No. 08-2044

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIAN NELSON,

Plaintiff-Appellant

v.

CARL MILLER,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANT AND URGING REVERSAL ON RLUIPA CLAIM

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INTEREST OF THE UNITED STATES

The United States submits this *amicus curiae* brief pursuant to Federal Rule of Appellate Procedure 29(a).

The United States has authority to enforce compliance with the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc, *et seq.*, by bringing a civil action for injunctive or declaratory relief. 42 U.S.C. 2000cc-2(f). The district court's interpretation of the substantial burden language

of the statute may impair the ability of the United States to carry out its statutory responsibilities.

Pursuant to its RLUIPA responsibilities, the United States filed a brief as *amicus curiae* in this Court in *Sts. Constantine & Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895 (7th Cir. 2005), concerning the provision of RLUIPA involving government land use regulations that are alleged to impose a substantial burden on religious exercise. 42 U.S.C. 2000cc.

STATEMENT OF THE ISSUE

Whether defendant Miller's refusal to permit inmate Nelson to receive a diet that complies with his religious beliefs imposed a substantial burden on Nelson's religious exercise in violation of his rights under Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc-1(a).

STATEMENT OF THE CASE

1. Statutory Background

RLUIPA was enacted in 2000 after the Supreme Court held that its predecessor statute, the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb-2000bb-4, was unconstitutional as applied to State and local governments. *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). RLUIPA is narrower in scope than RFRA, as it is limited to state and local laws and

regulations concerning land use and the religious rights of persons in institutions receiving federal financial assistance. See 42 U.S.C. 2000cc(a)(2) & 2000cc-1(b). In holding that RLUIPA is consistent with the Establishment Clause, the Supreme Court stated that the statute "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* v. *Wilkinson*, 544 U.S. 709, 721 (2005).

RLUIPA provides that

> [n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, * * * even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that 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. 2000cc-1(a).

2. Proceedings Below

In February 2003, Brian Nelson, an inmate incarcerated in the Tamms Correctional Center of the Illinois Department of Corrections (Tamms) filed suit in state court against Carl Miller, head chaplain at Tamms. R. 1.[1] On April 23, 2003,

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[1] The citation "R. ___" refers to the documents filed in the district court as they appear on the docket sheet. The citation "Tr. ___" refers to the pages of the

(continued...)

the case was removed to federal court, R. 1, and, on April 2, 2004, it was referred to United States Magistrate Judge Clifford J. Proud. R. 9 at 5. On August 17, 2005, the district court (Gilbert, J.) adopted the magistrate's report and recommendation that Nelson's motion for a preliminary injunction be denied. R. 29.

On July 17, 2006, Nelson filed an amended complaint against Miller, in his individual and official capacities, under 42 U.S.C. 1983, RLUIPA, and state law. R. 33. The complaint sought a declaratory judgment, injunctive relief, and compensatory and punitive damages. R. 33. Nelson claimed that Miller's refusal to approve a vegan diet placed a substantial burden on his religious exercise in violation of the Free Exercise Clause of the First Amendment and RLUIPA. The complaint also alleged that Miller's actions in denying Nelson a vegan diet while permitting prisoners holding other religious beliefs to receive such a diet violated the Establishment and Equal Protection Clauses.

The parties filed cross-motions for summary judgment. On January 30, 2007, the magistrate issued an order granting in part and denying in part Miller's motion for summary judgment. R. 56. The magistrate found that Nelson had

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[1](...continued)
January 7, 2008, trial transcript. The citations "Pl. Exh. ___" and "Def. Exh. ___" refer to the exhibits introduced at trial.

failed to exhaust his administrative remedies with respect to his free exercise and RLUIPA claims insofar as they were based on his belief that he cannot eat *any* meat and dismissed that aspect of his claims.[2] R. 56 at 17; see *Nelson* v. *Miller*, No. 03-254-CJP, 2008 WL 904735, at *1 (S.D. Ill. Mar. 31, 2008). In contrast, the magistrate ruled that Nelson *had* exhausted his administrative remedies with respect to (1) his free exercise and RLUIPA claims insofar as they were based on his belief that he cannot eat any meat on Fridays and during all of Lent; and (2) all aspects of his Establishment Clause claim. R. 56 at 11-12; see *Nelson*, 2008 WL 904735, at *1.[3] On September 20, 2007, the magistrate denied Nelson's motion

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[2] Under the Prison Litigation Reform Act (PLRA), 42 U.S.C. 1997e(a),

> [n]o action shall be brought with respect to prison conditions under [42 U.S.C.] section 1983 * * *, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

RLUIPA provides specifically that nothing therein "shall be construed to amend or repeal" the PLRA. 42 U.S.C. 2000cc-2(e).

[3] The magistrate found that Nelson's request for injunctive relief was moot because Nelson was receiving a vegan diet as of the time of the order. R. 56 at 12-13, 17. He indicated, however, that the request for a declaratory judgment would survive as a predicate for an award of damages. R. 56 at 13. The magistrate also concluded that damages against Miller in his official capacity were barred by Eleventh Amendment sovereign immunity as to the constitutional claims brought under 42 U.S.C. 1983 and RLUIPA, and that material issues of fact precluded summary judgment as to whether qualified immunity would shield Miller from

(continued...)

for summary judgment, finding that there were material questions of fact regarding Nelson's evolving religious beliefs. R. 62 at 5.

The magistrate conducted a bench trial on January 7, 2008. On March 31, 2008, the magistrate issued an order entering judgment in favor of Miller on all counts of the amended complaint. R. 77; *Nelson*, 2008 WL 904735, at *11. Nelson filed a timely notice of appeal on April 24, 2008. R. 78.

STATEMENT OF FACTS

1. Facts

Plaintiff Brian Nelson has been incarcerated in the Tamms Correctional Center of the Illinois Department of Corrections (Tamms) since 1998. Tr. 15. Tamms offers a "regular" diet, which may or may not include meat at any given meal, to all inmates. Tr. 148. The facility also prepares a vegan meal for inmates who have been approved for such a diet under Institutional Directive 04-25-101, which provides that "[c]ommitted persons shall be permitted to abstain from any foods the consumption of which violates their required religious tenets." *Nelson* v. *Miller*, No. 03-254-CJP, 2008 WL 904735, at *2 (S.D. Ill. Mar. 31, 2008)

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[3](...continued)
damages in his individual capacity. R. 56 at 14-18.

(quoting IDO 04-25-101 (Pl. Exh. 25)).[4] The vegan diet contains no animal flesh or animal by-products such as cheese and eggs. *Nelson*, 2008 WL 904735, at *2 (citing Tr. 148-149, 152-153).

The institutional directive requires inmates to make a written request "for a diet due to religious beliefs," which must contain "*[s]pecific* details as to the tenets of the religion * * * and confirmation from the religious faith representative as to the dietary requirements." Pl. Exh. 25 at 9. The senior chaplain of the facility has authority to review such requests. Pl. Exh. 25 at 6.

When Nelson was initially incarcerated in 1983, he designated his religion as Roman Catholic. Tr. 13. By the time Nelson was transferred to Tamms in 1998, he had taken a greater interest in his faith, including studying the teachings of St. Benedict, which led him to request a meatless diet on Fridays throughout the year as an act of penance. Tr. 15-17. On May 8, 1999, Nelson requested "a no meat diet on Fridays and through Lent," based on his belief that "[f]rom Ash Wednesday through Holy Thursday * * * you're not supposed to eat meat * * * unless you asked for dispensation for illness." Tr. 18-19; see Pl. Exh. 23. His request for such a diet was denied by Chaplain Hal Barker, who has since left

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[4] IDO 04-25-101 was issued under the authority of state law. 20 Ill. Adm. Code 425.

Tamms. Pl. Exh. 23; Tr. 18. In a memorandum dated November 23, 1999, from Chaplain Barker to Nelson, Barker made reference to Nelson's June 26, 1999, written request for a "religious modification to his diet," and noted that Father Fortenberry, the Catholic priest at Tamms, "reiterated the 'strong recommendation' of the modification." Pl. Exh. 23 at 2. Barker stated, however, that a representative of the Chief Chaplain's office had advised him to deny Nelson's request for a meatless diet on all Fridays during the year, other than Fridays during Lent, in accordance with a dispensation given by the Pope. Pl. Exh. 23 at 1-2.

On April 23, 2001, Nelson submitted a written request for a religious diet "free of 'flesh meat on Fridays'" as an act of penance. *Nelson*, 2008 WL 904735, at *2 (citing Pl. Exh. 5). Nelson's request stated that Father Fortenberry supported and encouraged such acts of penance. *Ibid.* He indicated that he would be willing to accept a "vegetarian/religious no meat diet for all meals" in order to be able to do penance on Fridays, if that would be more convenient for the facility. Pl. Exh. 5 at 2. Nelson acknowledged the existence of the papal dispensation but stated that he did not seek such a dispensation because it was "against [his] beliefs to eat meat on any [F]riday." Pl. Exh. 5 at 2. Nelson also noted that the state prison system accommodated numerous other religions in which not all members abide by a religious diet. Pl. Exh. 5 at 2.

On May 2, 2002, defendant Carl Miller, Tamms' senior chaplain and an ordained Lutheran minister, issued a memorandum denying Nelson's request for a meatless diet as an act of penance either all the time or on Fridays. *Nelson*, 2008 WL 904735, at *2 (citing Pl. Exh. 22). Miller explained that "there are many ways to do penance," and, in any event, Nelson was free to "choose not to eat meat * * * on Fridays." *Ibid*. (citing Pl. Exh. 22). Miller concluded that refraining from eating meat on Fridays as an act of penance was "not required by the Roman Catholic faith nor does Jesus or God's Word command abstention from meat on Fridays for penance." *Ibid.* (citing Pl. Exh. 22). Nothing in Miller's response questioned the sincerity of Nelson's religious beliefs. Tr. 22-23.

During Lent 2002, Nelson abstained from eating any meat when he was served the regular diet. *Nelson* v. *Miller*, 2008 WL 904735, at *5. Because some meals, such as spaghetti with meat sauce, contained meat that could not be separated from the entree, Nelson often had to skip a significant portion of the meal in order to avoid eating meat. *Ibid.* As a result, Nelson was hospitalized during Lent that year because he lost substantial weight. *Ibid.* Nelson testified that "during this time period, his bones began to protrude, he was cold, and he was depressed and anxious." *Ibid*. (citing Tr. 43, 45, 50-51).

On May 8, 2002, Nelson filed an administrative grievance challenging the

denial of a diet without "flesh meat" on Fridays and during Lent. Pl. Exh. 1. He noted in the grievance that Muslims and Buddhists at Tamms were permitted vegan diets and did not have to "eat around meat" as he was required to do. *Nelson*, 2008 WL 904735, at *3 (citing Pl. Exh. 1). He also indicated that he would be willing to accept a "vegetarian diet to meet the NO FLESH MEAT belief, on all Fridays, [e]veryday throughout Lent or if necessary and to ease any burden on Tamms/IDOC everyday or ease security concerns." (Pl. Exh. 1). That grievance was denied at the institutional level on the ground that a non-meat diet on Fridays is not required by Nelson's faith, and the Illinois Department of Corrections Administrative Review Board denied Nelson's appeal. *Nelson*, 2008 WL 904735, at *3 (citing Pl. Exs. 1 & 2).

Meanwhile, Nelson continued his religious studies and learned that St. Benedict's teachings give rise to two different penitential dietary restrictions: abstention from eating the flesh of four-footed animals, which most Benedictine monks follow, and abstention from all meat, which the Cistercians, a related religious order, follow. Tr. 26. On July 20, 2002, Nelson wrote to Miller citing the rule requiring abstention from eating the flesh of four-footed animals. *Nelson*, 2008 WL 904735, at *3 (citing Pl. Exh. 6). Abstention from eating the meat of four-footed animals would permit eating chicken, turkey, fish, eggs, and dairy

foods. *Nelson*, 2008 WL 904735, at *5. Several weeks later, Nelson provided Miller with letters from Father Fortenberry and another Catholic priest, Father Domenic Roscioli, in support of his desire to follow a vegetarian or non-meat diet as part of his faith. *Id.* at *4 (citing Pl. Exhs. 8, 9, & 21).

Miller sent a memorandum to Nelson on August 6, 2002, acknowledging Nelson's request to "abstain entirely from eating the flesh of four-footed animals" in accordance with Chapter 39 of The Rule of St. Benedict. Pl. Exh. 10. Miller stated that it was his understanding from materials that Nelson had supplied to him that the rule against eating the flesh of four-footed animals applied only to Cenobite monks who live in monasteries, and therefore Miller could not grant his request for a vegan religious diet. Pl. Exh. 10.

On September 15, 2002, Nelson filed a second grievance, asserting that his religious beliefs as a Catholic following the Rule of St. Benedict forbade eating "the flesh meat of four[-]legged animals" at all times and complaining that Miller had denied his request for a religious diet out of ignorance. *Nelson*, 2008 WL 904735, at *4 (citing Pl. Exh. 3); see Pl. Exh. 17 (booklet entitled *St. Benedict's Rules For Monasteries*). In denying the grievance at the institutional level, prison officials indicated that "until [Miller] has evidence that inmate Nelson has or is fulfilling the requirements of being a Cenobite monk * * * he cannot grant inmate

Nelson's request to receive a vegan religious diet." Pl. Exh. 3; see Tr. 32; see also Tr. 115-116 (Miller testimony). The grievance was also denied on appeal, with no suggestion that Nelson's beliefs lacked sincerity. Tr. 37.[5]

2. The Decision Below

On March 31, 2008, the magistrate issued an order entering judgment in favor of Miller on all counts of the amended complaint. *Nelson*, 2008 WL 904735.

a. Free Exercise Clause Claim

The magistrate ruled that insofar as Institutional Directive 04-25-101, § II(I)(3), required that requests for a religious diet be in writing, give specific details concerning the applicable religious tenet, and require confirmation from a faith representative, the directive is appropriate on its face, but that it could be misapplied, and that Miller's application of the directive "was clearly inconsistent with the principle enunciated in *Thomas* [v. *Review Board of Indiana Employment Security Division*, 450 U.S. 707, 715-716 (1981)], that government is not equipped to be the arbiter of religious doctrine and personal belief." *Nelson*, 2008 WL

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[5] On October 8, 2002, Miller quoted the institutional directive in stating that accommodated dietary restrictions must be religious tenets, "a requirement of the religion." Pl. Exh. 20; *Nelson*, 2008 WL 904735, at *4. Miller continued to assert that the Roman Catholic faith does not require abstention from eating meat on Fridays except during Lent. Pl. Exh. 18; *Nelson*, 2008 WL 904735, at *4.

904735, at *6-7. Nonetheless, the magistrate concluded that Nelson did not establish a violation of his free exercise rights because any misapplication of the directive by Miller did not substantially burden Nelson's observance of his religious beliefs. *Ibid.*

Specifically, the magistrate ruled that because Nelson failed to exhaust his administrative remedies regarding his final request that he be given a totally non-meat diet, the "only relevant religious tenet at issue is abstention from eating the flesh of four-legged animals on Fridays and during Lent." *Nelson*, 2008 WL 904735, at *7. The Tamms dietician testified that the regular diet would be nutritionally adequate if an inmate simply refrained from eating the meat of four-legged animals. *Ibid.* Based on that testimony, the magistrate reasoned that Nelson did not require a vegan diet to comply with his religious beliefs and therefore that Nelson failed to show that Miller's refusal to approve such a diet impeded or burdened his religious beliefs in any way. *Ibid.* The magistrate noted elsewhere in the opinion, *id.*, at *3, and also in the January 30, 2007, summary judgment order, R. 56 at 3, that Nelson had exhausted his administrative remedies with regard to his request for a diet free of all meat on Fridays and during Lent. But the magistrate failed to mention the claims regarding abstention from all meat on Friday and during Lent in the Free Exercise Clause discussion, instead focusing

on the claim about abstaining from the meat of four-legged animals as the "only relevant religious tenet at issue." *Nelson*, 2008 WL 904735, at *7.

b. *RLUIPA*

For the same reasons, the magistrate concluded that because "there was no impediment to plaintiff complying with his religious dietary requirements, the required 'substantial burden' [on Nelson's religious exercise] is absent and [his] RLUIPA and [state law] claims fail." *Nelson*, 2008 WL 904735, at *8.

c. *Establishment Clause And Equal Protection Claims*

Although he acknowledged that Miller's practice of automatically giving Muslims and Black/African Hebrew Israelites a vegan diet without requiring proof that such a diet is religiously mandated contrasted with Miller's insistence that Nelson could not have a non-meat diet since it was not a requirement of Catholicism, the magistrate nonetheless concluded that Miller did not violate either the Establishment Clause or deny Nelson constitutional equal protection. *Nelson*, 2008 WL 904735, at *8. Since Nelson was the "first declared Catholic to claim any dietary requirements beyond abstaining from meat on Fridays during Lent," the magistrate found that Nelson was treated in accordance with standard procedure for "nontraditional dietary requests," and "notions of neutrality and equality" therefore were not offended. *Ibid*.

SUMMARY OF ARGUMENT

RLUIPA forbids government officials such as Chaplain Miller from imposing a substantial burden on the religious exercise of incarcerated persons such as Nelson unless the imposition of such a burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. 2000cc-1(a). Under RLUIPA, "[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)(A).

Nelson followed established institutional procedures for requesting a diet that complies with his religious beliefs. Yet Miller repeatedly denied Nelson a non-meat diet, which was readily available in the facility and already being served to many other inmates, because Nelson was unable to show that his religion, Roman Catholicism, required members to refrain from eating meat. Neither Miller nor any of the other prison officials who rejected Nelson's administrative grievances ever questioned the sincerity of Nelson's beliefs that adhering to a non-meat diet on all Fridays and during Lent was a permissible way for him to do penance for his sins. In *Koger* v. *Bryan*, 523 F.3d 789 (7th Cir. 2008), this Court established that it is a violation of RLUIPA for prison officials to deny an inmate's request for a non-meat diet on the ground that his religion does not require such a

dietary restriction. On that basis alone, the magistrate's decision should be reversed.

In addition, the magistrate applied an incorrect standard in finding that Nelson had failed to show that denial of a non-meat diet imposed a substantial burden on his religious exercise within the meaning of RLUIPA. During the period that the prison refused to accommodate his request for a non-meat diet, Nelson avoided eating all meat on his tray on Fridays and for the forty days of Lent in 2002. The magistrate found, based on the testimony of the Tamms dietician, that "there probably was insufficient nutrition in the regular diet plan if all meat were skipped." *Nelson* v. *Miller*, No. 03-254-CJP, 2008 WL 904735, at *5 (S.D. Ill. Mar. 31, 2008). And, indeed, Nelson lost so much weight and body mass during the period when he abstained from all meat that he had to be hospitalized. See *ibid*.

Congress intended that RLUIPA's substantial burden standard be interpreted in accordance with Free Exercise Clause principles established by the Supreme Court prior to *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990). See 146 Cong. Rec. S7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy); *Koger*, 523 F.3d at 799. Under those principles, a "government imposes a substantial burden on a

person's beliefs when it 'put[s] substantial pressure on an adherent to modify his behavior and violate his beliefs.'" *Koger*, 523 F.3d at 799 (quoting *Thomas* v. *Review Bd.*, 450 U.S. 707, 718 (1981)). Here, the denial of Nelson's request for a non-meat diet put pressure on him to violate his religious beliefs – especially by eating meat during the forty days of Lent – in order to receive adequate nutrition. See *Hunafa* v. *Murphy*, 907 F.2d 46, 47 (7th Cir. 1990). Accordingly, the magistrate's substantial burden analysis was flawed, and the case should be remanded for application of the proper standard.

ARGUMENT

THE DISTRICT COURT APPLIED AN INCORRECT LEGAL STANDARD UNDER RLUIPA TO CONCLUDE THAT MILLER'S REFUSAL TO GRANT NELSON'S REQUEST FOR A DIET COMPLYING WITH HIS RELIGIOUS BELIEFS DID NOT IMPOSE A SUBSTANTIAL BURDEN ON NELSON'S EXERCISE OF HIS RELIGION

Section 3 of RLUIPA provides that

> [n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, * * * even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that 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. 2000cc-1(a).

In *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005), the Supreme Court upheld the

constitutionality of this provision against an Establishment Clause challenge. The Court held that Section 3 "does not, on its face, exceed the limits of permissible government accommodation of religious practices." *Id*. at 713. It found "RLUIPA's institutionalized-persons provision compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise." *Id.* at 720.

RLUIPA does not define "substantial burden," but the statute's legislative history indicates that Congress intended that term to be "interpreted by reference to Supreme Court jurisprudence." 146 Cong. Rec. S7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy). The Supreme Court recognized in *City of Boerne* v. *Flores*, 521 U.S. 507, 529 (1997), that in enacting RFRA, the predecessor statute to RLUIPA, Congress sought to revive the definition of "substantial burden" in effect prior to the Court's decision in *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990).

The pre-*Smith* definition of substantial burden is illustrated by the Court's decision in *Sherbert* v. *Verner*, 374 U.S. 398 (1963). In *Sherbert*, the Court held that it was a substantial burden on a Seventh-Day Adventist to deny her unemployment benefits after she was discharged from her job for refusing to work on Saturdays. Although recognizing that the woman might eventually be

successful in finding full-time work that would permit her to observe her Saturday Sabbath, the Court focused on the burden placed on her when she was "force[d] * * * to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Sherbert*, 374 U.S. at 404. See also *Frazee* v. *Illinois Dept. of Employment Sec.*, 489 U.S. 829, 832 (1989); *Hobbie* v. *Unemployment Appeals Com'n of Fla.*, 480 U.S. 136, 140-141 (1987).

In *Koger* v. *Bryan*, 523 F.3d 789 (7th Cir. 2008), this Court considered the claims of an inmate who, like Nelson, was incarcerated in the Illinois Department of Corrections. Koger practiced a religion, Ordo Templi Orientis (OTO), that does not have either universal requirements or a traditional clergy. He contended that prison officials violated RLUIPA by denying his request for a non-meat diet to accommodate his religious beliefs because the request was not verified by a "Rabbi-Imam, etc." (the clergy verification requirement) and a non-meat diet was not required by his religion (the religiously required test). *Id.* at 795.

As part of his request for accommodation, Koger had submitted documentation to prison officials from the prison ministry coordinator of OTO stating that dietary restrictions, although not required of members of his religion, were forms of a "personal regimen of spiritual discipline" frequently practiced by

adherents. *Koger*, 523 F.3d at 794, 797. This Court found that Koger's documentation brought his dietary request "squarely within the definition of religious exercise set forth by RLUIPA" and that "Koger sought to refrain from eating meat as a religious exercise as that term is defined by RLUIPA." *Id.* at 797 (citing 42 U.S.C. 2000cc-5(7)(A)). The Court held that a substantial burden on Koger's religious exercise was "manifest" in light of the fact that prison officials insisted that Koger establish that his requested diet was "compelled by" or "central to" his faith when RLUIPA prohibits reliance on such a requirement. *Id.* at 798. For the same reasons, this Court should hold that Miller's denial of Nelson's request for a non-meat diet on Fridays and during Lent because it was not required by Roman Catholicism imposed a substantial burden on Nelson's religious exercise in violation of RLUIPA.

The Court in *Koger* also found that the district court had wrongly ruled that the plaintiff in that case could not prove a substantial burden on his religious exercise because he had not submitted verification by a clergy member to support his religious belief. 523 F.3d at 799. In so ruling, this Court relied on the Supreme Court's Free Exercise Clause decision in *Thomas* v. *Review Board of Indiana Employment Security Division*, 450 U.S. 707, 718 (1981), which held that a substantial burden on an individual's religious beliefs occurs when a government

"put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." This Court reasoned that requiring Koger to have his request for a non-meat diet verified by a member of the clergy, when his religion lacks traditional clergy members and there are no universal requirements that can be verified, "render[ed] Koger's religious exercise effectively impracticable." 523 F.3d at 799.

Other courts of appeals likewise have applied the *Thomas* standard in the context of RLUIPA. In *Shakur* v. *Schriro*, 514 F.3d 878 (9th Cir. 2008), prison officials argued that the lacto-vegetarian diet they provided the prisoner in place of the kosher diet he requested met his religious needs because it did not require him to eat non-halal meat. The prisoner claimed, however, that the diet caused him gastrointestinal discomfort that interfered with the "state of 'purity and cleanliness' needed for Muslim prayer." *Id*. at 882. The court of appeals held that the prisoner's claim raised issues of fact that precluded summary judgment in favor of state prison officials, namely "the extent to which Shakur's gastrointestinal problems interfered with his religious activities," and "the extent to which the prison's policies pressured Shakur to betray his religious beliefs." *Id*. at 889. See also *Washington* v. *Klem*, 497 F.3d 272, 277-281 (3d Cir. 2007) (combining aspects of *Sherbert* and *Thomas*); *Lovelace* v. *Lee*, 472 F.3d 174, 187 (4th Cir. 2006); *Adkins* v. *Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004), cert. denied, 545 U.S.

1104 (2005).

Here, the magistrate ruled that the "only relevant religious tenet at issue is abstention [from] eating the flesh of four-legged animals on Fridays and during Lent (because of plaintiff's failure to exhaust administrative remedies regarding abstention from all meat)." *Nelson* v. *Miller*, No. 03-254-CJP, 2008 WL 904735, at *7 (S.D. Ill. Mar. 31, 2008). The magistrate then concluded that Miller's actions did not impose a substantial burden on Nelson's religious practice because the record showed that the regular diet at Tamms still would be nutritionally adequate if Nelson simply refrained from eating all dishes in that diet that contained the meat of four-legged animals.

But this singular focus on abstention from eating the meat of four-legged animals is misplaced. The magistrate found in both the March 31, 2008, final judgment order and in the January 30, 2007, summary judgment order that Nelson had claimed in his May 8, 2002, grievance that "as a Roman Catholic, he was forbidden to eat 'flesh meat' on Fridays and during Lent," and that he requested "a vegan diet on Fridays and during Lent." R. 56 at 3; *Nelson*, 2008 WL 904735, at *3. It is undisputed that Nelson exhausted his administrative remedies with respect to this request. R. 56 at 3, 6. Thus, the relevant religious tenet at issue is abstention from *all* meat (not just the meat of four-legged animals) on Fridays and

during Lent.

There was ample evidence in the record to support a conclusion that Miller's insistence that Nelson skip the meat in the regular diet on Fridays and during Lent placed a substantial burden on Nelson's exercise of his religion. The Tamms dietician opined that "there probably was insufficient nutrition in the regular diet plan if all meat were skipped." *Nelson*, 2008 WL 904735, at *5, see also *id.* at *2 n.2. Indeed, Nelson testified that when he abstained from all meat during Lent in 2002, he lost so much weight (approximately forty pounds) that he had to be hospitalized, "felt hungry during this time period, his bones began to protrude, he was cold, and he was depressed and anxious." *Ibid.* In *Hunafa* v. *Murphy*, 907 F.2d 46, 47 (7th Cir. 1990), this Court reversed a grant of summary judgment for the defendant prison officials where a prisoner claimed a violation of his rights under the Free Exercise Clause by being "put to an improper choice between adequate nutrition and observance of the tenets of his faith." See *Koger*, 523 F.3d at 799 (citing *Hunafa* as support for its decision under RLUIPA).

The magistrate discounted Nelson's testimony that his loss of weight during this time caused him to be hospitalized, citing lack of proof of medical causation between the weight loss and the diet. *Nelson*, 2008 WL 904735, at *5. But the fact that Nelson did not present any medical evidence that these symptoms were caused

by lack of nutrition in the regular diet if all meat is skipped is not dispositive, where, as noted above, the dietician believed that such a diet would be nutritionally inadequate. Moreover, Nelson's uncontradicted testimony that he felt cold and hungry while abstaining from all meat during Lent, that he lost weight during this period, and that his bones protruded (Tr. 43-45), are all probative of whether Nelson may have felt pressure to abandon his religious precepts during this period and thus is relevant to the substantial burden analysis. The magistrate erred in failing to consider that a reasonable perception of a link between weight loss and diet by an inmate, regardless of actual medical causation, would be probative of whether there was a substantial burden.

Since the record shows that Nelson would be required to forego adequate nutrition for the entire forty days of Lent in order to comply with his sincerely held religious beliefs, it supports a conclusion that Miller's refusal to grant Nelson a non-meat diet during that period imposed a substantial burden on Nelson's religious exercise under RLUIPA. The magistrate's substantial burden analysis was flawed, and the case should be remanded for application of the proper standard and consideration of the relevant evidence.[6]

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[6] In considering Nelson's Free Exercise Clause claim, the magistrate applied the standard that is applicable to Free Exercise claims that arise outside the

(continued...)

Because the magistrate found no substantial burden on Nelson's religious exercise, he did not discuss whether Miller could show that his refusal to approve a meatless diet on Fridays and during Lent was "in furtherance of a compelling governmental interest," and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000cc-1(a)(1) & (2). If this Court agrees with our submission that the district court erred in finding no substantial burden, it should reverse that portion of the court's judgment and remand for a determination whether that burden can be justified under the RLUIPA standard.

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[6](...continued)
prison context, *i.e.*, "whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Nelson*, 2008 WL 904735, at *6 (quoting *Hernandez* v. *C.I.R.*, 490 U.S. 680, 699 (1989)). But that test does not apply in the context of prison regulations. Rather, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interest." *Turner* v. *Safley*, 482 U.S. 78, 89 (1987). That reasonableness test applies to prisoner claims involving rights under the Free Exercise Clause. *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 (1987). This Court would not need to reach the Free Exercise Clause issue, however, if it agrees that remand in order for the District Court to apply the proper RLUIPA standard is appropriate. See *Koger*, 523 F.2d at 801-802 (court should "avoid making unnecessary constitutional decisions").

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision on Nelson's RLUIPA claim and remand for reconsideration under the proper legal standard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that this brief is proportionally spaced, 14-point Times New Roman font. Per WordPerfect 12 software, the brief contains 5738 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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DATED: September 11, 2008

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2008, two copies of the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANT AND URGING REVERSAL ON RLUIPA CLAIM, as well as a PDF version of the brief on a CD-ROM, were served by first class mail, postage prepaid, on counsel of record at the following addresses:

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