church Aff."] ¶ 5). The CMU is a self-contained general population unit where all activities and services take place on the unit. (*Id.*).

CMU is an open self-contained unit, meaning that prisoners are free to move about the unit without the high supervision and restraints that are typical of units featuring controlled movements of prisoners. (Deposition of Associate Warden Church, attached to Motion for Summary Judgment as Exhibit 1 ["Church Dep."] at 14).² There are no controlled movements within the CMU. (*Id.*). Therefore, the prisoners are allowed out of their cells from 6 a.m. until 9:15 p.m., except for count periods. (*Id.* at 12). There is only one count period on weekdays at 4:00 p.m. and an additional count period on weekends and holidays at 10:00 a.m. (*Id.* at 12-13).³ These counts take approximately 30-45 minutes and during the count period prisoners must return to their cells. (*Id.* at 13).

When out of their cells prisoners are free to go to the various areas within the unit, including a lounge area with multiple televisions; a food services area with tables, microwave, and drink dispenser that can be accessed at any time; multi-purpose rooms with a washer and dryer that can be used for personal laundry; rooms with exercise equipment; and an outdoor recreation area containing an area to play basketball and smaller recreation areas. (*Id.* at 14-19).

² Portions of this deposition have already been introduced as evidence in support of the motion for class certification. (Doc. No. 46-1). Mr. Church testified as the designee of the defendant Warden pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. (Church Dep. at 7, Ex. 1 to Church Dep.).

³ There are five segregation cells located in the unit. (Church Dep. at 12). Prisoners in these cells are only allowed out one hour a day. (*Id.*). The segregation is short-term. (*Id.* at 22.)

Thus, during the day while outside of their cells prisoners are allowed to engage in a range of group activities including watching TV, talking, playing basketball, playing cards, etc. (*Id.* at 18-22). Prisoners are even allowed to return to their cells during the day, and can be accompanied by other prisoners. (Plaintiff's First Request for Admissions and Defendant's Responses to Plaintiff's First Request for Admissions, attached to Motion for Summary Judgment as Exhibit 2 ["Admissions"] ¶ 2).

Although the unit is open, there are cameras and listening devices throughout the unit. (Church Dep. at 17). Some of these are visible to the prisoners, and some are not. (*Id.* at 17-18).

There is no chapel in the CMU. (*Id.* at 28). Religious services that are allowed take place in a multi-purpose room, which features a mesh door and mesh barrier between it and the hallway so that the room is visible from its exterior. (*Id.*). The room is also used for education programs. (*Id.*). However, for much of each day there is no programming scheduled for the multi-purpose room. (Admissions ¶ 1, Attachment to Admissions).

The CMU has 55 cells which could be double-celled, although at the current time the prisoners are single-celled and there are no plans to double-cell prisoners. (Church Dep. at 11-12, 21-22). The unit is not to have more than 50 prisoners. (*Id.* at 22). In December of 2009, there were 41 prisoners on the unit. (*Id.*). At the current time there are approximately 35-40 prisoners. (Supplemental Declaration of John Lindh attached to Plaintiffs' Motion for Summary Judgment as Exhibit 3 ["Lindh Supp.,"] at ¶ 8, Attached as Exhibit 3 to Plaintiffs' Motion for Summary Judgment). There is some turnover of prisoners within the CMU, with one to two prisoners either entering or leaving each month. (Church Dep. at 24).

A majority of prisoners in the CMU are Muslim. (*Id.* at 24). In December of 2009, 24 of

the 41 prisoners in the unit identified themselves as Muslim. (Church Aff. at ¶ 6). On July 8, 2010, approximately 25 of the 40 prisoners then on the unit who were recognized as Muslim. (Supplemental Declaration of Enaam Arnaout, Exhibit 2 to Plaintiffs' Memorandum in Support of Motion to Certify Case as Class Action [Doc. No. 46-2] ["Arnaout Supp.,"] at ¶¶ 6-7). On August 25, 2010, there were approximately 20-21 Muslim prisoners on the unit out of the total population of 35-40 prisoners. (Lindh Supp. at ¶ 8). All are Sunni Muslims, with one exception. (*Id.* at ¶ 9). This prisoner is a Shiite, but he worships with the Sunnis. (*Id.*).

Muslims are required to engage in five-daily prayers. (Arnaout Supp. at ¶ 1; Lindh Supp. at ¶ 1). Prayers, or *Salat*, are obligatory and commanded by the Koran. (Lindh Supp. at ¶¶ 1, 3). The prayers create a direct link between the person worshipping and God. (*Id.* at ¶ 3). The Koran commands that the prayers be held at dawn (*Fajr*), early afternoon (*Dhur*), in the late afternoon (*Asr*), at post-sunset (*Maghrib*), and in the evening (*Isha*). (*Id.* at ¶ 4). Depending on the school of Islam to which an adherent belongs, making these prayers in a congregate setting is either considered to be theologically preferable or absolutely required. (Declaration of Enaam Arnaout attached as Exhibit 2 to Plaintiffs' Memorandum in Support of their Motion to file Amended Complaint, Doc. No. 23-2 ["Arnaout Dec.,"] at ¶ 9; Declaration of John Phillip Walker Lindh attached as Exhibit 1 to Plaintiffs' Memorandum in Support of their Motion to file Amended Complaint, Doc. No. 23-1 ["Lindh Dec.,"] at ¶¶ 7-8; and the following affidavits attached as exhibits to Plaintiffs' Memorandum in Support of Motion to Certify Case as Class Action, Doc. No. 46; Affidavit of Ahmed Bilal ["Bilal"] at ¶¶ 1-3, Doc. No. 46-3; Affidavit of Ali Asad Chandia ["Chandia"], Doc. No. 46-4; Affidavit of Avon Twitty ["Twitty"], Doc. No. 46-5; Affidavit of Brian Carr ["Carr"] at ¶¶ 1-3, Doc. No. 46-6; Affidavit of Mokhtar Haouari ["Haouari"] at ¶¶ 1-3, Doc. No. 46-7; Affidavit of Rafil Dhafir ["Dhafir"] at ¶¶ Doc. No. 46-7).

Even if not deemed to be absolutely required, group prayer is preferred because praying in a group multiplies the blessings and utility of prayer. (Arnaout Dec. at ¶ 9).

The prayers feature a prescribed sequence of actions and words including bowing, prostration, and sitting. (Lindh Supp. at ¶ 2). Those praying do not converse among themselves. (*Id.*). The prayers last for only a brief period, approximately ten minutes. (*Id.* at ¶ 1).

In the past, from the time that the first group of prisoners came to the CMU in December of 2006, until June of 2007, Muslim prisoners in the CMU were allowed to pray in a congregate setting for daily prayers occurring during the time periods that prisoners were generally allowed out of their cells. (Arnaout Supp. at ¶¶ 8-11; Declaration of Randall T. Royer, Attached to Plaintiffs' Motion for Summary Judgment as Exhibit 4 ["Royer"] ¶¶ 2-5). However, this ended in June of 2007, when a lockdown was announced during one of the daily prayers and the prisoner leading the prayers and many of those praying did not hear the announcement as it was obscured by a noisy fan and the prisoners therefore did not immediately respond and lock up. (Arnaout Supp. at ¶¶ 10-11; Royer at ¶ 6).

At the current time CMU prisoners, including Muslim prisoners, are allowed one congregate service each week. (Church Dep. at 41-42). The congregate service for Muslim prisoners is the Friday *Jum'ah* service and it takes place in the multi-purpose room described above. (Church Dep. at 29, 31; Admissions ¶ 1 and Attachment to Admissions). Approximately once a month a contracted Imam is present for the *Jum'ah* service. (Admissions ¶ 3). However, the remainder of the times the Friday *Jum'ah* prayers are led by the prisoners, with the prisoners rotating responsibility for leading the prayer. (Admissions ¶ 4).

Although prisoners may not recite the daily prayers together, they may do so individually. (Church Dep. at 41, 46). However, the prohibition on congregate prayer applies to

prevent even two prisoners from saying the prayers together. (*Id.* at 46).

The CMU prohibits the daily congregate prayer because of what the Warden's designee states is the intensiveness of staff supervision required and the disruption of the daily unit occasioned by the prayers. (*Id.* at 44). There is a concern when "you have a group of the same affiliation discussing things specific to that affiliation." (*Id.* at 51). However, the prisoners are allowed to gather in groups for such things as basketball, watching television, speaking about public events, etc. (*Id.* at 46). There is no restriction on the numbers of prisoners who can engage in these activities. (*Id.* at 20-21, 46-47).

The Warden, through her designee, believes that the restriction to one congregate service a week is pursuant to a Program Statement from the Bureau of Prisons which states that "authorized congregate services will be made available for all inmates weekly." (Church Dep. at 41-42 and Ex. 4 to Dep. at p. 3 [U.S. Department of Justice – Federal Bureau of Prisons, *Religious Beliefs and Practices*, No. P5360.09 (12/31/2004)]). However, many Bureau of Prison institutions allow Muslim prisoners to pray together for the brief daily prayers. *See* Bilal at ¶¶ 4-7 (congregate daily prayers allowed at FCI Terminal Island and FCI Lompoc); Chandia at ¶¶ 4-5 (congregate daily prayers allowed at FCI McKean); Twitty at ¶¶ 4-7 (congregate daily prayers allowed at United States Penitentiary in Leavenworth, Kansas); Carr at ¶¶ 4-8 (congregate daily prayers allowed at United States Penitentiaries in Lewisburg, Pennsylvania; Lompoc, California; and, Leavenworth as well as in FCI Allenwood); Haouari at ¶¶ 4-7 (congregate daily prayers allowed at the Metropolitan Correctional Center in Manhattan, the Metropolitan Detention Center in Brooklyn, FCI Ray Brook, and in the United States Penitentiary in Lewisburg); Dhafir at ¶¶ 4-6 (congregate daily prayers allowed at FCI Fairton).

Indeed, despite the prohibition that is the subject of this case, the Warden has allowed

Muslim CMU prisoners to engage in regular daily prayer within the past year. During the month long holiday of Ramadan in August and September of 2009, CMU prisoners were allowed access to the multi-purpose room for three of the five daily prayers. (Arnaout Dec. at ¶ 3-7 and attachment to the Declaration; Lindh Dec. at ¶¶ 3-7). A formal memorandum was issued, signed by the Warden, allowing the Muslim CMU prisoners to meet, and specifying the times that each prayer would begin. (Attachment to Arnaout Dec.). The prayers were led by the prisoners. (Lindh Supp. at ¶10). All, or virtually all, of the Muslim prisoners on the CMU participated in the group prayers and they occurred without disturbances or incidents. (Arnaout Dec. at ¶ 6-7; Lindh Dec. at ¶ 5-6). During the current Ramadan, beginning in August of this year, daily prayers have again been allowed, led by prisoners, although they are allowed only one time a day. (Lindh Dec. at ¶ 11).

Plaintiff Lindh believes, as do many of the Muslim prisoners on the CMU, that it is mandatory for the daily prayers to be performed communally and wishes to be able to attend congregate daily prayer. (Lindh Dec at ¶ 7; Bilal at ¶ 3; Chandia at ¶ 3; Twitty at ¶ 3; Carr at ¶ 3; Haouari at ¶ 3; Dhafir at ¶ 3).⁴ Plaintiff Lindh timely pursued his administrative remedies and was informed at each level that no congregate prayer was allowed other than the Friday *Jum'ah* prayer. (Lindh Supp. at ¶ 12 , and attachments to Lindh Supp.). Plaintiff Lindh attempts to follow all the laws of Islam and the denial of the ability to pray with other Muslim prisoners is imposing a substantial burden on his exercise of his religion. (Lindh Supp. at ¶¶ 6, 13).

Argument

I. A violation of RFRA exists when an agency of the United States substantially burdens the exercise of a prisoner's religion, unless the government demonstrates that the burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest

⁴ Plaintiff Arnaout also indicated a desire to engage in the daily prayers with other prisoners. (Arnaout Supp. at ¶ 3).

RFRA was explicitly enacted “to restore the compelling interest test as set forth in *Sherbet v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened.” 42 U.S.C. § 2000bb(b)(1). The statute reflects Congress’ concern about the Supreme Court’s holdings in *Employment Division v. Smith*, 494 U.S. 872 (1990), and *O’Lone v. Shabazz*, 482 U.S. 342 (1987), both of which, in Congress’ estimation, weakened traditional First Amendment protections. S. Rep. 103-11, 1993 U.S.C.C.A.N 1892, 1895-1901. RFRA therefore provides that “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.” 42 U.S.C. § 2000bb-1(a). Subsection (b) states, “Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1(b). Therefore, under RFRA the plaintiff has the burden of persuasion of showing that a challenged practice creates a substantial burden on religious exercise at which point the burden of persuasion shifts to the government to prove that the burden is necessitated by a compelling governmental interest and is the least restrictive means to meet that interest. *See, e.g., Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1069 (9th Cir. 2008), *cert den.*, 129 S.Ct. 2763 (2009).

In *Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that RFRA was not a valid exercise of Congress’ powers under Section 5 of the Fourteenth Amendment to enforce the substantive portions of that amendment. *Id.* at 532-35. However, this holding did not disturb the constitutionality of RFRA when addressed to the United States, as opposed to those acting under color of state law, inasmuch as “legislation affecting the internal operations of the national

government does not depend on § 5 [of the Fourteenth Amendment]; it rests securely on Art. I § 8 cl. 18.” *O’Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003) (holding that RFRA applies to Bureau of Prisons). Therefore, “[e]very appellate court that has squarely addressed the question has held that the RFRA governs the activities of federal officers and agencies.” *Id.*⁵

II. The denial of congregate prayer to plaintiffs affects religious exercise motivated by sincere belief

RFRA states that “the term ‘exercise of religion’ means religious exercise, as defined in section 2000cc-5 of this title.” 42 U.S.C. § 2000bb-2(4). The latter statutory section, part of the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), 42 U.S.C. § 2000cc-1, *et seq.*, notes that “[t]he term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7). This requires that “[a] litigant’s claimed beliefs ‘must be sincere and the practice[] at issue must be of a religious nature.’” *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting *Leviton v. Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002)).⁶ The plaintiffs in this case easily meet this standard.

Obviously, prayer is a religious exercise. *See, e.g., Lynch v. Donnelly*, 465 U.S. 688, 716 (1984) (Brennan, J., dissenting) (citing to the writings of Thomas Jefferson, 11 Jefferson’s Writings 428-430 (1967)). Group prayer is no less a religious exercise. As the Supreme Court

⁵ Congress responded to *Flores* by enacting RLUIPA, 42 U.S.C. § 2000cc. And, RFRA and RLUIPA are “substantively identical with respect to prisoners’ entitlements.” *Whitfield v. Illinois Dept. of Corrections*, 237 Fed. Appx. 93, *1 (7th Cir. 2007). RLUIPA applies to state and local government and to those acting under color of state law. 42 U.S.C. § 2000cc-5(4). However, in order for RLUIPA to apply, the program or activity in question must have received federal financial assistance, affect interstate or foreign commerce, or involve land use regulations. 42 U.S.C. § 2000cc(a)(2).

⁶ When it was first enacted, the term “exercise of religion” in RFRA was defined as “the exercise of religion under the First Amendment to the Constitution.” 42 U.S.C. § 2000bb-2(4) (1999). This led to “many courts requir[ing] the religious exercise to be ‘central’ to the religion. . . . The RFRA was amended by the RLUIPA’s enacting legislation to incorporate the same definition for ‘exercise of religion’ as ‘religious exercise’ under the RLUIPA.” *Adkins v. Kaspar*, 393 F.3d 559, 567 n.34 (5th Cir. 2004).

noted in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), in upholding the constitutionality of RLUIPA, “[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.” *Id.* at 720 (quoting *Smith*, 494 U.S. at 877). It is uncontested that the plaintiffs desire to engage in congregative prayer as part of their religious practices. And, “[i]t is difficult to imagine a burden more substantial than banning an individual from engaging in a specific religious practice.” *Meyer v. Teslik*, 411 F.Supp.2d 983, 989 (W.D. Wis. 2006) (concerning the denial of the ability of a prisoner to attend group Native American religious services.)

There also can be no question that the “sincerity” requirement is met here. Mr. Lindh is an observant Muslim and has forcefully argued that as a Muslim he is required by his religion to perform daily prayers in congregation. (Lindh Aff. at ¶ 7, Lindh Supp at ¶¶ 1, 6-7, and attached grievances to Lindh Supp.).⁷ The mandatory, or at least preferred, status of group prayer is well-recognized. *See, e.g.*, Arnaout Dec. at ¶ 9, Bilal at ¶¶ 1-3, Chandia at ¶¶ 1-3; Twitty at ¶¶ 1-3; Carr at ¶¶ 1-3, Haouari at ¶¶ 1-3; Dhafir at ¶¶ 1-3. Indeed, in responding to Mr. Lindh’s grievances, the Bureau of Prisons did not doubt his sincerity, but only reiterated the policy that the only group prayer allowed was the *Jum’ah* prayer. (Lindh Supp., Attached grievances). Mr. Lindh has availed himself of every group prayer opportunity that has been made available to him. (Lindh Supp. ¶ 4). He has a sincere religious belief that group prayers are a necessity.

III. The denial of daily congregative prayer substantially burdens the religious exercise

RFRA and RLUIPA both concern government action that “substantially burdens” religious exercise. 42 U.S.C. § 2000bb-1(a); 42 U.S.C. § 2000cc(a)(1). The term is not defined in either statute. In *Mack v. O’Leary*, 80 F.3d 1175 (7th Cir. 1996), *vacated and remanded for*

⁷ *See Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008) (noting that prisoner had established that the prisoner had demonstrated that refraining from eating was a religious exercise under RLUIPA where he consistently requested a non-meat diet as a religious accommodation).

consideration in light of *City of Boerne v. Flores*, 522 U.S. 801 (1997), the Seventh Circuit, after reviewing both Supreme Court precedent and law from other circuits, held that a substantial burden of religious exercise under RFRA “is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifest a central tenet of a person’s religious beliefs, or compels conduct or expression that is contrary to those beliefs.” *Id.* at 1179. The Seventh Circuit has more recently “held that ‘in the context of RLUIPA’s broad definition of religious exercise [a definition now shared by RFRA], a . . . regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable.” *Koger*, 523 F.3d at 799 (quoting *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003)).

Mr. Lindh and the other Muslim prisoners believe that they are to engage in daily congregate prayer. They cannot do so. The religious exercise – group prayer – is not only impracticable; it is impossible. This is a substantial burden. *See, e.g., Murphy v. Missouri Dept. of Corrections*, 372 F.3d 979, 988 (8th Cir. 2004) (In finding that summary judgment for defendants was precluded on plaintiff’s claims that RLUIPA was violated by denial of group worship the court noted that “[w]e have stated that a substantial burden to free exercise rights may exist ‘when a prisoner’s sole opportunity for group worship arises under the guidance of someone whose beliefs are significantly different from his own.’” [internal citation omitted]); *Phillips v. Ayers*, 2010 WL 1947015, *8 (C.D. Cal. Jan. 14, 2010), *Report and Recommendation Adopted*, 2010 WL 1947019 (C.D. Cal. May 12, 2010) (The prison’s prohibition on group worship was a “substantial burden” inasmuch as “[i]t is clear that an outright ban on a particular religious exercise is a substantial burden on that religious exercise.”); *Lee v. Gurney*, 2009 WL

3109850, *6 (E.D. Va. Sept. 25, 2009) (“Defendants concede that the prohibition on group religious activity in the recreation yard substantially burdens Plaintiffs’ religious exercise.”); *Meyer*, 411 F.Supp.2d at 989 (The denial of plaintiff’s ability to attend religious services for three months created a substantial burden.); *Moore v. Cross*, 2007 WL 835417, *13 (D. Minn. Mar. 15, 2007) (“[A]ctions by prison officials that have been found to substantially burden a prisoner’s religious beliefs include . . .barring a prisoner from the prison chapel, and thus preventing him from performing communal prayer.” [Internal citation omitted]).

IV. The Warden cannot carry her burden of demonstrating that allowing group prayers for Muslim prisoners during the time that they are out of their cells furthers a compelling governmental interest

The plaintiffs have established that the denial of congregate prayer substantially burdens their religious exercise. This satisfies their burden of persuasion under 42 U.S.C. § 2000bb-1(a). The Warden has the burden of demonstrating that this substantial burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1(b). The Warden will not be able to demonstrate that the prohibition on congregate prayer during the times that prisoners are allowed out of their cells furthers a compelling governmental interest.⁸ Summary judgment must therefore be awarded to the plaintiffs.⁹

In reintroducing the compelling governmental interest standard through RFRA, the

⁸ As indicated, the Warden also carries the burden of showing that the denial of congregate prayer is the least restrictive alternative. “[A] prison ‘cannot meet its burden to prove least restrictive alternative unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.’” *Shakur v. Schirro*, 514 F.3d 878, 890 (9th Cir. 2008) (internal citation omitted). Mr. Lindh does not believe that this burden can be met as well, but reserves further comment until the Warden files her summary judgment memorandum and materials.

⁹ “[A] movant for summary judgment can meet its burden by ‘show[ing] that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial.’” *U.S. v. Real Property Located at 475 Martin Lane, Beverly Hills Calif.*, 298 Fed.Appx. 545, 549 (9th Cir. 2008) (quoting *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000)).

Senate's Judiciary Committee stressed that:

[t]he committee does not intend the act to impose a standard that would exacerbate the difficult and complex challenges of operating the Nation's prisons and jails in a safe and secure manner. Accordingly, the committee expects the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.

At the same time, however, 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.

Sen. Rep. 103-111, 1993 WL 286695 at 1899-1900. Additionally, the Committee stressed that there must be a "proper balance between one of the most cherished freedoms secured by the first amendment and the compelling governmental interest in orderly and safe operations of prisons." *Id.* at 1900.

The Warden's designee has indicated that the basis for the ban on communal daily prayer is because it is disruptive, requires staff supervision, and raises concerns because persons of the same "affiliation" are "discussing things specific to that affiliation." (Church dep. at 44, 51). This is a security concern. As one court has noted, institutional security is "the most compelling governmental interest in a prison." *Ochs v. Thalacker*, 90 F.3d 293, 296 (8th Cir. 1996). But, as indicated, "[a]lthough we give prison officials 'wide latitude within which to make appropriate limitation,' they 'must do more than offer conclusory statements and post hoc rationalizations for their conduct.'" *Murphy v. Missouri Dept. of Corrections*, 372 F.3d at 989 (internal citation omitted).

The problem for the Warden is that the evidence is uncontested that all of the Muslim prisoners in the CMU are allowed to gather to watch television, or to engage in recreational activities in the outside area, or to sit in a common area and talk about anything – except engage

in brief prayers that feature no conversations between those praying. This might be a different case if the prisoners were locked in their cells and were asking for special accommodations to be brought out to engage in prayer. In such a situation it is conceivable that legitimate security concerns could be articulated. *Cf.*, *Williams v. Jabe*, 2008 WL 5427766, *7 (W.D. Va. Dec. 31, 2008), *aff'd*, 339 Fed.Appx. 317 (4th Cir. 2009), *cert. denied*, 130 S.Ct. 1061 (2010) (When prison had an 8:00 p.m. institutional curfew, denying congregational prayer after that time furthered “the compelling government interest in prison security”). Mr. Lindh is not arguing that Muslim prisoners should be allowed to pray during times that all prisoners are locked down. However, there is absolutely no reason why the Muslim prisoners cannot gather together and pray during the times that they are free to gather together and talk, watch television, play and observe basketball games, *etc.*

The Warden has tacitly recognized this already. For, during the full month of Ramadan in 2009, Muslim prisoners were allowed to go into the CMU’s multi-purpose room for three of the daily prayers. (Attachment to Arnaout Dec.). No disruption or problems arose from allowing the prisoners to attend these daily congregate prayers from August 21, 2009 through September 22, 2009.¹⁰ During Ramadan in 2010, the prisoners have been allowed to pray together for one of the daily prayers. (Lindh Supp. at ¶ 11). That congregate prayers have been allowed without problem undercuts any claim of a compelling governmental interest in security or any other concerns. In *Lee v. Gurney*, 2009 WL 3109850 at *5-*7, the court denied defendants’ motion for summary judgment concerning plaintiff’s claim that RLUIPA was

¹⁰ Congregate prayer was also allowed from the time the first group of prisoners were brought to the CMU in December of 2006 until June of 2007 at which time it was discontinued after prisoners did not immediately lock up when ordered to do so. (Arnaout Supp. at ¶¶ 10-11, Royer at ¶¶ 4-6). This past incident did not prove an institutional impediment to allowing congregate prayers during Ramadan in 2009 or to allowing the weekly *Jum’ah* prayers in congregation.

violated by the ban on group prayer by Muslims during recreation periods at the Nottoway Correctional Center (“NCC”), part of the Virginia Department of Corrections (“VDOC”). The Court noted:

Defendants . . . do not point to any evidence that religious gatherings on the NCC recreation yard or at any other VDOC facility ever have been used for . . . subversive activities. . . Moreover, Defendants do not counter Plaintiff’s evidence that for ten years he conducted group Salat on the NCC recreation yard without any incident. . . Thus, it is doubtful that Defendant have adequately shouldered their burden of demonstrating that no material questions of fact exist as to whether the ban on group religious activity in the recreation yard furthers a compelling state interest.

Id. at *6.

Also significant is that congregate prayer is available in other BOP institutions. The fact that many of the prisoners who are now confined in the CMU were allowed to pray together with other Muslims in BOP prisons undercuts any “compelling governmental interest” argument that the Warden could make.

RFRA demands that the Warden present actual evidence that demonstrates that there is a compelling governmental interest in denying the daily prayers 42 U.S.C. § 2000bb-1(b)(1). To satisfy this high hurdle, the Warden must present some basis for security concerns. *Murphy*, 372 F.3d at 989. Given the freedom which the prisoners have to congregate and the fact that congregate worship has been allowed in the past for lengthy periods of time without problems, the Warden cannot meet her burden.

Conclusion

Summary judgment must therefore be entered for the plaintiffs. This Court must declare that the denial of all congregate prayer, with the exception of the *Jum’ah* prayer, to the Muslim prisoners in the CMU violates the Religious Freedom Restoration Act and an injunction must be entered allowing congregate daily prayers to occur during all times that the CMU prisoners are

allowed out of their cells.

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Certificate of Service

I hereby certify that on this 26th day of August, 2010, a copy of the foregoing was filed electronically with the Clerk of this Court. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system and the parties may access this filing through the Court's system.

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