Appeal No. 07-1537

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROSARIO GUZZI,

Plaintiff-Appellant,

v.

MICHAEL THOMPSON, *ET AL.*,

Defendants-Appellees,

On Appeal from the United States District Court
for the District of Massachusetts,
Civil Action No. 06-10874-WGY

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus* states that *amicus* has no parent corporation, nor does it issue any stock.

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INTEREST OF THE AMICUS

The Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Appellant in accordance with FED. R. APP. P. 29 and this Court's order dated November 15, 2007. *Amicus* attempted to contact Appellant to obtain consent to file, but officials at Appellant's prison did not respond to *amicus*'s request to speak with Appellant. Appellees have informed counsel for *amicus* that Appellees neither consent nor object to the filing of this brief.

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan public interest law firm dedicated to protecting the free expression of all religious traditions and the equal participation of religious people in public life and public benefits. Over the first thirteen years of its existence, The Becket Fund has represented Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Sikhs, Zoroastrians and others in cases involving the full range of religious freedom issues under federal and state constitutional and statutory law. In particular, *amicus* has worked on, either as lead counsel or as *amicus curiae*, numerous cases defending the religious exercise rights of prisoners.

Amicus submits this brief to highlight the danger of requiring prisoner plaintiffs to submit expert testimony supporting the validity of their religious beliefs. Validity inquiries are not only unconstitutional, they also serve as poor substitutes for the real issue—sincerity.

BACKGROUND

Appellant Rosario Guzzi is incarcerated at Massachusetts Correctional Institution-Shirley, under the custody of the Massachusetts Department of Correction ("DOC"). Dkt.8 ¶ 1. Beginning in 2002, Guzzi requested inclusion on the Special Diet List to receive kosher meals. Dkt.35 at 5. Guzzi described his "religious reasons" for requesting kosher meals as

> My religious beliefs are non-conforming to mainline catholisism [sic] since the precepts I follow are orthodox. I believe Jesus is God. He was also a Jew and a Rabbi. I follow his examples while on earth. …
>
> The Kosher meal is in keeping with my religious beliefs.

Id. Greg McCann, Director of Treatment at MCI-Shirley, approved at least one of these requests. *Id.* McCann declared in a summary judgment affidavit that prior to 2004, the DOC approved kosher diet requests from MCI-Shirley inmates "without regard to whether or not they were Jewish." Dkt.36 ¶4. In 2004, this policy changed "as the result of state court litigation,"[1] prompting McCann and Appellee[2] Yacob Blotner to review each prisoner on the kosher diet list at MCI-Shirley to determine if he was Jewish and could therefore receive a kosher diet. *Id.* McCann and Blotner decided that because Guzzi was not halakhically Jewish, he could not receive a kosher diet. *Id.* ¶6.

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[1] The "state litigation" was apparently the first stage of *Rasheed* v. *Commissioner of Correction*, 446 Mass. 463, 845 N.E.2d 296 (Mass. 2006).

Thus McCann revoked Guzzi's authorization to receive kosher meals on January 23, 2004, more than a year after Guzzi had been authorized to receive a kosher diet. Dkt.35 at 7. Four days later, Guzzi submitted a grievance complaining that his removal from the kosher diet violates his religious beliefs and requesting reinstatement of the kosher diet. *Id.* at 2. On February 12, 2004, the Institutional Grievance Coordinator denied Guzzi's request, with the recommendation that he file a request through the Departmental Religious Services Review Committee. *Id.* at 2-3. Two days later, Guzzi forwarded his grievance to the Religious Services Review Subcommittee. *Id.* at 1. He also sent the grievance to DOC Grievance Coordinator Kristie Ladouceur. *Id.* at 1. Finally, he also appealed the denial of grievance to the Superintendent of MCI-Shirley. *Id.* at 4.[3]

Almost two months later, Allison Hallett, Director of Program Services, replied to his letter to the Religious Services Review Committee, telling him that based on his interview with the chaplain rabbi, "it was determined that you are not a sincere follower of Judaism and therefore you are not entitled to . . . special diets . . . of that faith. Furthermore, you claim your religion is Orthodox Roman Catholic, not Judaism. I trust this response addresses your issue." *Id.* at 11.

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[2] Appellees are referred to as the "Commonwealth."

[3] There appears to be no record evidence that either Ladouceur or the then-Superintendent of MCI-Shirley responded to Guzzi.

Guzzi submitted a *pro se* petition for preliminary injunction on May 15, 2004 in Massachusetts Superior Court, Dkt.26, Ex. A, and followed up with a complaint ten days later. Dkt.25, Ex. A. The record available to *amicus* is incomplete, but it appears from the docket that the state court denied his request for an injunction. Dkt.25, Ex. B at 6-14. Guzzi, representing himself again, initiated action in federal court in the District of Massachusetts raising claims among other things under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq*. ("RLUIPA"). Dkt.3.

On January 25, 2007, the district court issued an opinion and order denying Commonwealth's motion to dismiss, finding that abstention under the *Colorado River* doctrine was not warranted. *Guzzi* v. *Thompson*, 470 F. Supp. 2d 17, 20-24 (D. Mass. 2007) ("*Guzzi I*"). The district court also denied Guzzi interim relief. *See id.* at 24-28. The district court rejected Guzzi's explanation of his religious beliefs as rooted in Chapter 15 of the book of Acts, noting in the very next sentence that "[t]hough the Biblical cite does reference dietary laws typically associated with a kosher diet, it is not this Court's role to perform Biblical interpretation." *Id.* at 27. After refusing to consider the basis for Guzzi's religious beliefs, the district court held that because Guzzi's religious practices "are not generally associated with the system of beliefs of Christian-Catholics," Guzzi did not have a likelihood of success on the merits, and the district court therefore

denied Guzzi interim relief. *Id.* The district court left open the possibility for Guzzi, who was proceeding *in forma pauperis*, to "demonstrat[e] through expert testimony that at least an ancillary tenet of Orthodox Catholics requires [a kosher diet]." *Id.*

Upon cross-motions for summary judgment, the district court reaffirmed its earlier reasoning and found that Guzzi "fail[ed] in his own motion for summary judgment to provide any admissible evidence that supports a reasonable factual inference that his alleged system of religious beliefs requires him to maintain a kosher diet." *Guzzi* v. *Thompson*, 470 F. Supp. 2d 28, 29 (D. Mass. 2007) ("*Guzzi II*"). The district court then denied Guzzi's motion for summary judgment and granted the Commonwealth's motion for summary judgment. *See id.* at 29-30. This appeal followed.

After briefing was completed, this Court asked *amicus* to file a brief in response to questions posed by the Court centering on (a) whether Guzzi had exhausted his remedies under the Prison Litigation Reform Act ("PLRA"); and (b) whether the district court's dismissal of Guzzi's RLUIPA claim was correct.

ARGUMENT

The Supreme Court has repeatedly held that federal courts are not fit to judge whether a person's religious beliefs are valid or not; rather, they may determine only whether such beliefs are sincerely held. Here, the district court

turned that long-settled precedent on its head by requiring Guzzi to provide expert testimony that his religious beliefs were valid. This decision was doubly unnecessary because the district court skipped the logically prior step of determining whether Guzzi had exhausted his administrative remedies as required by the Prison Litigation Reform Act.

Amicus does not know whether Guzzi is sincere in his religious beliefs or not. That is a question left unanswered in the record because both the DOC and the district court chose not to ask it. The DOC instead decided that because Guzzi wasn't Jewish, he couldn't receive kosher food. And the district court decided that non-mainstream forms of Catholicism like the kind Guzzi claims are not protecting by RLUIPA. This inquiry into the religious validity of Guzzi's claims not only contravenes longstanding Supreme Court precedent; it also puts an extra burden on members of minority faiths, or those who sincerely dissent from the views of larger religious groups. Since the district court's expert testimony rule is unconstitutional, this Court should vacate the district court's grant of summary judgment and remand for further proceedings.

I. Because the District Court Failed to Determine Whether Guzzi Exhausted His Administrative Remedies Under the PLRA, This Court Should Vacate and Remand.

On summary judgment, the Commonwealth argued that Guzzi failed to exhaust his administrative remedies. Dkt.33 at 5-11. Rather than consider this

threshold procedural issue, the district court sidestepped it, issuing an opinion on the merits of Guzzi's RLUIPA claim. See *Guzzi II*, 470 F. Supp. 2d at 30 n.1 ("While [the failure to exhaust] argument resonates with the Court and, as a procedural issue, would normally be properly addressed before an argument on the merits, it is neither reached nor addressed due to this Court's previous consideration of the merits upon which this holding rests."). Although the Court can raise this issue sua sponte, it must remand it for further factfinding by the district court because the record is too weak. The Court should also remand to deprive governments of an incentive to forfeit PLRA arguments on appeal.

A. The district court improperly granted summary judgment on Guzzi's RLUIPA claims without ruling on exhaustion of administrative remedies under the PLRA.

The Prison Litigation Reform Act states, in relevant part, that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, 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." 42 U.S.C. § 1997e (a). Last year the Supreme Court found that failure to exhaust administrative remedies is an affirmative defense to a PLRA action and must therefore be raised by the governmental defendant. *See Jones* v. *Bock*, 127 S.Ct. 910, 918-19 (2007). However, the Court reiterated that "exhaustion is mandatory under the PLRA and . . . unexhausted claims cannot be brought in

court." *Jones*, 127 S.Ct. at 918-19 (citing *Porter* v. *Nussle*, 534 U.S. 516, 524 (2002)). And where Congress has not made exhaustion explicitly jurisdictional, this Court has applied this principle to exhaustion of administrative remedies generally: "[a]lthough exhaustion is not a jurisdictional issue, it is mandatory." *Nulankeyutmonen Nkihtaqmikon* v. *Impson*, 503 F.3d 18, 33 (1st Cir. 2007).

Two other Circuits have warned district courts not to entertain a case on the merits before considering the PLRA question. The Eleventh Circuit held that lower courts "should first consider whether the PLRA bars a prisoner plaintiff's suit prior to rendering a decision on the merits." *Boxer X* v. *Harris*, 437 F.3d 1107, 1110 n.2 (11th Cir. 2006). Referring to § 1997e(c)(2), that court noted that "this kind of merits dismissal should be reserved for claims that are clearly frivolous. When . . . a district court has to cover new constitutional ground, it should first, as a matter of judicial economy, ensure that a claim should not be dismissed under the PLRA." *Id.* The Seventh Circuit considered a case where a prisoner filed a "motion" in one case that was, in reality, an entirely unrelated civil action. *United States* v. *Antonelli*, 371 F.3d 360, 361 (7th Cir. 2004) (per curiam). Although the district court there had denied the motion on the merits, *see id.*, the Seventh Circuit nevertheless vacated the lower court's judgment and remanded the case, stating that "although we in no way suggest disagreement with the district court's

evaluation of the merits of [plaintiff's] claim, we conclude that the district court should not have reached the merits without first enforcing the PLRA." *Id.* at 362.

B. Although the Commonwealth waived its PLRA defense on appeal, this Court may raise it sua sponte.

Though the Commonwealth raised failure to exhaust as an affirmative defense in its motion for summary judgment, on appeal it failed to offer exhaustion as an alternative ground for affirmance. *See* Dkt.33 at 5-11. Arguments not renewed on appeal are normally forfeited. *See, e.g.*, *Keeler* v. *Putnam Fiduciary Trust Co.*, 238 F.3d 5, 10 (1st Cir. 2001). This Court may nevertheless raise the exhaustion issue *sua sponte*. *See Izquierdo Prieto* v. *Mercado Rosa*, 894 F.2d 467, 471 n.4 (1st Cir. 1990) ("A court may, however, when good reason to do so exists, raise non-jurisdictional issues not raised by the parties either below or on appeal."); *cf.* FED. R. APP. P. 2. Moreover, this Court has a "settled rule that an appellate court may affirm the entry of summary judgment on any ground made manifest by the record." *Cherry Hill Vineyard, LLC* v. *Baldacci*, 505 F.3d 28, 32 (1st Cir. 2007) (citing *Iverson* v. *City of Boston*, 452 F.3d 94, 98 (1st Cir. 2006)). The necessary implication of this rule is that the Court may review the entire record and raise issues that might lead to affirmance, even when the parties have not briefed

them. Since PLRA exhaustion may lead to affirmance, this court may raise the issue sua sponte. [4]

C. Because the record on appeal does not make manifest whether Guzzi exhausted his administrative remedies, this Court should vacate and remand.

Although the Court can (and should) raise the exhaustion issue, it cannot decide it now because the record is incomplete and the parties' briefing before this Court and the district court does not illuminate the issue.

The central question unresolved by the record is whether Guzzi's submission of both a letter to the Religious Services Review Committee appealing the denial of his grievance and a direct appeal to the Superintendent effectively exhausted his administrative remedies. On summary judgment, the Commonwealth argued that the letter was insufficient because he should have filed a "Religious Services Request Form" instead of writing a letter to the Committee. Dkt.33 at 8-10. The Commonwealth argued that the procedure set out in the "Religious Services Handbook" requires inmates to use a Religious Services Request Form when requesting a special diet. *Id.*; Dkt.37 at 12-13, 16-17 (special diet procedures and form). According to the Commonwealth, Guzzi's failure to use what it believes to

[4] Had the Commonwealth not pleaded failure to exhaust as an affirmative defense, sua sponte affirmance would not be proper. *See Jones*, 127 S.Ct. at 920.

be the correct form means he failed to exhaust his administrative remedies. There are several reasons this argument cannot be credited on this record.

First, Guzzi was not making a new request for a kosher diet—he was complaining that the DOC had terminated the kosher diet he had been receiving for over a year. Dkt.35 at 2. It is not obvious from the Religious Services Handbook, Dkt.37 at 12-13, that an inmate grieved by the termination of a special diet he had already been receiving must file a Religious Services Request Form in lieu of the normal grievance procedure.

Second, no DOC official told Guzzi that sending a letter to the Religious Services Review Committee was, in their view, the wrong way to raise the issue. If Guzzi's failure to use the correct form was really a reason to deny his request for reinstatement of his kosher meal, Hallett should have (and presumably would have) said so in her letter to him. Instead she reiterated that Blotner had determined Guzzi was not Jewish, concluding "I trust this response resolves your issue." Dkt.35 at 11.

Third, there is no record of any response to Guzzi's appeal of the grievance denial to the Superintendent. Since the Superintendent is required by law to respond with reasons for denial, 103 MASS. CODE REGS. § 491.12 (3)-(4), any failure to exhaust may be more the Commonwealth's fault than Guzzi's. If, as the Commonwealth contends, appealing his grievance was the wrong way for Guzzi to

ask for a kosher diet, the Superintendent should still have denied the grievance appeal and stated that the basis for that denial was Guzzi's failure to use the proper procedure.

Fourth, it is ultimately unclear from the record what the appropriate administrative system was in which to file complaints and appeals, and if such a system existed, whether it was valid. For example, even Hallett, the official responsible for religious accommodations throughout the DOC, seems confused about the proper way to ask for a kosher diet. She states in her affidavit that a prisoner should submit a "Religious Property Request Form" to the Religious Services Review Committee for a "religious item" under 103 CODE MASS. REGS. § 403.10(9). Dkt.34 ¶12. Aside from the question of whether kosher food can be a "religious article" under Section 403.10(9)—which deals entirely with inmate property like belts, watches, books, and radios—this procedure is not the one the Commonwealth says Guzzi should have used to get his special diet. If one of the officials being appealed to cannot distinguish between inmate property and special diets in the Religious Services Handbook, why should a prisoner be expected to?

Given this confusion, the district court would also need to find out whether the appeals system, to the extent it actually existed, was sufficiently comprehensible to allow dismissal for failure to exhaust. *See, e.g.*, *Giano* v. *Goord*, 380 F.3d 670, 678-79 (2d Cir. 2004) (failure to exhaust was excused

because even if plaintiff misread the appeals regulations, his interpretation was reasonable).

Since the only way to resolve these questions would be additional fact-finding, the record does not make failure to exhaust manifest. The Court should therefore vacate and remand with instructions to determine whether Guzzi properly exhausted his administrative remedies prior to filing his suit in federal court. *See Nulankeyutmonen Nkihtaqmikon*, 503 F.3d at 34 ("On remand, the district court should consider whether Plaintiffs merit an exception to the exhaustion requirement.") (citing *Casanova* v. *Dubois*, 289 F.3d 142, 147 (1st Cir. 2002)); *Casanova*, 289 F.3d at 147 (remanding to determine PLRA exhaustion issue); *Antonelli*, 371 F.3d at 362 (vacating district court merits opinion and remanding for further proceedings involving the PLRA).

D. Remand will also eliminate the Commonwealth's temptation to forfeit its affirmative PLRA defense in cases involving constitutional and civil rights.

The other reason (besides the undeveloped record) this Court should remand for a decision on the PLRA defense is to eliminate any temptation the Commonwealth may have to forfeit affirmative PLRA defenses on appeal from favorable district court decisions on the merits. It is more than a little peculiar that the Commonwealth has failed to argue its PLRA defense as alternative grounds for affirmance, especially since exhaustion was the first argument in its summary

judgment brief. Perhaps the Commonwealth will describe its motives for forfeiting this defense on appeal in its brief responding to *amicus*'s brief.

Whatever the Commonwealth's actual motivation here, however, it is indisputable that any government will be tempted to drop the PLRA issue on appeal when the district court has rejected a prisoner civil rights claim on the merits. A government will inevitably want to lock in favorable district court precedent: why endanger that precedent by arguing the PLRA defense as an alternative ground to affirm, especially if it is well-taken?[5] Not only does this perverse incentive lead to the unnecessary expenditure of judicial resources, it is also pernicious because it encourages decisions on the merits of knotty constitutional and civil rights claims that federal courts normally try to avoid.

The Court should lead the Commonwealth (and governments throughout the First Circuit) out of this particular temptation by ruling that failure to argue a PLRA exhaustion defense raised below requires remand to the district court for determination of the PLRA issue.

I. This Court Should Instruct the District Court on Remand Not To Conduct Another Unconstitutional Inquiry Into the Validity of Guzzi's Religious Beliefs.

[5] This is especially so in *pro se* cases like this one, where the prisoner plaintiff will not necessarily be able to brief complicated constitutional and civil rights issues.

This Court should not just vacate and remand. It should also instruct the district court—should it again reach the merits of Guzzi's claims—not to conduct another unconstitutional validity inquiry on remand. This instruction is necessary to forestall another validity inquiry that is ***itself*** unconstitutional. *See West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .").

In its grant of summary judgment to Commonwealth, the district court relied on its reasoning in *Guzzi I* that Guzzi "cannot assert a protected right to keep kosher solely by demonstrating a sincere belief in the need to follow that religious practice." *Guzzi I*, 470 F. Supp. 2d at 26. Settled Supreme Court precedent holds that a plaintiff ***can*** assert a protected religious right based on his sincere belief, rather than a court's evaluation of whether his religious beliefs are ecclesiastically valid. Therefore, this court should vacate the district court's opinion and remand for further consideration in accordance with the correct standard: whether Guzzi is sincere in his religious beliefs.

A. Courts may not render judgment on the validity of religious beliefs.

The Supreme Court has long held that "Courts are not arbiters of scriptural interpretation." *Thomas* v. *Review Board*, 450 U.S. 707, 716 (1981). *See also Hernandez* v. *Commissioner of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *United States* v. *Ballard*, 322 U.S. 78, 86 (1944) ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."). This rule makes sense. Courts cannot take the place of theologians, nor should they. Deciding which religious beliefs are valid and worthy of protection would entangle the courts in religious questions, a notion foreclosed by longstanding precedent. *See Watson* v. *Jones*, 13 Wall. 679, 728 (1872) ("The law knows no heresy . . . .").

Validity tests especially harm members of minority religions or those that have no common creed. Proving the validity of a belief derived from a religion that rejects a centralized scripture would be impossible. Hindus, for example, possess a number of sacred texts, yet lack a central scripture: "[w]ithin Hinduism, one person's sacred scripture is by no means necessarily someone else's." JULIUS LIPNER, HINDUS: THEIR RELIGIOUS BELIEFS AND PRACTICES (Routledge 1998) at 3. Similarly non-creedal religions explicitly reject any common statement of their beliefs. *See, e.g.*, Unitarian Universalist Association of Congregations, "Beliefs

Within Our Faith," available at http://www.uua.org/visitors/beliefswithin/index.shtml (visited Dec. 6, 2007) ("As there is no official Unitarian Universalist creed, Unitarian Universalists are free to search for truth on many paths. . . . Individual Unitarian Universalists have varied beliefs about everything from scripture to rituals to God."). Indeed, certain religions, such as the Druze and the Alawites, forbid non-believers from reading their sacred scriptures altogether. Asking a believer of such religions to "validate" their beliefs and practices through external sources would be futile and impossible. *Cf. Thomas*, 450 U.S. at 714 ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible ***to others*** in order to merit *First Amendment* protection.") (first emphasis added).

B. The district court violated the Constitution by questioning the validity of Guzzi's beliefs.

The district court granted summary judgment to the Commonwealth, reaffirming its earlier reasoning that Guzzi "cannot assert a protected right to keep kosher solely by demonstrating a sincere belief in the need to follow that religious practice."[6] *Guzzi I*, 470 F. Supp. 2d at 26. The district court made three primary

[6] *Starr v. Cox*, the New Hampshire case the district court primarily relied on (even assuming it was correctly decided) is irrelevant to this case. Although Tai Chi is a religious exercise for members of the Taoist faith, the prisoner in *Starr* did not profess to be a Taoist. No. 05-cv-368-JD, 2006 WL 1575744 (D.N.H. June 5, 2006). In fact, it does not appear that he professed to be a follower of any religion, instead merely referring to his practice of Tai Chi as "prayer," and failing to provide any explanation for his practices. The court in *Starr* found that the practice

errors: (1) it required Guzzi to show that his beliefs are part of a "system of belief" shared by others, (2) it required Guzzi, a *pro se* plaintiff, to provide expert testimony about his claimed beliefs, and (3) it treated Guzzi's request to keep kosher as a personal preference rather than what Guzzi has consistently claimed it was—a religious practice required by his sincerely held beliefs. Each of these is a form of validity test.

1. Requiring religious plaintiffs to show that their beliefs are part of a system of belief is a form of unconstitutional validity test.

Section 3 of RLUIPA provides that "no [state or local] government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the government demonstrates that the burden furthers a compelling government interest and does so by the least restrictive means. 42 U.S.C. § 2000cc-1(a)(1)-(2). RLUIPA defines "religious exercise" 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). The district court misread these provisions and turned the statute on its head by ***requiring*** Guzzi to

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of Tai Chi, apart from the practice of Taoism, is not a religious activity. *See id.* at *4. Here, by contrast, Guzzi contends that he is an Orthodox Catholic and cites as authority for his dietary restrictions a chapter of the Christian Bible. It is not the act of keeping kosher that is a religion on its own, as the lower court contends, *see Guzzi I*, 470 F. Supp. 2d at 25-26 ("Keeping kosher itself is not a religion."), but rather that for Guzzi keeping kosher is a religious practice required by his Orthodox Catholicism.

connect his religious exercise to "a system of religious belief." *Guzzi I*, 470 F. Supp. 2d at 26 ("Guzzi cannot assert a protected right to keep kosher solely by demonstrating a sincere belief in the need to follow that religious practice. Instead, Guzzi must show that keeping kosher is part of a system of religious belief."). RLUIPA's definition of "religious exercise," however, states that a religious exercise need ***not*** be compelled by (or central to) "a system of religious belief." Though RLUIPA explicitly severs "religious exercise" from the need to be connected to "a system of religious belief," the district court incorrectly reads it back in as a requirement.

The district court's definition of "system of a religious belief" is also remarkably narrow, excluding most believers in minority faiths. For example, the district court questions the validity of Guzzi's religious beliefs because they are "not generally associated with the system of beliefs of Christian-Catholics." *Id.* at 27. But why can't Guzzi's own purported beliefs qualify as a "system of religious belief"? Was Judaism at the time of Abraham not a "system of religious belief"? When Muhammad conceptualized Islam, was this not a bona fide "system of religious belief" merely because it was not yet shared by millions?

Even if RLUIPA required a systematic theology—and it doesn't—Guzzi has consistently described one. In his summary judgment briefing, for example, Guzzi wrote:

> Orthodoxy is not limited to the Hebrew. It is possible to extoll [sic] the traditional concepts of Catholisism [sic] as the early Christians did. Their customs, taken from the Hebrew, define diettary [sic] law for Orthodox Catholics. They old ones [sic] were Jewish, predominately, keeping Kosher. The Gentiles followed James as well, he the brother of Jesus and advocated conversion for all those not Jewish prior to baptisism [sic] as a Christian. . . . [W]hile few [Gentiles] made the dual-conversion, most keep [sic] Kosher in their daily lives, while all worshipped the One God. [7]

Dkt.4 at 6 (citing Acts, Chapter 15). Guzzi conveys the notion that he keeps kosher because he purportedly wishes to emulate the kosher dietary practices of the early Christians. Again, on this record no one can tell whether Guzzi is sincere in this belief. Guzzi does, however, provide a facially rational explanation for his unusual behavior. Though Guzzi need not prove the validity of his beliefs through a formal creed, Guzzi has provided one.

2. The district court's demand for expert testimony is another form of unconstitutional validity test.

[7] The district court correctly noted that "it is not this Court's role to perform Biblical interpretation." *Guzzi I*, 470 F. Supp. 2d at 27 (quoting *Thomas*, 450 U.S. at 716). Yet the district court did just that when responding to Guzzi's citation to Chapter 15 of the Book of Acts, stating that although "the Biblical cite does reference dietary laws typically associated with a kosher diet . . . . This Court may note, however, that a kosher diet is not typically associated with followers of Christian sects." *Id.* In essence, the district court decided that no Christian could decide to keep kosher. This conclusion contradicts the experience of a number of Christian groups that observe kosher or kosher-like dietary restrictions, such as Seventh-Day Adventists and Messianic Jews. *See, e.g.*, Messianic Jewish Rabbinical Council, "Kashrut," *http://www.ourrabbis.org/main/content/view/20/34*.

Because Guzzi's purported beliefs do not conform to mainstream Catholicism or Christianity, the district court required Guzzi, who is *pro se* and proceeding *in forma pauperis*, to present "through expert testimony that at least an ancillary tenet of Orthodox Catholics requires" keeping kosher. *Guzzi I*, 470 F. Supp. 2d at 27. As noted above, settled Supreme Court precedent forbids the district court from questioning the validity of Guzzi's purported religious beliefs. But by requiring Guzzi to demonstrate that there are others who share his beliefs, the district court engaged in a second kind of validity test that the Supreme Court has expressly forbidden.[8] Such a test enshrines discrimination against smaller faiths that may not have many adherents.

The Supreme Court considered a similar situation in *Frazee* v. *Illinois Department of Employment Security*, 489 U.S. 829 (1989), which considered whether a nondenominational Christian could refuse to accept a temporary job offered by an employment agency because of his refusal to work on "the Lord's Day" (Sunday) and still retain his unemployment benefits under Illinois law. *Id.* at 830. The Court unanimously held that because the district courts and the state had conceded that the plaintiff in *Frazee* was sincere, he was entitled to First

[8] This Court should note that a case with a similar legal issue, *Shakur v. Stewart*, No. 05-16705 (9th Cir.) has been briefed and argued and is currently pending before the Ninth Circuit. The parties' briefs in that appeal are available at http://www.law.stanford.edu/program/centers/conlaw/#constitutional_litigation.

Amendment protection even though he did not affiliate with a specific denomination that forbade working on Sunday:

> Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, ***but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization***.

Id. at 834 (emphasis added).

Forcing a party to demonstrate that an organized movement shares the same beliefs would, in effect, show favoritism to mainstream religions and would hamper the ability of members of minority, decentralized, non-creedal, secretive, or newer religions from exercising their religious rights. *See Thomas*, 450 U.S. at 714 ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible ***to others*** in order to merit *First Amendment* protection.") (first emphasis added). *See also DeHart v. Horn*, 227 F.3d 47, 55 (3d Cir. 2000) (unanimous en banc decision) ("[T]he District Court . . . purported to determine what was generally accepted Buddhist doctrine and to discount DeHart's sincerely held religious belief because it was not in that mainstream. ***This is simply unacceptable.***") (emphasis added).

In *Cutter* v. *Wilkinson*, the Supreme Court expressly applied the nondiscrimination principle to the RLUIPA context. *See Cutter*, 544 U.S. 709,

723-24 (2005) ("RLUIPA does not differentiate among bona fide faiths. . . . It confers no privileged status on any particular sect, and singles out no bona fide faith for disadvantageous treatment.") Other courts to reach the issue have rejected the idea that plaintiffs must be part of a larger religious group to qualify for RLUIPA's protections. *See Williams* v. *Bitner*, 359 F. Supp. 2d 370, 376 (M.D. Pa. 2005) (". . . for purposes of the RLUIPA, it matters not whether the inmate's religious belief is shared by ten or tens of millions. All that matters is whether the inmate is sincere in his or her own views.") The district court erred by requiring Guzzi to provide expert testimony about his beliefs.

3. The district court confused personal philosophical preference, which is not protected, with personal religious belief, which is.

In an attempt to buttress its faulty reasoning, the district court also misconstrued *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). Citing *Yoder*, the district court declared that Guzzi's "purely subjective ideas of what his religion requires will not suffice" to protect his claimed religious exercise. *Guzzi I*, 470 F. Supp. 2d at 26. In a parenthetical, the district court cited *Yoder* for the proposition that "for the purposes of a First Amendment inquiry . . . individuals are not free to define religious beliefs solely based upon individual preference." *Id*. Read in context, however, the *Yoder* Court was limning a distinction between individual ***philosophical*** preferences and ***religious*** beliefs. As the Court stated:

> Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Id. The Court went on to say that "the very concept of ordered liberty precludes allowing ***every person*** to make ***his own*** [secular, irreligious] standards on matters of conduct in which society as a whole has important interests." *Id*.

Had Guzzi stated that he preferred kosher food because it is tasty, his demand would merely be an unprotected personal preference. But since Guzzi claims that his desire to keep kosher stems from the Bible and what he views as more Biblically accurate historical practice, his demand is a protected religious belief, subject of course to a determination that it is sincerely held.[9] *See Bates* v. *Commander, First Coast Guard District*, 413 F.2d 475, 480 (1st Cir. 1969) ("[G]reat weight must be attributed to a registrant's claim that his belief is rooted in religious faith. . . . It matters only that he sincerely believes that his convictions

[9] The Commonwealth cites *Yoder* for the idea that "Where '[C]ourts are not arbiters of scriptural interpretation,' it was [Guzzi's] burden to provide expert testimony to support his biblical interpretation." Commw. Br. 11-13 (quoting *Thomas*, 450 U.S. at 716). But the expert testimony in *Yoder* wasn't used to interpret the Bible—it was used to help the Court distinguish between cultural preferences and religious beliefs. The expert testified that "the Old Order Amish religion pervades and determines virtually their entire way of life." *Yoder*, 406 U.S. at 216. In any event, nothing in *Yoder* suggests that religious plaintiffs are

are religious in origin."). *cf. Thomas*, 450 U.S. 713-16 (finding that employee who quit because, as he stated, working with armaments "would be against all of the . . . religious principles that . . . [he has] come to learn," "terminated his employment for religious reasons.") (ellipses in original).

By deciding that Guzzi's request for kosher food was mere personal preference, the district court contravened the Supreme Court's command that "[c]ourts should not undertake to dissect religious beliefs . . . because [the believer's] beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Id.* at 715. The district court should not have taken it upon itself to declare Guzzi's beliefs invalid.

C. On remand, the district court should focus on the real issue: sincerity.

The Commonwealth identified the real issue in this case in its summary judgment briefing: whether Guzzi's beliefs are sincerely held or not. Dkt.33 at 15-17. Unlike validity, courts can determine the sincerity of a plaintiff's religious beliefs without violating the Constitution. "'[T]he "truth" of a belief is not open to question'; rather, the question is whether the objector's beliefs are 'truly held.'" *Gillette* v. *United States*, 401 U.S. 437, 457 (1971) (quoting *United States* v. *Seeger*, 380 U.S. 163, 185 (1965)). This is because only sincerely held religious

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required to put on expert testimony about their beliefs.

beliefs are entitled to protection.[10] The Supreme Court has extended this sincerity test to RLUIPA prisoner claims like Guzzi's: "[P]rison officials may appropriately question whether a prisoner's religiosity . . . is authentic. . . . [T]he Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity." *Cutter* v. *Wilkinson*, 544 U.S. 709, 725 n.13 (2005) (citation omitted).[11]

The sincerity test, if impartially and accurately applied, helps ***protect*** religious liberty, because it reduces the points of conflict between prison administrators and those seeking religious accommodations; sincere believers are not lumped in with those crying wolf. The district court therefore erred by shying away from testing Guzzi's sincerity.

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10 *See, e.g.*, *Jackson* v. *Mann*, 196 F.3d 316, 321 (2d Cir. 1999) ("[T]he question whether Jackson's beliefs are entitled to Free Exercise protection turns on whether they are 'sincerely held,' not on the 'ecclesiastical question' whether he is in fact a Jew under Judaic law. Courts are clearly competent to determine whether religious beliefs are 'sincerely held.'"); *LaFevers* v. *Saffle*, 936 F.2d 1117, 1119 (10th Cir. 1991) ("[I]f plaintiff's religious beliefs are sincerely held, he is entitled to *First Amendment* protection regardless of whether the Seventh Day Adventist Church requires that its members maintain a vegetarian diet.") (emphasis original).

11 In its brief, the Commonwealth bizarrely cites this same text for the proposition that "Guzzi's subjective thoughts and perceptions of whether keeping kosher is a mandate or highly recommended part of his Orthodox Catholic faith, standing alone, will not suffice" to merit protection under RLUIPA. Commw. Br. at 11. Apparently, Commonwealth erroneously conflates the word "authentic" with "valid." But just one sentence later, the *Cutter* court quotes the language in *Gillette* above, stating "The truth of a belief is ***not open to question***; rather the question is whether the objectors' beliefs are truly held." 401 U.S. at 457 (emphasis added, internal quotation marks omitted).

1. The district court's fears are unfounded.

The district court's reluctance to test Guzzi's sincerity appears to stem from fears that (a) protecting sincerely held "isolated" religious beliefs "could lead to much abuse by prisoners and ultimately undermine the statutory purpose," *Guzzi I*, 470 F. Supp. 2d at 27 n.1, and (b) determining the sincerity of "isolated" religious beliefs would necessarily "entail a judgment as to the merits or appropriateness of the practice in a religious sense," *id.* at 26.

Courts have found, however, that both fears are overblown. The Supreme Court has rejected the prisoner abuse argument on at least two occasions. In *Frazee*, the lower court feared that upholding the plaintiff's religious right to abstain from working on Sunday would lead to "chaos," presumably because everyone would claim a religious right to stay home on the weekend. 489 U.S. at 835 (citation omitted). The Supreme Court summarily dismissed this argument: "We are unpersuaded, however, that there will be a mass movement away from Sunday employ if [plaintiff] succeeds in his claim." *Id.* This conclusion seems to have been borne out in modern American working habits. The *Cutter* defendants paraded the same horrible: "[RLUIPA], they project, advances religion by encouraging prisoners to 'get religion,' and thereby gain accommodations afforded under [the Act]." 544 U.S. at 721 n.10. The unanimous Court again rejected this argument, holding: "[W]e doubt that all accommodations would be perceived as 'benefits.' For example, congressional hearings on RLUIPA

revealed that one state corrections system served as its kosher diet a fruit, a vegetable, a granola bar, and a liquid nutritional supplement—each and every meal." *Id.* at 721 (internal quotation marks and citation omitted). This accords with academic studies, which have demonstrated that RLUIPA has not unleashed the feared wave of prisoner lawsuits.[12]

Similarly, courts have found themselves fully competent to decide sincerity questions without deciding whether the claimed beliefs have any religious merit. *See, e.g.*, *Jackson*, 196 F.3d at 321 ("Courts are clearly competent to determine whether religious beliefs are 'sincerely held.'"); *EEOC* v. *Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 56 (1st Cir. 2002) ("Credibility issues such as the sincerity of an employee's religious belief . . . should be reserved for the factfinder at trial") (internal quotation marks omitted). *Kuperman* v. *New Hampshire Department of Corrections*, No. 06-CV-

[12] *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1583 tbl. I.A, 1584 fig. I.A, 1586 fig. I.B (2003) (showing that RLUIPA's enactment was followed by a slight *decrease* in religious accommodation suits); *accord* Gaubatz, *RLUIPA at Four*, 28 HARV. J.L. & PUB. POL'Y at 557-571 (finding that only 59 reported RLUIPA prisoner cases were filed in the 50 state prison systems in the four years following the statute's passage). *See also* 146 CONG. REC. S7774-7776 (daily ed. July 27, 2000) (citing studies showing "that religious liberty claims are a very small percentage of all prisoner claims, that [the Religious Freedom Restoration Act] led to only a very slight increase in the number of such claims, and that on average RFRA claims were more meritorious than most prisoner claims"); Lee Boothby & Nicholas P. Miller, *Prisoner Claims for Religious Freedom and State RFRAs*, 32 U.C. DAVIS L. REV. 573 (1999).

420-JD, 2007 WL 1200092 (D.N.H. 2007) at *4 (finding based on hearing testimony that "Kuperman is a practicing orthodox jew [sic] who holds a very sincere belief in Judaism" and ordering kosher diet on that basis).

Nor should the "isolated" nature of Guzzi's claimed beliefs deter a sincerity analysis. Although connection to a faith community and its wider beliefs can help demonstrate sincerity, the lack of that connection should not be used against defendants who hold more idiosyncratic views. *See supra* Section II.B. The normal indicia of sincerity—deeds matching words, consistent practice[13] of the religious exercise claimed both inside and outside prison, and the presence or absence of an ulterior motive—will also be available to courts deciding the sincerity of "isolated" beliefs.

2. Focusing on sincerity would save significant judicial resources.

If the district court's decision to avoid examining Guzzi's sincerity was a method of docket management, it was a poor one. Courts will save valuable resources by looking at sincerity. For example, if the district court reaches the merits on remand, it could then hold a factfinding hearing to explore whether Guzzi's beliefs are sincerely held.[14] At the conclusion of the hearing, the court

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[13] The rule of consistency should not, however, be applied against those who on occasion violate the precepts they sincerely hold to. *See Kuperman*, 2007 WL 1200092 at *4. Casual disregard is a better indicator of insincerity than occasional sin.

[14] The Commonwealth claims that the DOC already conducted such a hearing.

could elicit motions for summary judgment on the sincerity issue, based on the evidence obtained at the hearing. To the extent that the only relief sought is injunctive—and in most cases subject to the PLRA it is—the court could itself find facts as to Guzzi's sincerity.

Had either the Commonwealth or the district court applied the sincerity test, this Court might not have this appeal to decide. The Court should remand to allow them the opportunity to engage in that analysis.

CONCLUSION

This Court should vacate and remand to the district court with instructions (1) to determine whether Guzzi exhausted his administrative remedies and (2) not to conduct another unconstitutional validity inquiry.

Commw. Br. at 11. But the hearing was conducted to determine whether Guzzi was halakhically Jewish, not whether his claim to kosher food was rooted in a sincerely held religious belief. The DOC unsurprisingly concluded that Guzzi, who has consistently described himself as an "Orthodox Catholic," was not Jewish. Dkt.38 ¶ 9; 36 ¶ 8; 35 at 11 ("As a result of your responses to the interview questions it was determined that you are not a sincere follower of Judaism . . . . Furthermore you claim your religion is Orthodox Roman Catholic, not Judaism.").

Respectfully submitted,

Dated: December 17, 2007

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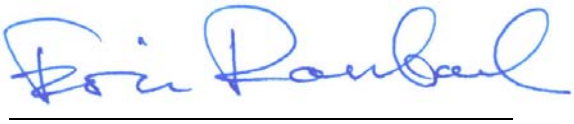
By: 

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CERTIFICATE OF SERVICE

I, Eric C. Rassbach, attorney for *Amicus Curiae*, hereby certify that on December 17, 2007, two true and correct copies—one paper and one electronic—of the Brief *Amicus Curiae* of The Becket Fund for Religious Liberty were served upon the following by First-Class Mail:

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