IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CASE NO. 12-8048

ANDREW JOHN YELLOWBEAR, JR.,
Plaintiff-Appellant

v.

ROBERT O. LAMPERT, Director
Wyoming Department of Corrections,
et al.,
Defendant-Appellee

On Appeal from
The United States District Court for the District of Wyoming
(Case No. 2:11-CV-003 (Johnson, J.))

SUPPLEMENTAL REPLY BRIEF OF PLAINTIFF-APPELLANT ANDREW JOHN YELLOWBEAR, JR.

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REPLY STATEMENT

There is no dispute that Wyoming's medium-security prison substantially burdens Yellowbear's sincere religious beliefs by refusing to make Sacred Sweat Lodge Ceremonies available to inmates in protective custody (PC). Accordingly, "the burden of proof shifts to the defendants to show . . . that the government has employed the 'least restrictive means' of accomplishing its [compelling] interest," *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1318 (10th Cir. 2010), and part of "the government's burden" is to "refute the alternative schemes offered by the challenger." *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011). Moreover, in this summary judgment context, the record must be viewed in the light most favorable to Yellowbear. *Abdulhaseeb*, 600 F.3d at 1311.

Appellees' Supplemental Brief (ASB) fails to show that denying Yellowbear and other PC inmates the religious rights of those in the general population (GP) was the least restrictive means of furthering compelling interests. The brief cites cases upholding denial of sweat lodges to maximum security inmates (ASB 15-18), but these are inapposite because Wyoming never suggested medium-security PC inmates are any more dangerous than GP inmates. Defendants fall back on claims of administrative inconvenience—and ultimately the classic bureaucratic imaginings of slippery slopes—that fail to satisfy their RLUIPA burden.

REPLY ARGUMENT

I. DEFENDANTS CANNOT CARRY THEIR RLUIPA BURDEN.

A. Defendants Do Not Contend that Yellowbear or Other PC Inmates Are Too Dangerous to Participate in Sacred Sweat Lodge Ceremonies.

Prison officials denying Yellowbear's religious practices never suggested he or other PC inmates in medium security were too dangerous to participate in Sacred Sweat Lodge Ceremonies. Nor does the Supplemental Brief so contend.

Defendants nonetheless place exclusive reliance on cases denying claims of inmates found too dangerous to participate in sweat lodge activities. ASB 15-18. They rely most heavily on *Fowler v. Crawford*, 534 F.3d 931, 939-43 (8th Cir. 2008), which upheld a *maximum*-security prison's denial of sweat lodge services based on the "serious safety and security concerns [that] arise when inmates at a maximum security prison are provided ready access" to items such as "burning embers and hot coals," "blunt instruments" and "sharper objects." They also cite a recent case applying *Fowler* to deny sweat lodge participation to dangerous "death-row inmates." *Haight v. Thompson*, No. 5:11-CV-00118, 2013 WL 1092969, at *1, 10-12 (W.D. Ky. Mar. 15, 2013). But Defendants ignore the *Fowler* court's emphasis that it "did not foreclose the possibility of a successful sweat lodge claim *under different circumstances*." 534 F.3d at 943 (adding emphasis to *Hamilton v. Schriro*, 74 F.3d 1545, 1557 (8th Cir. 1996); internal punctuation omitted).

Inexplicably, after quoting *Fowler*, Defendants contend "[t]hese security and safety concerns are the same as those facing the State in this case." ASB 16. This case, however, unlike *Fowler* and the other cases relied on by Defendants, involves a *medium*-security prison. Courts, including the Eighth Circuit, have drawn clear distinctions between maximum- and medium-security institutions when analyzing RLUIPA challenges to denials of prison sweat lodges. *See Pounders v. Kempker*, 79 Fed. App'x 941, 943 (8th Cir. 2003) (reversing summary judgment denial of inmate's RLUIPA challenge to denial of sweat lodge; distinguishing *Hamilton* (*Fowler*'s precursor) partly because *Pounders* involved "a lower-security-level institution"); *Farrow v. Stanley*, No. Civ. 02-567-PB, 2005 WL 2671541, at *9 n.11 (D.N.H. Oct. 20, 2005) (denying defense summary judgment motion in inmate's RLUIPA challenge to denial of sweat lodge; distinguishing cases where "the prisoners who sought access to a sweat lodge were incarcerated in maximum security facilities, in which the security concerns . . . were higher").

Defendants never claimed that Yellowbear and other PC inmates in medium security were too dangerous to participate in Sacred Sweat Lodge Ceremonies. Instead, they claimed that granting Yellowbear the same religious rights as GP inmates was an administrative burden given the need to protect PC inmates *from* others. The *Fowler* line of cases is inapposite.

B. Defendants Have Not Refuted Yellowbear's Alternatives of Conducting Monthly Ceremonies In a New PC Sweat Lodge or the Existing GP Sweat Lodge.

Defendants offer no real response to Yellowbear's proposed alternatives—creating a sweat lodge in the PC yard or allowing use of the GP sweat lodge—to absolute denial of his religious practice. Yellowbear offered specific reasons, tied to the record, why either alternative could satisfy prison officials' concerns of protecting PC inmates. *See* Yellowbear's Supplemental Brief (YSB) 17-19.

The record cannot support the ultimate conclusion urged by Defendants: that the facts "taken in the light most favorable to Yellowbear" show that "the State had met its burden" of demonstrating that denying Yellowbear's religious rights was the "least restrictive means" of furthering compelling interests. ASB 19-20. To the contrary, the record supports precisely the contrary conclusion.

Defendants ultimately contend that accommodating religion would be too burdensome in terms of "funding and personnel." ASB 19. What they ignore is that "RLUIPA 'may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.'" *Garner v. Kennedy*, ___ F.3d ___, 2013 WL 1315926, *4, 6 (5th Cir. Apr. 2, 2013) (holding in favor of Muslim inmate that Texas's no-beard policy was not least restrictive means of furthering prison security interests).

Defendants, moreover, do not really argue it would be too costly or burdensome to accommodate Yellowbear's *specific* request. Rather, they contend that doing so "would be just the tip of the iceberg for religious accommodation requests." ASB 19. This "'classic rejoinder of bureaucrats throughout history'" is precisely the "slippery-slope argument" precluded by RLUIPA. *See* YSB 21 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 436 (2006) (RFRA case)). Instead, the Supreme Court, under both RLUIPA and RFRA, requires case-by-case consideration of religious exemptions to generally applicable rules." *Gonzales*, 546 U.S. at 436 (citing *Cutter v. Wilkinson*, 544 U.S. 709 (2005)). Defendants have failed to meet their burden in *this* case.

II. DEFENDANTS HAVE NO IMMUNITY TO THESE CLAIMS FOR NON-MONETARY RELIEF.

Yellowbear consistently has sought declaratory and injunctive relief allowing him to practice his religion, and the supplemental brief reaffirmed that he was not seeking monetary relief against individual state officials. *See* YSB 11-12. Defendants, ostensibly because the original complaint referred imprecisely to both "individual" and "official" capacities, waste many words on immunity issues that even they concede "are red herrings." ASB 11-12, 22-29. Without belaboring this point further, it should be apparent that immunity issues—including whether the asserted rights are "clearly established"—have no point in this litigation.

CONCLUSION

For the above reasons, and those more fully set forth previously, the Court should hold that the summary judgment record does not support a conclusion that denying Yellowbear's participation in Sacred Sweat Lodge Ceremonies is the least restrictive means of furthering compelling interests.

Respectfully submitted,

s/ Sean Connelly

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 1,121 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Sean Connelly
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I hereby certify that on May 9, 2013 this Supplemental Reply Brief was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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