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UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

HOWARD THOMPSON, JR.,	*	
	*	
Plaintiff,	*	
	*	
v.	*	Civil Action No.
	*	
MICHELLE R. RICCI, in her official capacity as Administrator, New Jersey State Prison; and GEORGE W. HAYMAN, in his official capacity as Commissioner, New Jersey Department of Corrections,	*	
	*	
Defendants.	*	
	*	

* *

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

For over a decade, Plaintiff Howard Thompson has preached to his fellow inmates during weekly worship services at New Jersey State Prison ("NJSP") in Trenton. Not only has this preaching resulted in no security incidents of any kind, but the prison's chaplaincy staff has actively supported Mr. Thompson and encouraged him to spread his deeply held message of faith. Yet in June 2007, without any warning or justification, NJSP instituted a blanket ban on all preaching by all inmates, even when done under the direct supervision of prison staff.

America's prisoners, however pervasively subject to the control of the state, still maintain inalienable rights under the law. "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). Congress strengthened these rights when it passed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.*, which compels the courts to apply strict scrutiny to those prison regulations that substantially burden an inmate's constitutional right to free religious exercise.

NJSP has violated both the First Amendment's Free Exercise Clause and RLUIPA by implementing an absolute ban on inmate preaching. The ban serves no compelling governmental interest, does not employ the least restrictive possible means, and is not reasonably connected to legitimate penological interests. Indeed, a plaintiff in materially identical circumstances in another state recently prevailed against just such a preaching ban. *See Spratt v. Rhode Island Dep't of Corr.*, 482 F.3d 33, 34-37 (1st Cir. 2007).

Mr. Thompson respectfully requests that the Court issue a preliminary injunction to restore his fundamental right to preach at NJSP.

STATEMENT OF FACTS

As a devout Pentecostal, Howard Thompson has participated in the religious life of NJSP throughout his incarceration. Since 1986, he has preached at supervised Christian worship services, and he both founded and led the prison's Protestant choir. *See* Verified Compl. ¶¶ 7, 11.[1]

It is a central tenet of Pentecostalism that when an individual receives a special calling to the ministry from God, that individual must spread the Word of God by preaching and ministering to others within the faith community. Mr. Thompson is sincere in his belief that he has received such a calling, and is thus compelled by his faith to preach. *See* Verified Compl. ¶¶ 8, 9, 13, 25; Ravenell Decl. ¶ 7.[2]

Every instance of Mr. Thompson's preaching was authorized and encouraged by NJSP's chaplaincy staff. Verified Compl. ¶¶ 10, 15, 19, 20; Ravenell Decl. ¶ 8. At no point throughout Mr. Thompson's incarceration at NJSP has his preaching been linked to any security concerns, nor to any other impediment to the good order of the prison. Verified Compl. ¶ 22; Ravenell Decl. ¶ 9. Quite the contrary, NJSP's chaplains and volunteers have cited the positive impact of Mr. Thompson's preaching on the behavior of his fellow inmates. *See* Ravenell Decl. ¶ 10.

Although he had been preaching periodically at NJSP for years, Mr. Thompson was formally ordained as a Pentecostal minister in October 2000, at a Sunday morning worship service that was overseen by then-chaplain Rev. Samuel K. Atchison, former chaplain Bishop Joseph Ravenell, and two chaplaincy volunteers. For the next six years, Mr. Thompson preached

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[1] Mr. Thompson filed a Verified Complaint in this case, which serves as his affidavit for purposes of this motion. *See, e.g., Reese v. Sparks*, 760 F.2d 64, 67 (3d Cir. 1985).
[2] The Declaration of Bishop Joseph Ravenell is attached hereto as Exhibit 1.

at Sunday services regularly, with the approval of the chaplaincy staff and without incident. *See* Verified Compl. ¶¶ 12-22; Ravenell Decl. ¶¶ 8-9.

Mr. Thompson began to lead these services on a weekly basis in 2006, when the interim chaplain was unavailable to lead worship services on Sundays. *See* Verified Compl. ¶ 20. NJSP Administrator Michelle Ricci was aware of this weekly preaching and knowingly permitted it to continue, without incident.

On June 24, 2007, Mr. Thompson preached his last sermon. Soon afterward, the chaplain informed Mr. Thompson that Administrator Ricci would henceforth enforce a ban on all preaching and religious leadership by inmates. *See id.* ¶¶ 24, 27.

Mr. Thompson proceeded to file an Inmate Remedy System Form, formally requesting relief from the ban on inmate preaching. Administrator Ricci responded to this initial complaint on April 15, 2008, stating only: "Staff and volunteers are assigned the duties to provide religious services. Not inmates." *See id.* ¶ 28 and Ex. A (attached thereto). Mr. Thompson promptly appealed the decision, and on April 28, 2008, Ricci responded in similar fashion, rejecting the administrative appeal and explaining simply: "Staff and volunteers will continue to provide religious services to the inmate population at NJSP." *See id.* ¶¶ 29-30 and Ex. B (attached thereto).

After Mr. Thompson exhausted his administrative remedies, his counsel sent a demand letter to Administrator Ricci and George Hayman, Commissioner of the New Jersey Department of Corrections ("NJ DOC"). The October 2, 2008 letter highlighted Thompson's statutory and constitutional right to preach at NJSP and sought resolution of this issue, if possible, without resort to litigation. *See id.* ¶ 32 and Ex. C (attached thereto). Neither Mr. Thompson nor his counsel received any substantive response, other than a form letter from the NJ DOC's Office of

Community Programs and Outreach Services that addressed an entirely different issue. *See id.* ¶ 33 and Ex. D (attached thereto).

To date, the Defendants have provided no explanation for the preaching ban. Indeed, at no point since implementing the ban has NJSP mentioned any justification or relevant incidents that might explain the prison's interest in this newfound policy. Meanwhile, a variety of other inmate-led activities continue unimpeded at NJSP, including a prison NAACP chapter, an inmate legal association, and an incarcerated veterans' group. *See id.* ¶ 26.

Mr. Thompson is willing and ready to preach to other inmates under prison supervision,[3] and does not insist on any leadership title or mantle of authority. *See id.* ¶ 25. He merely wishes to restore his right to minister to fellow prisoners to the same extent, and in the same highly supervised, controlled environment in which he previously practiced his faith at NJSP.

LEGAL STANDARD

The granting of a preliminary injunction is based on four factors: "(1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest." *American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1477 n.2 (3d Cir. 1996) (citations omitted). As discussed below, Plaintiff easily meets this test and is therefore entitled to a preliminary injunction.

[3] As with other inmate-led activities and organizations, NJSP's supervision of Mr. Thompson's religious exercise can take a variety of forms, and need not be limited to direct oversight by the prison chaplain.

ARGUMENT

I. Mr. Thompson Will Likely Prevail on the Merits of His RLUIPA Claim.

Like the plaintiff in *Spratt v. Rhode Island Department of Corrections*, 482 F.3d 33 (1st Cir. 2007) – a case materially indistinguishable from this action – Mr. Thompson is highly likely to prevail on the merits of his claims. Wesley Spratt was incarcerated in the maximum security unit of a federally funded prison in Rhode Island, underwent a religious awakening in 1995, and was ordained in 2000. *Id.* at 35. From 1995 to 2003, the prison's chaplains allowed Mr. Spratt to preach during weekly services. Although his preaching resulted in no disciplinary problems, in 2003 the prison prohibited him from continuing to preach. *Id.* On appeal, the Court of Appeals for the First Circuit reversed the district court's grant of summary judgment for the defendant department of corrections, *id.* at 37-43, and the defendant ultimately agreed to a settlement in July 2007 that allowed Mr. Spratt and other inmates to resume supervised preaching, *see, e.g.*, Eric Tucker, "R.I. inmate wins right to resume jailhouse preaching," A.P., Aug. 2, 2007, *available at* http://www.firstamendmentcenter.org/news.aspx?id=18867. The First Circuit's analysis in *Spratt* applies with equal force here.

As in *Spratt*, Mr. Thompson challenges the preaching ban under RLUIPA, which subjects burdens on prisoners' religious exercise[4] to strict scrutiny. RLUIPA bars federally funded prisons from "impos[ing] a substantial burden on the religious exercise of a person residing in or confined to an institution . . . 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)

[4] In addition to its protections for institutionalized persons, RLUIPA contains separate provisions (not at issue here) governing restrictions on religious exercise imposed by land use regulations. *See* 42 U.S.C. § 2000cc.

(internal punctuation omitted). Under 42 U.S.C. § 2000cc-2(b), "once a plaintiff has established that his religious exercise has been substantially burdened, the onus shifts to the government to show that the burden furthers a compelling governmental interest and that the burden is the least restrictive means of achieving that compelling interest." *Spratt*, 482 F.3d at 38 (internal citations and numbering omitted); *see also, e.g.*, *Sharp v. Johnson*, No. 00-2156, 2008 WL 941686 (W.D. Pa. Apr. 7, 2008); *Washington v. Klem*, 497 F.3d 272 (3d Cir. 2007).[5]

Like the plaintiff in *Spratt*, Mr. Thompson easily satisfies this test under RLUIPA. NJSP's preaching ban unequivocally burdens Mr. Thompson's exercise of his sincerely held calling to preach, without furthering any compelling governmental interest or using the least restrictive means to achieve such an interest.

A. NJSP's policy places a substantial burden on Mr. Thompson's exercise of his sincere religious beliefs.

The NJSP ban on inmate preaching clearly burdens Mr. Thompson's "religious exercise," defined by RLUIPA as including "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(a) (emphasis added); *see Spratt*, 482 F.3d at 38 ("[I]t is clear that preaching is a form of religious exercise."). As the Supreme Court has made clear, "the right to the free exercise of religion unquestionably encompasses the right to preach, proselyt[ize], and perform other similar religious functions." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). *See also, e.g.*, *Employment Div. v. Smith*, 494 U.S. 872 (1990) ("[T]he 'exercise of religion' often involves not only belief and profession but the performance of . . . physical acts [such as] assembling with others for a worship service [or] proselytizing . . . ."), *quoted in part in Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

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[5] By its express terms, RLUIPA "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of th[e statute] and by the Constitution." 42 U.S.C. § 2000cc-3(g).

While RLUIPA "does not preclude inquiry into the sincerity of a prisoner's professed religiosity," *Cutter*, 544 U.S. at 725 n.13, courts assume such sincerity when it is not contested by the opposing party, *see, e.g., id.* at 713; *Klem*, 497 F.3d at 282. In any event, the sincerity of Mr. Thompson's religious beliefs is beyond dispute, as affirmed by NJSP chaplaincy staff; he sincerely believes that he must obey God's call to the ministry by preaching to fellow inmates within his faith community. *See* Verified Compl. ¶¶ 8, 9, 13, 25; Ravenell Decl. ¶ 7.

The Third Circuit recently articulated a controlling definition of "substantial burden" in *Klem*, holding that a Pennsylvania Department of Corrections restriction on the number of books permitted in prisoners' possession substantially burdened the plaintiff's religious exercise. Citing legislative history indicating that "substantial burden" as used in RLUIPA "should be interpreted by reference to Supreme Court jurisprudence," 146 Cong. Rec. S7774, 7776 (July 27, 2000), the *Klem* court established a disjunctive test that combines the slightly different holdings of *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) and *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 717-18 (1981):

> For the purposes of RLUIPA, a substantial burden exists where: 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs.

Klem, 497 F.3d at 280; *followed by Sharp*, 2008 WL 941686, at *65-66; *Brown v. City of Pittsburgh*, 543 F. Supp. 2d 448, 487 (W.D. Pa. 2008); *Smith v. Kyler*, No. 1:CV-03-0898, 2008 WL 474252, at *8-10 (M.D. Pa. Feb. 20, 2008); *Albanian Associated Fund v. Twp. of Wayne*, No. 06-cv-3217 (PGS), 2007 WL 2904194, at *11-14 (D.N.J. Oct. 1, 2007).

Under this test, the NJSP ban has put "substantial pressure" on Mr. Thompson not only "to substantially modify his behavior," as he may no longer preach (even under staff

supervision), but also "to violate his beliefs," as he has a deeply held calling to preach. *See* Verified Compl. ¶¶ 8, 9, 13, 25; Ravenell Decl. ¶ 7. The plaintiff in *Klem* satisfied this standard by showing that a ten-book limitation on inmate possessions effectively prevented him from exercising his religious mandate to read four new Afro-centric books each day. *Klem*, 497 F.3d at 282. The challenged policy in *Klem* was far less restrictive than NJSP's preaching ban, which permits absolutely no exercise of Thompson's preaching right whatsoever. Not surprisingly, the First Circuit in *Spratt* found that the RIDOC's blanket preaching ban satisfied the *prima facie* requirements for a substantial burden under this standard. *Spratt*, 482 F.3d at 38. Just like the plaintiff in *Spratt*, Mr. Thomas will be subject to disciplinary sanctions if he attempts to preach in defiance of the ban. *See* Verified Compl. ¶ 25. The clear and overwhelming consequence of the NJSP preaching ban is an absolute and substantial burden on Mr. Thompson's sincere religious exercise.

B. NJSP's policy does not serve a compelling governmental interest, because its relationship to prison security is arbitrary and speculative.

The government bears the burden of persuasion as to whether its policy serves a compelling interest. 42 U.S.C. § 2000cc-2(b); *Klem*, 497 F.3d at 283. The legislative history of RLUIPA makes clear that, although courts should give "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[,] . . . 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." S. Rep. No. 103-111, 10 (1993) (emphasis added) (discussing Religious Freedom Restoration Act of 1993 ("RFRA")), *quoted in* 146 Cong. Rec. S7774, S7775 (2000) ("[w]hat the

Judiciary Committee said about [the compelling interest] standard in its report on RFRA is equally applicable to [RLUIPA]").

Congress thus clearly advised against a judicial rubber-stamp of prison policies, as confirmed by the Third Circuit: "Even in light of the substantial deference given to prison authorities, the mere assertion of security or health reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement. Rather, the *particular policy* must further this interest. A conclusory statement is not enough." *Klem*, 497 F.3d at 283 (emphasis added) (internal quotation marks omitted) (citing *Spratt*, 482 F.3d at 39; *Murphy v. Missouri Dep't of Corr.*, 372 F.3d 979, 988-89 (8th Cir. 2004) (to satisfy RLUIPA, prison authorities must provide some basis for their concern that racial violence will result from religious accommodation of plaintiff inmate); and *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (to satisfy strict scrutiny under RFRA, government cannot rely on a general interest in health and safety to ban religious use of hallucinogenic tea)). Applying this particularity requirement to the facts in *Klem*, the Third Circuit found scant evidence that the prison's ten-book rule furthered a compelling governmental interest, given the multitude of conflicting policies in effect under the Pennsylvania Administrative Code and Department of Corrections rules: "If safety and security are the paramount concerns, these exceptions seem to undermine the *compelling* nature of the ten-book limitation." *Klem*, 497 F.3d at 284.

Under RLUIPA, moreover, the prison must have a compelling interest not only in the *particular policy* at issue, but also in its refusal to grant the *particular individual* his requested exemption from that policy. In discussing the strict scrutiny mandated by both RLUIPA and its predecessor statute, RFRA, the Supreme Court recently "reaffirmed . . . the feasibility of case-

by-case consideration of religious exemptions to generally applicable rules." *O Centro*, 546 U.S. at 436 (discussing *Cutter*, 544 U.S. at 722). When enforcing the religious-liberty protections of those statutes (which, in turn, incorporate the Supreme Court's compelling interest test prior to *Smith*, *see O Centro*, 546 U.S. at 431), courts must "look[] beyond broadly formulated interests justifying the general applicability of government mandates [and] scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id.*

NJSP has thus far offered no evidence or explanation that would establish any adverse effect of Mr. Thompson's preaching on prison security, and his preaching caused no known security problems prior to the ban. *See* Verified Compl. ¶ 22; Ravenell Decl. ¶¶ 9-10. As the First Circuit concluded about a materially identical inmate, "Spratt's seven-year track record as a preacher, which is apparently unblemished by any hint of unsavory activity, at the very least casts doubt on the strength of the link between his activities and institutional security." *Spratt*, 482 F.3d at 40.

While Plaintiff can only speculate about NJSP's proffered justification for its absolute ban on inmate preaching, any such justification would be undermined by NJSP's simultaneous endorsement of non-religious inmate leadership roles, including the prison's NAACP chapter, inmate legal association, and incarcerated veterans' group. *See* Verified Compl. ¶ 26. However valid an interest NJSP has in maintaining security, this interest does not compel its total ban on preaching and religious leadership, any more than the *Klem* prison's valid interest in reducing fire risk, sanitation problems, and hidden contraband compelled its arbitrary ten-book rule. *Klem*, 497 F.3d at 284. Just as NJSP's security concerns clearly have *not* compelled the prison to ban a wide range of leadership roles currently held by inmates, its ban on preaching as one among many forms of leadership cannot be a truly compelling necessity.

NJSP is thus unlikely to meet its considerable burden to demonstrate that its preaching ban, including its specific application to Mr. Thompson, serves a compelling governmental interest.

C. NJSP's policy is not the least restrictive means of furthering its security interest, given the readily available alternative of supervised preaching.

To satisfy its burden of persuasion under RLUIPA, NJSP must demonstrate not only that its policy serves a compelling interest, but also that the policy is the least restrictive means of furthering that interest. 42 U.S.C. § 2000cc-2(b); *Klem*, 497 F.3d at 283; *see also, e.g., O Centro*, 546 U.S. at 429. It is easy to envision a less restrictive means for NJSP to protect any security interests without burdening Mr. Thompson's religious exercise: simply restore his ability to preach under proper prison supervision (whether by the chaplain or other prison officials). The *Spratt* court was particularly frustrated by the defendant prison's failure to consider this alternative to a total ban. 482 F.3d at 42. As NJSP allows supervised inmate leadership over a variety of non-religious assemblies, it is hardly conceivable that a preaching ban is the least restrictive policy available.

The Supreme Court, in considering other strict-scrutiny requirements, has held that the government's burden cannot be satisfied without an active consideration of alternative means. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 824 (2000) (when considering a First Amendment challenge to speech restrictions, "[a] court should not assume a plausible, less restrictive alternative would be ineffective"); *City of Richmond v. J.A. Croson*, 488 U.S. 469, 507 (1989) (in part because city had not considered whether race-neutral measures would have achieved the government's interest, city's minority set-aside program failed "narrowly tailored" test). In *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005), the Ninth Circuit adapted this reasoning to the RLUIPA claim of a Native American inmate whose religion forbade him from

cutting his hair in compliance with prison rules. "[The prison] 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." *Id.* at 999 (holding that the prison failed to satisfy this burden).

This "consider and reject" requirement is controlling in the Third Circuit under *Klem*: "[W]e agree with the Ninth Circuit in *Warsoldier* that this requirement applies with equal force to RLUIPA. Additionally, the phrase 'least restrictive means' is, by definition, a relative term. It necessarily implies a comparison with other means. Because this burden is placed on the Government, it must be the party to make this comparison." *Klem*, 497 F.3d at 284. With this requirement in place, the *Klem* Court could easily imagine policies less restrictive than the ten-book rule: "The least restrictive means would be to allow an inmate to choose what property he may keep in the [four permissible] storage units so long as the property does not violate prison policy for an independently legitimate reason." *Id.* at 285.

The availability of a less restrictive alternative to NJSP's breaching ban is inescapable for yet another reason: Inmates in federal prisons are permitted to deliver "[s]ermons, original oratory, teachings and admonitions" as part of supervised "[i]nmate-led religious programs." Federal Bureau of Prisons, *Program Statement: Religious Beliefs and Practices*, Statement P5360.09 (2004); *see also Spratt*, 482 F.3d at 42 (citing same). As the Supreme Court has noted, "'[f]or more than a decade, the federal Bureau of Prisons has managed 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.'" *Cutter*, 544 U.S. at 725 (quoting Brief for United States at 24).

Even maximum-security federal prisons permit supervised preaching and religious leadership by inmates. It is highly unlikely that the relatively permissive policy of a federal supermax prison would be unworkable at a state prison in New Jersey; thus "the Federal Bureau of Prisons policy suggests that some form of inmate preaching could be permissible without disturbing prison security." *Spratt*, 482 F.3d at 42; *see also Warsoldier*, 418 F.3d at 1000 ("[W]e have found comparisons between institutions analytically useful when considering whether the government is employing the least restrictive means. Indeed, the failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means.").

The Third Circuit adopted this comparative inquiry in *Klem*, examining the plaintiff inmate's full two-decade incarceration history within the Pennsylvania correctional system, and finding no prior restriction on his religiously mandated possession of more than ten books at a time. This comparison to less restrictive state prisons, together with its analysis of less restrictive hypothetical policies, led the Court to conclude that "the Pennsylvania DOC has not satisfied its burden to show that the [ten-book] limitation qualified as the least restrictive means to protect its interests in health, safety, and security." 497 F.3d at 285.

Similarly, NJSP is highly unlikely to prevail in proving that its ban is the least restrictive means of guaranteeing prison security, given the less restrictive policies of (a) the same prison prior to 2007, (b) the same prison today with respect to non-religious inmate leadership, and (c) the federal prison system. It is doubtful that NJSP's current security interests are so distinct that they alone require no less than a blanket ban on all inmate preaching and religious leadership.

Moreover, even if NJSP were to demonstrate successfully a unique and hitherto unexplained security interest in prohibiting certain of its inmates from preaching, this would still not satisfy the least-restrictive-means test with respect to Mr. Thompson. NJSP's policy could be narrowly tailored to affect only those inmate populations or individuals associated with a history of disruption or a heightened security risk. Mr. Thompson's preaching has transpired without incident for more than a decade, and thus any preaching ban could be less restrictively tailored to accommodate his religious exercise.

II. Mr. Thompson Will Likely Prevail on the Merits of His First Amendment Claim.

Independent of RLUIPA, the NJSP policy violates Mr. Thompson's free-exercise rights under the First Amendment. In *Turner v. Safley*, 482 U.S. 78, 89 (1987), the Supreme Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89. Seeking to balance a court's duty to protect inmates' rights with due deference to the expertise of prison administrators, *Turner* articulated four factors in applying this "reasonable relationship" test, as summarized by the Third Circuit in *Waterman v. Farmer*, 183 F.3d 208 (1999):

> [*Turner*] requires courts to consider (1) whether a rational connection exists between the regulation and a neutral, legitimate government interest; (2) whether alternative means exist for inmates to exercise the constitutional right at issue; (3) what impact the accommodation of the right would have on inmates, prison personnel, and allocation of prison resources; and (4) whether obvious, easy alternatives exist.

Id. at 213 n.6 (citing *Turner*, 428 U.S. at 89-91).

"When a prisoner claims that his or her right to exercise religion has been curtailed, a court must determine as a threshold matter whether the prisoner has alleged a belief that is 'both sincerely held and religious in nature.'" *Heleva v. Kramer*, 214 Fed. Appx. 244, 246 (3d Cir. 2007) (citing *DeHart v. Horn*, 227 F.3d 47, 51 (3d Cir. 2000)(en banc)). This threshold is easily

crossed, given Mr. Thompson's unquestioned sincerity and the clearly religious nature of his preaching. *See supra* Part I.A; Verified Compl. ¶ 25.

NJSP's preaching ban fails the first prong of the *Turner* test, because "a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 428 U.S. at 89. NJSP has asserted no goal for its policy, despite repeated administrative requests by Mr. Thompson. In light of his prior decades of productive, supervised preaching, it would strain credulity to claim a newfound rational connection between a blanket ban on that preaching and the prison's legitimate interests.

Even if there were some imaginable security risk posed by Mr. Thompson's ministering to fellow inmates, such risk must be "non-negligible" before constitutional rights may be infringed. *Jones v. Brown*, 461 F.3d 353, 364 (3d Cir. 2006). The *Jones* Court held that only three years after the anthrax attacks of 2001, the New Jersey state prisons could no longer establish a rational connection to a policy that abridged inmates' free-speech rights under the First Amendment: "Yes, such an attack is conceivable, but . . . while the health and safety of inmates and staff are legitimate penological interests, if there is no information suggesting a significant risk of an anthrax attack, there is no reasonable connection between those interests and the policy of opening legal mail in the absence of the inmate addressee." *Id.* at 363-64. NJSP's preaching ban is even *less* rationally connected to prison security because it was first implemented arbitrarily, rather than in the wake of any actual threat.

Even if Defendants succeed with respect to this first prong of the *Turner* test, Mr. Thompson is still highly likely to prevail on the balance of the remaining three factors. "[T]he determination that there is a rational relationship between the policy and the interest commences rather than concludes our inquiry as not all prison regulations that are rationally related to such

an interest pass *Turner*'s overall reasonableness standard." *Wolf v. Ashcroft*, 297 F.3d 305, 309 (3d Cir. 2002) (citing *DeHart,* 227 F.3d at 53) (internal quotation marks omitted).

Turning to the second prong of *Turner*, Mr. Thompson clearly has no alternative means of exercising his constitutional right to preach, as the NJSP policy bans all forms of preaching and religious leadership by any inmates. Although this right "must be viewed sensibly and expansively," *Thornburgh v. Abbott*, 490 U.S. 401, 417 (1989); *see also O'Lone v. Shabazz*, 482 U.S. 342 (1987); *DeHart*, 227 F.3d 54, Mr. Thompson's permitted forms of religious exercise are no substitute for his right to obey his calling to preach. *See Sutton v. Rasheed*, 323 F.3d 236, 257 (3d Cir. 2003) (finding that notwithstanding *O'Lone*, the deprivation of Nation of Islam texts "implicates not just the right to read those particular texts, but the prisoners' ability to practice their religion in general").

Regarding the third *Turner* factor, NJSP has offered no arguments supporting any adverse impact of inmate preaching on prison guards, other inmates, or prison resources. NJSP continues to support a Protestant inmate congregation with regular prayer services under constant supervision, and Mr. Thompson's preaching did not cause even a single indirect adverse effect in the years prior to NJSP's sudden ban.

This leads to the fourth and final prong of the *Turner* test, where, in stark contrast to the facts of *O'Lone*, NJSP has an obvious and easy alternative policy available to it: restore staff-supervised inmate preaching. This would involve *de minimis* additional cost – if any costs at all – as chaplaincy staff are already on hand to lead the prayer services during which inmates like Mr. Thompson seek to preach. *See Anderson v. Angelone*, 123 F.3d 1197, 1199 (9th Cir. 1997) (upholding prison rule that prohibited inmate from acting as minister of his own church, but noting that "[t]he rule does not foreclose [plaintiff] from practicing his religion; in fact, he is

welcome to assist the prison chaplain in leading religious activities"). Given the longstanding success of this prior policy, NJSP's recent ban is an "exaggerated response" under *Turner*. It is not rationally related to legitimate penological interests, and it fails the reasonable relationship test applied in full.

III. Plaintiff Will Be Irreparably Harmed by Denial of Immediate Injunctive Relief.

Defendants are currently infringing Mr. Thompson's fundamental religious-liberty rights, as guaranteed by RLUIPA and the First Amendment, and that harm will persist as long as the NJSP preaching ban continues to restrict Mr. Thompson's religious exercise. *See Conchatta, Inc. v. Evanko*, 83 Fed. Appx. 437, 442-43 (3d Cir. 2003) (citing *Anderson v. Davila*, 125 F.3d 148, 164 (3d Cir. 1997)) (First Amendment violation must be both threatened and occurring in order to warrant preliminary injunction). Mr. Thompson, therefore, will suffer ongoing irreparable harm absent an injunction, as "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *followed by Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 178 (3d Cir. 2002). This is equally true for Mr. Thompson's RLUIPA claim, which serves to vindicate his free-exercise rights. *See, e.g., Hummel v. Donahue*, No. 07-cv-1452, 2008 WL 2518268, at *8 (S.D. Ind. June 19, 2008) (violation of RLUIPA inflicts irreparable harm) (citing cases); *Reaching Hearts Int'l v. Prince George's County*, Civ. No. RWT 05-1688, 2008 WL 4817008, at *23 (D. Md. Nov. 4, 2008) (same); *Guru Nanak Sikh Soc'y v. County of Sutter*, 326 F. Supp. 2d 1140, 1161-62 (E.D. Cal. 2003) (same), *aff'd*, 456 F.3d 978 (9th Cir. 2006); *Murphy v. Zoning Comm'n of Town of New Milford*, 148 F. Supp. 2d 173, 180-181 (D. Conn. 2001) (same).

IV. The Balance Of Hardships Tips Heavily in Favor of Granting Injunctive Relief Because Mr. Thompson's Certain, Ongoing Harm Outweighs Defendants' Unspecified Concerns.

While a preliminary injunction will afford immediate relief for Mr. Thompson's clear and ongoing deprivation of constitutional rights, such relief will not result in greater harm to the Defendants. NJSP has indicated no particular harm that would arise from the renewal of Mr. Thompson's supervised preaching. Indeed, Mr. Thompson has engaged in such preaching for many years at NJSP without any evidence of impediment to the security and good order of the prison. *See* Verified Compl. ¶ 22; Ravenell Decl. ¶ 9-10.

V. Injunctive Relief Will Serve the Public Interest.

A preliminary injunction is necessary to serve the public's vital interest in protecting the religious freedom of those citizens most vulnerable to arbitrary authority.

Before enacting the RLUIPA, "Congress documented, in hearings spanning three years, that 'frivolous or arbitrary' barriers impeded institutionalized persons' religious exercise." *Cutter*, 544 U.S. at 716. In passing the statute, Congress deliberately and explicitly sought to ensure that state prisons would no longer restrict inmates' religious freedom unnecessarily: "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 . . . 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, S7775 (2000) (joint statement of Sens. Hatch and Kennedy on RLUIPA), *quoted in part in Cutter*, 544 U.S at 716. Restoring Mr. Thompson's right to preach at NJSP would thus vindicate the central purpose behind RLUIPA and, therefore, would surely serve the public interest.

Injunctive relief, moreover, will allow Mr. Thompson to resume a ministry of preaching that has positively affected the lives of his fellow inmates for years. Ravenell Decl. ¶ 10. Far from creating a security concern, such positive influences serve the public interest by decreasing the likelihood of inmate conflict and post-incarceration recidivism.

CONCLUSION

After years of incident-free preaching by Mr. Thompson at NJSP, the facility has imposed a blanket ban on Plaintiff's fundamental religious exercise. Defendants cannot possibly justify this highly restrictive prohibition, either under the strict scrutiny of RLUIPA or under the Free Exercise Clause. Mr. Thompson, therefore, respectfully requests that the Court grant his motion for preliminary injunction, and restore his ability to follow his deeply held religious calling without detriment to the good order of the prison where he has long ministered.

Respectfully submitted,

/s/ Edward Barocas

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Dated: December 3, 2008