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Gary Wall, Plaintiff-Appellant v. James Wade, et al., Defendants-Appellees: Reply Brief of Appellant

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No. 13-6355

In The

United States Court of Appeals for the Fourth Circuit

Gary Wall,

Plaintiff-Appellant,

v.

James Wade, et al.,

Defendants-Appellees.

On Appeal from the
United States District Court for the Western District of Virginia
in Case No. 7:11-cv-00191-JLK-RSB

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Wall established in his opening brief that a "'heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again,'" is placed on a defendant asserting that a claim is moot due to the voluntary cessation of that defendant's actions. AOB 11, *citing Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 189 (2000). Red Onion does not dispute that. It only asserts that there is "no reason to believe that prison officials will revive the 2010 Ramadan Policy," AB 13, without pointing to a single piece of evidence in the record to support this contention. Red Onion's conjecture is insufficient. It did not even attempt to meet its heavy burden of production below, and thus, Wall's request for equitable relief under the Religious Land Use and Institutionalized Persons Act (the "Act" or "RLUIPA") is not moot.

Additionally, despite Red Onion's acknowledgement in a policy memorandum that it was "not appropriate to require inmates to buy something which is related to exercising First Amendment rights," Red Onion still contends that conditioning Wall's Ramadan participation on producing religious materials to prove his sincerity did not violate Wall's Free Exercise Rights. AB 21. Red Onion attempts to justify its policy in light of the factors set forth by the Supreme Court in *Turner v. Safley*, arguing that other alternatives to the 2010 policy are not a good fit in the prison context, AB 28. However, Red Onion repeatedly references the

fact that Wall has been able to participate in Ramadan since their policy changed to take a more reasonable approach to the assessment of sincerity, thus undercutting their argument that the 2010 policy was a legitimate method of testing sincerity. *See e.g.* AB 5, 7, 9, 12.

The 2010 Ramadan policy's requirement that "inmates buy something" or possess some specific object to prove their faith was clearly "not appropriate." AB 13-14. A reasonable official should have understood that a rule requiring only physical tokens of an inmate's faith was not sufficient justification to deny Wall his right to participate in Ramadan. Therefore, this Court should reverse the district court's ruling and remand the case for further proceedings.

ARGUMENT

I. RED ONION FAILS TO MEET ITS BURDEN OF SHOWING THAT THE VOLUNTARY CESSATION OF THE RAMADAN POLICY MOOTS WALL'S CLAIMS FOR EQUITABLE RELIEF UNDER THE ACT.

A. Wall Sufficiently Asserted A Claim For Injunctive Relief And Both Red Onion And The District Court Address This Claim As If Properly Asserted.

Despite Red Onion's assertion to the contrary, Wall's request for equitable relief is available under the Act. Under the Act, a person "residing in or confined to an institution," 42 U.S.C. § 2000cc-1(a), may assert a claim in a judicial proceeding and subsequently "obtain appropriate relief against a government." 42 U.S.C. § 2000cc-2(a). Appropriate relief "ordinarily includes injunctive and declaratory relief." *Madison v. Virginia*, 474 F.3d 118, 130-31 (4th Cir. 2006). Thus, where Wall asserts a claim under RLUIPA, equitable relief in the form of injunctive and declaratory relief is available.

Red Onion acknowledges Wall's claim for declaratory relief, but asserts that Wall waived any claim for injunctive relief in the Amended Complaint. AB 10. As the Act allows for both declaratory and injunctive relief, it is irrelevant to mootness whether injunctive relief was properly pled. The parties agree that Wall has a properly pled claim for declaratory relief under the Act. In any event, Wall properly pled injunctive relief. Although the Amended Complaint does not use the specific term injunctive relief, the complaint clearly incorporates requests for

injunctive remedies. As a *pro se* plaintiff, Wall is entitled to a liberal construction of his pleadings. AB 10; *see Estelle v. Gamble*, 429 U.S. 97, 106 (1976). No matter how "inartfully pleaded," a pro se complaint must be held to a "less stringent standard" than the standard applied to complaints drafted by lawyers. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citing *Estelle*, 429 U.S. at 106). Red Onion recognized the required leniency and goes on to say that, while the court needs not search for some unexpressed intent, the court is to rely on the meaning of the words used in the complaint. AB 10.

The purpose of injunctive relief is to "prevent future violations." *Edwards v. Flowers*, 460 F.2d 1191, 1192 (4th Cir. 1972). In his complaint, Wall seeks relief from Red Onion's denial of his "right to exercise [his] chosen religion by participating in a[n] obligatory religious service (Ramadan)." JA32. Wall's claims center on his unlawful removal from participation in the Ramadan month of fasting and he specifically asks the court to find that removal unconstitutional. JA33. A fair reading of Wall's Amended Complaint makes clear that the relief he seeks is injunctive in nature. Moreover, both Red Onion and the district court interpreted Wall's Amended Complaint as seeking injunctive relief. Red Onion argued before the district court that Wall's claim for injunctive relief was moot due to his participation in subsequent Ramadan observations. JA80-81. Likewise the District Court ruled that Wall's claim for injunctive relief was moot and his

subsequent return to Red Onion too speculative to support injunctive relief. JA142-143. Importantly, neither Red Onion nor the district court made any statement or argument to suggest that Wall failed to seek injunctive relief. Thus, based on the Amended Complaint, the nature of Wall's claims and the record showing that both Red Onion and the district court treated Wall as having sought injunctive relief, Wall's claims for both declaratory and injunctive relief can and should properly be considered on remand.

B. Wall's Claim For Equitable Relief Is Not Moot Because Red Onion Has Failed To Meet Its Heavy Burden Under The Voluntary Cessation Doctrine.

Wall's move back to Red Onion makes his claim for equitable relief justiciable, regardless of the fact that in the interim time Red Onion may have changed its Ramadan policy. Red Onion asserts that because it voluntarily ceased its policy Wall's claim is moot. In order to succeed on such an argument Red Onion must show "that there is no reasonable expectation that the wrong will be repeated." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). Red Onion—the party asserting mootness—must meet "[t]he heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc*., 528 U.S. 167, 189 (2000) (quotations omitted); *see also Lyons P'ship v. Morris Costumes, Inc.*, 243 F.3d 789, 800-801 (4th Cir. 2001). Red Onion's voluntary cessation of

their inappropriate conduct "does not deprive a federal court of its power to determine the legality of the practice unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Doe v. Kidd*, 501 F.3d 348, 354 (4th Cir. 2007) (citing *Friends of the Earth Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 189 (2000)). This rule prevents the government from changing its policy in order to moot litigation while leaving open the opportunity to change the policy back after proceedings conclude.

Although Red Onion asserts, without any factual support in the record, that the latest iteration of its Ramadan policy will not be rescinded, AB 13, it fails to embrace or meet its burden of affirmatively supporting this assertion. Red Onion bears the "heavy burden" of affirmatively showing that (1) there is no reasonable expectation the alleged policy or practice will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *Friends of the Earth, Inc.*, 528 U.S. at 189. The voluntary cessation standard helps to ensure that defendants will not reinstate improper policies post-litigation. Thus, even if Red Onion changed its 2010 policy and subsequently provided Wall the opportunity to participate in Ramadan, Wall's claims are not moot until Red Onion has satisfied its burden.

Red Onion presents no evidence to show that the 2010 Ramadan policy would not be reinstated. In fact, Red Onion hardly provides any evidence that the 2010 Ramadan policy is no longer in effect. Instead of presenting any evidence, Red Onion merely refers to another case for the proposition that the 2010 Ramadan policy was changed. *See DePaola v. Wade*, No. 7:11-cv-00198-SGW-RSB (W.D. Va. Jan. 20, 2012), aff'd, No. 12-6803 (4th Cir. Oct. 3, 2012). The district court took notice of the information presented in *DePaola* and concluded, based on the record of that case, that the 2010 Ramadan policy was rescinded in 2011.

Regardless, Red Onion has provided absolutely no evidence to show that the 2010 Ramadan policy will not be changed again and reenacted at some point after litigation. Although Red Onion states in its brief here that there is little reason to believe the 2010 Ramadan policy will return, AB 13, there is no factual support for that assertion. Instead, Red Onion admits to a demonstrated pattern of changing its policies concerning Ramadan frequently, as different policies were utilized in 2009, 2010 and again in 2011. AB 1-2. To meet its burden Red Onion must provide some admissible evidence that the policy will not be reenacted. In other cases, such evidence might come in the form of an affidavit stating that the unconstitutional conduct will not happen again, *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009) (Prison director affidavit stating the policy of denying prisoners access to religious services had ended "was sufficient"

to meet the heavy burden), or a showing that the unconstitutional policy had not been reinstated for many years, *County of Los Angeles*, 440 U.S. at 632 (discriminatory civil service exam had not been used in over ten years). On the contrary, when a party continues to assert the acceptability of its position, mootness is not found and the claim must be assessed on its merit. *Com. of Va. ex rel. Coleman v. Califano*, 631 F.2d 324, 326-27 (4th Cir. 1980) (Virginia's claims against the Department of Health, Education, and Welfare were not moot where the Department "continued to assert the correctness of its position."). In light of the constantly-changing policy, the lack of oversight over the policy and Red Onion's assertion that the "policy as a whole was reasonable," (AB 22), more than a simple affidavit likely would be required to meet Red Onion's burden here, but the Court need not address what amount of evidence is required to meet the burden: Red Onion presented none at all.

Red Onion's failure to satisfy its burden under the voluntary cessation doctrine is not excused because Red Onion is a government defendant. Even if a government defendant has a "lighter burden," the government still has a burden to make "absolutely clear" that an alleged violation cannot "reasonably be expected to recur." *Sossamon*, 560 F.3d at 325; *see also Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 421 (8th Cir. 2007)(claim was not moot where Department of Corrections, et al., failed to

provide "any assurance that they will not resume the prohibited conduct"). Red Onion argues that a prison, like a state legislature, should only be liable under the voluntary cessation doctrine if it "openly announc[es] its intention to reenact" a formerly improper policy. *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000). However, a change in Red Onion's prison policies cannot properly be analogized to legislative action. Unlike a legislature, Red Onion officials have the ability to unilaterally change policies without significant procedural hurdles. Red Onion officials are also not in the public eye or accountable to the public in the same fashion as legislatures. Thus additional assurances beyond legislative inertia are required to ensure that a prison policy will not recur.

Even if Red Onion could shift the burden to Wall, Wall has met any burden just on the facts provided by Red Onion. Red Onion, attempting to shift its burden to Wall, states that he does not allege that the policy change was merely in response to litigation. AB 13. However it is Red Onion's burden, not Wall's, to show that the policy change was not a result of litigation. Yet again Red Onion fails to present any evidence to support its assertion that the policy change was not related to litigation. In any event, the circumstances surrounding the policy's cessation establish that Red Onion's actions were connected to or motivated by litigation. On September 19, 2011, Red Onion filed a Motion for Protective Order

and Memorandum in Support of that Motion in the *DePaola* matter. *See DePaola*, No. 7:11-cv-00198 (W.D. Va., Sept. 19, 2011), ECF No. 25. That protective order sought, in part, to curtail *DePaola's* discovery requests concerning his claim for injunctive relief. *Id*. at p. 2-3. In support of their argument that DePaola's request for injunctive relief was moot, Red Onion relied on its policy change to no longer require possession of religious items. *Id*. at 3. As Red Onion failed to present any evidence of this change in its motion, the Court later requested some proof that Red Onion's policy had changed. Red Onion produced an affidavit and memorandum showing that its policy changed on September 13, 2011, a mere 6 days before it filed the motion seeking a protective order relying on the elimination of the 2010 Ramadan policy. *See DePaola*, No. 7:11-cv-00198 (W.D. Va., Jan 20, 2012) ECF No. 35-1. Additionally, the Department of Corrections' memorandum itself states that the policy was changed in response to an investigation "concerning the management of Muslim inmates in segregation at one of our facilities, and their eligibility for Ramadan." *Id*. at 2. It notably omits, however, any explanation for why this investigation was initiated.

The extremely close temporal connection to litigation and the use of that policy change as the justification to avoid discovery in litigation meet any burden of establishing that Red Onion changed its policy directly in response to litigation. Red Onion's failure to produce any evidence concerning the reasons for the policy

change or any evidence to suggest that it was motivated by something other than litigation certainly fails to rise to an adequate level for Red Onion to meet its burden under the voluntarily cessation doctrine or to respond to evidence that Red Onion was motivated by litigation. In light of the frequency of Red Onion's policy changes concerning Ramadan participation, the close connection to the policy change and ongoing litigation challenging the policy and Red Onion's lack of any evidence that that policy will not be revived, Red Onion has failed to discharge its heavy burden under the voluntary cessation doctrine. Therefore, the district court's finding of mootness should be reversed and Wall's claim under the Act for injunctive and declaratory relief be allowed to proceed.

II. RED ONION OFFICIALS ARE NOT ENTITLED TO QUALIFIED IMMUNITY FROM WALL'S SECTION 1983 CLAIMS.

A. Red Onion's Policy Undisputedly Burdened Wall's Sincerely Held Religious Beliefs.

Red Onion does not attempt to dispute the sincerity of Wall's Nation of Islam faith or challenge that the prevention or prohibition of Wall's observance of Ramadan would clearly infringe upon his sincere religious beliefs. Instead Red Onion argues that because this Court and the Supreme Court have not set forth specific limitation as to how the Red Onion officials can inquire into Wall's sincerity, there are therefore no clearly established "constitutional limits on a prison official's inquiring into religious sincerity." AB 18. Red Onion then argues

that the "lack of any governing authority" giving precise guidance on what means prison officials might use to screen for religious sincerity, even if there is persuasive authority from other Circuits demonstrating "the unreasonableness of defendant's actions," entitled the Red Onion officials to immunity. AB 20-21. Thus, Red Onion essentially argues that until this Court or the Supreme Court prohibit a particular type of examination into a prisoner's sincerity of belief, prison officials can inquire into that sincerity in any manner they elect with impunity.

However, an official action does not lose the protection of qualified immunity only when the very act in question has previously been held to be unlawful, but also when the impropriety is reasonably apparent from the then existing laws. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "The fact that an exact right allegedly violated has not earlier been specifically recognized by any court does not prevent a determination that it was nevertheless "clearly established" for qualified immunity purposes." *Pritchett v. Alford*, 973 F.2d 307, 314 (4th Cir. 1992); *see also Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999) ("[T]he nonexistence of a case holding the defendant's identical conduct to be unlawful does not prevent the denial of qualified immunity."). Thus, the Court considers "whether a reasonable person in the official's position would have known that his conduct would violate that right." *Id*. (citing *Anderson*, 483 U.S. at 639). A clearly established right is one that is "manifestly included within more

general applications of the core constitutional principle invoked." *Pritchett*, 973 F.2d at 314.

Contrary to Red Onion's assertion, while Red Onion may inquire into the sincerity of a prisoners beliefs, that inquiry is not without guidance as to what could constitute a permissible test of those beliefs. First, it is clearly established that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981). Further, this Court has clearly indicated that an individual does not need to participate in all aspects of a religion in order for their belief to be sincere. *Dettmer v. Landon*, 799 F.2d 929, 932 (4th Cir. 1986) ("Religious observances need not be uniform to merit the protection of the first amendment."). Additionally, the question of one's sincerity of belief is a factual inquiry, not a bright line legal rule. *United States v. Seeger*, 380 U.S. 163, 185 (1965). Red Onion officials may not substantially burden Wall's sincerely held religious belief by any action that "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (citing *Thomas*, 450 U.S. at 718). It is not permissible to assume "that lack of sincerity (or religiosity) with respect to one practice of a given religion means lack of sincerity with respect to others." *Id*. at 188.

Red Onion cannot reasonably dispute that Wall's faith was and is sincerely held as demonstrated by his past successful participation in Ramadan, his inclusion in the Common Fare program, and his repeated requests to participate in Ramadan during the time at issue. *See* JA138-39. Further, Wall provided clear evidence to the Red Onion officials that the physical objects they deemed so necessary to demonstrate faith were lost by the Department of Corrections during his transfer to Red Onion. JA138-39. Despite these clear indications of sincerity and with the legal backdrop that sincerity is a fact-specific inquiry where one is not required to participate in every aspects of a religion (*Dettmer*, 799 F.2d at 932), Red Onion nevertheless determined that Wall's beliefs were not sincere. These actions clearly placed additional burdens on Wall to obtain specific physical objects to prove his faith and unreasonably ignored this Court's precedent on what can constitute sincerity. Given all the information establishing the sincerity of his belief, even if Wall affirmatively elected not to have any physical relics specifically related to his faith, the Red Onion officials were not reasonable in concluding that he was insincere in his faith and preventing his observation of Ramadan.

Wall was ultimately forced to choose between observance of faith and his survival. The District Court clearly recognized the burden placed on Wall's faith by Red Onion as Wall, "[f]aced with starvation and repeated sanctions for trying to eat during the night," elected to eat during the day, violating his religious beliefs.

JA139. Red Onion officials themselves conceded that the policy imposed a substantial burden on Wall's faith. JA78. Therefore, Red Onion's policy, which clearly imposed a substantial burden on Wall's observation of his faith, must meet the four factors first articulated in *Turner v. Safley*, 482 U.S. 78 (1987).

B. The *Turner* Factors Show Red Onion's Policy To Be Clearly Unreasonable.

Given the fact that the *Turner* factors are clearly established law, no reasonable officials should or would act in such a fashion as to obviously violate them. If the Red Onion officials violated Wall's clearly established rights as understood when analyzed under the *Turner* factors, they lose the protections of qualified immunity and are liable for their failure to adhere to the constitutional requirements laid out by the Supreme Court. Under *Turner*, there first must be "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)). Second a court looks to "whether there are alternative means of exercising the right that remain open to prison inmates." *Id*. at 90. The analysis then turns to the impact the accommodation of the constitutional right will have on prison resources and finally, whether there are "ready alternatives" to the prison's regulation or policy. *Id*. at 90-91.

While a connection might exist between requiring the production of some physical token of faith and the reduction of the costs of allowing inmates to

observe Ramadan, such a requirement is not a "logical [or] reasonable means of distinguishing Ramadan observers" (AB 23) who were sincere in their faith. Such a policy will clearly eliminate the cost of accommodating those inmates who have sincere religious beliefs but are unable, for whatever reason, to produce acceptable physical items displaying their faith. However, it is unreasonable to presume that because an inmate does not possess some acceptable religious relic they lack a sincere faith. Wall provides a clear example of just how unreasonable this policy is in practice. Despite the other outward manifestations of his faith, including his past participation in Ramadan and common fare diet, and despite the explanation and evidence as to why he was unable to produce any religious relics when demanded to do so, the Red Onion official decided "[t]hat don't mean anything" and removed Wall from the Ramadan list. JA139.

Despite Red Onion's assertion, Wall did not have and was refused "alternative means of exercising" the faithful the observation of Ramadan. AB 25. As stated above, Wall attempted to demonstrate his sincerity through alternative means but Red Onion decided that did not mean anything unless he could produce some physical object to prove his sincere belief. When Red Onion still refused to permit his participation in Ramadan, Wall attempted to exercise the faithful observance of Ramadan by saving his meals in his cell to eat it after sundown as the tenants of his faith required. JA139. Wall, however, was not only prohibited

from saving the food but also threatened with punishment for his attempt to exercise his faith through alternative means. JA139. Furthermore, the inmates at Red Onion are severely limited in the alternative means available to them to more broadly participate in the observations of their religious practice, including a prohibition on participation in group religious services. JA138 n. 3; JA74. Thus, Wall did not have and was prohibited from adequate alternative means to exercise his faith.

The analysis of the third and fourth *Turner* factors similarly cut strongly in Wall's favor. Red Onion appears to argue that no viable alternatives to the 2010 Ramadan policy existed and that the impact of any accommodation or change would be substantial. At the same time Red Onion acknowledges that it not only employed a different policy with a different standard through 2009 but also implemented a new policy in 2011 which again applied a different standard and allowed a for a variety of methods to demonstrate sincerity of belief. AB 12, 28-30. The argument that any alternatives or accommodations would unreasonably tax prison resources is simply not compelling when, as here, Red Onion has utilized much less restrictive alternatives and has affirmatively argued that the implementation of its new policy moots Walls claims. AB 12, 28. Moreover, as explained in Wall's opening brief, Red Onion's own guidance documents provide

several alternatives to Red Onion's Ramadan policy. AOB 20; JA88. Red Onion does not respond to that point.

It is disingenuous for Red Onion to argue that a different, more inclusive policy, would unreasonably burden prison resources when, at the same time, it argues that Wall's argument under the Act is moot due to Red Onion's new, less restrictive policy. AB 12. Simply accepting any or all of Wall's ample proof of the sincerity of his belief, would result in no additional burdens on staff, inmates, or prison resources beyond the burdens Red Onion has to implement and enforce the new policy which allows such things to be used to demonstrate sincerity of belief. Thus, it is clear that Red Onion's policy and the implementation against Wall were not reasonable under *Turner*.

As discussed above, Wall pled facts establishing a constitutional violation under the Free Exercise Clause. Wall also pled sufficient facts to allow a reasonable fact-finder to decide that the Red Onion Officials acted intentionally in depriving Wall of his right to participate in Ramadan and thus supports an as applied challenge. A reasonable prison official would have known that requiring physical items and *only* physical items as proof of an inmate's faith was an unacceptable justification for denying Wall's right to participate in Ramadan.

Red Onion's policy as applied to Wall set an unreasonably high threshold for proving sincerity, as it excluded even a devout inmate with (1) a recorded

history of observing Ramadan, (2) prior approval for a special diet to accommodate his faith, and (3) evidence that his belongings, including his religious belongings, were lost by the prison system itself. The Red Onion officials applied their policy in such a way that failure to follow one practice (possessing a Quran or prayer rug) is used to preclude the inmate from engaging in another practice (fasting during Ramadan). Then, Red Onion Officials mischaracterized Wall's statement to make it appear as if he, himself elected not to participate. Any reasonable officer would have known such actions were impermissible. *See Lovelace*, 472 F.3d at 188 ("Such an inmate's right to religious exercise is substantially burdened by a policy, like the one here, that automatically assumes that lack of sincerity (or religiosity) with respect to one practice means lack of sincerity with respect to others."). Therefore, defendants were not entitled to summary judgment on either the question of mootness or their qualified immunity and the trial court ruling should be reversed.

CONCLUSION

For the reasons stated above, the district court's grant of summary judgment in defendants' favor should be reversed and the case remanded for further proceedings.

Respectfully Submitted

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Dated: June 27, 2013

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 27th day of June, 2013, I caused this Reply Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 27th day of June, 2013, I caused the required copies of the Reply Brief of Appellant to be hand filed with the Clerk of the Court.

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