No. 09-40400

United States Court Of Appeals For The Fifth Circuit

MAX MOUSSAZADEH,

Plaintiff-Appellant,

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE;
BRAD LIVINGSTON, SOLELY IN HIS OFFICIAL CAPACITY
AS EXECUTIVE DIRECTOR OF TDCJ-CID;
DAVID SWEETEN, SOLELY IN HIS OFFICIAL CAPACITY
AS WARDEN OF THE EASTHAM UNIT OF THE TDCJ-CID,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas, Galveston Division
No. 3:07-CV-00574, Hon. Melinda Harmon

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND ACLU OF TEXAS ON BEHALF OF PLAINTIFF-APPELLANT, SUPPORTING REVERSAL OF THE DISTRICT COURT'S DECISION

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to 5th Cir. R. 29.2, the following parties have an interest in this amicus brief. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. American Civil Liberties Union, Amicus Curiae;
2. ACLU of Texas, Amicus Curiae;
3. ACLU Foundation, Counsel for Amicus Curiae (David C. Fathi, Daniel Mach);
4. ACLU Foundation of Texas, Counsel for Amicus Curiae (Lisa Graybill);
5. Wheeler Trigg O'Donnell LLP, Counsel for Amici Curiae (Craig R. May, Kelly A. Laudenslager).

s/ Kelly A. Laudenslager
Kelly A. Laudenslager
Counsel for Amici Curiae

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CONSENT TO FILE AS *AMICI CURIAE*

This brief is filed with the consent of the parties pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization with over 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Texas is one of its state affiliates. Throughout its 90-year history, the ACLU has been deeply involved in protecting religious liberty, as well as the rights of prisoners, and has appeared before this Court in numerous cases involving those issues, both as direct counsel and as amicus curiae. To further its work in these areas, the ACLU has created both a National Prison Project and a Program on Freedom of Religion and Belief.

No party's counsel authored any part of this brief, and no person other than the amici curiae and their counsel contributed any money to fund the preparation or submission of this brief.

STATEMENT OF FACTS

Plaintiff-Appellant Max Moussazadeh ("Plaintiff") is an observant Jewish inmate in the custody of the Texas Department of Criminal Justice ("TDCJ"). In 2005, Plaintiff filed a grievance with TDCJ seeking the provision of kosher meals in the prison dining facility. His grievance included the following specific language:

> I am a jewish inmate. My beliefs state that I must eat kosher foods. I am born and raised jewish and both of my parents are jewish. Since I have been in the prison system, I have been forced to eat non kosher foods. All of my life my family has kept a kosher house hold. I feel that I am going against my beliefs and that I will be punished by God for not practicing my religion correctly. . . . In my requests I asked that I be allowed to receive kosher meals because it is part of my religious duty. . . . *I am asking that you please grant me access to kosher meals in the prison dining hall.*

Supp. USCA5 511 (Supp. RE 4) (emphasis added). It is undisputed that Plaintiff fully exhausted administrative remedies in 2005, as he filed a level I grievance, and timely filed a level II appeal. Both the initial grievance and the appeal were denied by TDCJ without explanation. Supp. USCA5 509-512 (Supp. RE 4).

Texas was (and continues to be) one of just a small number of states that do not provide kosher meals to all Jewish prisoners who request them. After TDCJ denied Plaintiff's grievance regarding the

availability of kosher food, this lawsuit followed. As the litigation progressed, Plaintiff and TDCJ attempted to reach a settlement, which resulted in the establishment of a kosher kitchen at one TDCJ facility, the Stringfellow Unit. (The kitchen was built in an unused storage area at the Stringfellow Unit, at an approximate cost of $8,000.) Plaintiff was transferred to the Stringfellow Unit, and shortly thereafter began receiving kosher meals free of charge in the prison dining hall. Nevertheless, TDCJ insisted that it had the right to transfer Plaintiff from Stringfellow at any time, and had no obligation to ensure that Plaintiff would receive kosher food for the remainder of his incarceration. Based on the fact that Plaintiff was, at the time, receiving kosher food, the district court dismissed his case as moot.

While the dismissal was being appealed to this Court, Plaintiff was transferred out of the Stringfellow Unit to the Stiles Unit, where he currently remains. At the Stiles Unit, Plaintiff no longer has the option to receive kosher food in the dining hall. Rather, he now can obtain kosher meals only by purchasing them in the prison commissary for almost $5 per meal. Based on this change in circumstances, in 2009 this Court reversed the district court's finding of mootness and remanded for

further discovery. *Moussazadeh v. Tex. Dep't of Criminal Justice*, 364 F. App'x 110, 110 (5th Cir. 2010) (unpublished).

On cross-motions for summary judgment, the district court again dismissed Plaintiff's Complaint without deciding whether TDCJ's policy is consistent with federal law. The district court found that Plaintiff's original Complaint "sufficiently incorporated" any claim that Plaintiff was currently being denied kosher meals, regardless of the fact that he had been transferred to the Stiles Unit. *Moussazadeh v. Tex. Dep't of Criminal Justice*, No. G-07-574, 2011 WL 437682, at *10 (S.D. Tex. Sept. 20, 2011). The court therefore denied Plaintiff's motion to amend as unnecessary and noted "the procedural posture of this case does not require that Moussazadeh amend his complaint." *Id.*

Notwithstanding its finding that Plaintiff's original Complaint still adequately stated his claim under his present circumstances, the court held that Plaintiff had failed to exhaust administrative remedies because he did not file a new grievance after his transfer to the Stiles

Unit. *Id.* at *10.[1] It reached this conclusion even though it recognized that the "core issue" had remained unchanged throughout the entire controversy. *Id*. The district court held that Plaintiff should have filed a new grievance, in spite of the fact that Plaintiff had properly exhausted administrative remedies under TDCJ regulations before filing this lawsuit and that his initial grievance and the Complaint assert the same claim and seek the same relief that Plaintiff is still seeking—provision of a kosher diet in the dining hall.

[1] The district court also ruled that Plaintiff was not sincere in his religious beliefs and dismissed the case on that ground as well. This brief does not address the issue of the sincerity of Plaintiff's religious beliefs, but amici agree with Plaintiff that the district court erred on that ground as well.

SUMMARY OF ARGUMENT

Plaintiff contends that TDCJ continues to violate his federal rights by denying him a kosher diet. Rather than addressing TDCJ's policy on the merits, the district court dismissed the case on procedural grounds, finding that Plaintiff had not properly exhausted administrative remedies. However, it is undisputed that Plaintiff did in fact file a grievance and exhaust administrative remedies under TDCJ regulations before filing this lawsuit. The Complaint filed in 2005 asserts the same claim and seeks the same relief that Mr. Moussazadeh has always sought—provision of a kosher diet in the dining hall, consistent with his religion. Yet the district court found that Plaintiff should have filed another grievance seeking the same relief. This misinterprets federal law on exhaustion, improperly applies the law to the facts here, and is contrary to the plain language and intent of the Prison Litigation Reform Act ("PLRA"), the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), and TDCJ policy, which states that prisoners should not file repeat grievances on the same issue. The district court's approach to exhaustion imposes an

impermissible burden on all prisoners in TDCJ custody seeking to vindicate rights under federal law, and it should be reversed.

The requirement that a prisoner exhaust administrative remedies before challenging prison conditions under federal law comes from the PLRA. The plain language of the PLRA exhaustion requirement, 42 U.S.C. § 1997e(a), makes clear that it applies only *before* commencement of litigation. It states that "No action shall be brought . . . until" administrative remedies are exhausted. It is undisputed that Plaintiff exhausted before bringing this action. If the prisoner continues to suffer the same deprivation of rights under a state-wide policy but in a different prison facility, that does not moot the lawsuit or require new exhaustion. Unilateral action on the part of prison officials while litigation is ongoing—such as transferring a prisoner to another facility without addressing his actual complaint—cannot render a properly exhausted claim "unexhausted." Yet that is what the district court concluded.

The district court's decision not only misconstrues the law, but also creates perverse incentives both for prison officials and inmates, by encouraging the former to engage in procedural gamesmanship, and

encouraging inmates to file needless and repetitive grievances simply to ensure that they have "exhausted" claims that are already being addressed by federal courts. These policy concerns are all the more troubling in the RLUIPA context, as prisons could engage in endless modifications of policies regulating religious practice in an effort to deprive inmates of a ruling on the merits of their claims.

Plaintiff has properly exhausted available administrative remedies. Because the facts regarding exhaustion are undisputed, and the district court's ruling was erroneous as a matter of law, this court should rule that Plaintiff *has* exhausted administrative remedies, and allow the merits of the case to be heard.

ARGUMENT

I. RLUIPA AND PLRA BOTH ADVANCE IMPORTANT CONGRESSIONAL PURPOSES AND CANNOT BE INTERPRETED SO AS TO NULLIFY EACH OTHER

RLUIPA was enacted by Congress to relieve the burden on religious exercise that is produced by incarceration. *See Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005) ("RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens."). Congress recognized that "[w]hether from indifference, ignorance, bigotry, or lack of

resources, some institutions restrict religious liberty in egregious and unnecessary ways." *Id.* at 716 (quoting 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy)). To remedy this problem, RLUIPA prohibits the imposition of a "substantial burden" on the religious exercise of an incarcerated person, unless that burden is in furtherance of a "compelling governmental interest" and is the "least restrictive means of furthering" that interest. 42 U.S.C. § 2000cc-1. In sum, RLUIPA "protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter,* 544 U.S. at 721.

The terms of RLUIPA are to be "construed in favor of a broad protection of religious exercise," to the maximum extent permitted by law. 42 U.S.C.A. § 2000cc-3. This Court has consistently recognized the expansive remedial effect of RLUIPA. *See, e.g.*, *Mayfield v. Tex. Dep't of Criminal Justice*, 529 F.3d 599, 612 (5th Cir. 2008) ("RLUIPA imposes a higher burden than does the First Amendment in that the statute requires prison regulators to put forth a stronger justification for regulations that impinge on the religious practices of prison inmates.");

Freeman v. Tex. Dep't of Criminal Justice, 369 F.3d 854, 858 n.1 (5th Cir. 2004) ("[T]he RLUIPA standard poses a far greater challenge than [traditional First Amendment analysis] to prison regulations that impinge on inmates' free exercise of religion.").

Despite the important remedial goals of RLUIPA, this is not the only action Congress has taken with respect to litigation over prisoners' rights. The Prison Litigation Reform Act requires any prisoner seeking to challenge prison conditions under federal law to first exhaust all available administrative remedies. *See* 42 U.S.C. § 1997e(a). This exhaustion requirement applies to claims brought under RLUIPA. *See Cutter*, 544 U.S. at 723 n.12.

"Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002). Additional purposes of the exhaustion requirement include the possibility that the prison could take "corrective action" which could "obviate[e] the need for litigation", the potential of filtering out frivolous claims, and the creation of an

administrative record that could aid the district court should the dispute eventually result in litigation. *Id.* at 525. "The benefits of exhaustion can be realized only if the prison grievance system is given a fair opportunity to consider the grievance." *Woodford v. Ngo*, 548 U.S. 81, 95 (2006). Any interpretation of the exhaustion requirement should therefore take into account whether it allows the prison system a "fair opportunity" to address the claim, and whether it furthers the potential "benefits of exhaustion." Courts should be cognizant that exhaustion is not meant to be a hyper-technical trap for the unwary, preventing meritorious cases from reaching the courthouse door. *See, e.g.*, *Kikumura v. Osagie*, 461 F.3d 1269, 1283-84 (10th Cir. 2006) ("The Supreme Court has cautioned that 'the creation of an additional procedural technicality . . . [is] particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.'" (quoting *Love v. Pullman Co.,* 404 U.S. 522, 526-27 (1972))).

Notwithstanding these clear purposes behind the exhaustion requirement, some courts have attempted to make the exhaustion requirement more stringent than Congress provided. The Supreme Court has explained in no uncertain terms that this is impermissible. In

Jones v. Bock, 549 U.S. 199, 218 (2007), the Court addressed whether a judicially created exhaustion requirement—that a prisoner name each individual defendant in his grievance or be barred from suit—was permissible. This rule was found nowhere in the applicable prison grievance policy, nor was it required by the PLRA. Because this exhaustion requirement had no statutory basis, "crafting and imposing [it] exceeds the proper limits on the judicial role." *Id.* at 202. Thus, the law is clear: Courts are prohibited from imposing additional exhaustion requirements not found in the statutory language or the relevant prison administrative grievance policies.[2]

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT PLAINTIFF FAILED TO EXHAUST ADMINISTRATIVE REMEDIES

A. The District Court Erred as a Matter of Law in Construing Exhaustion as an Ongoing Obligation that Persists Throughout the Litigation

The exhaustion requirement of the PLRA states, "No action shall be brought with respect to prison conditions under section 1983 of this

[2] *Jones v. Bock* also held that exhaustion is an affirmative defense rather than a pleading requirement. *See id.* at 212. Thus, TDCJ has the burden of proving that Plaintiff failed to exhaust administrative remedies.

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). The operative phrase in this situation is the requirement that "[n]o action shall be *brought* . . . *until*" administrative remedies are exhausted. It nowhere states (or even implies) that ongoing exhaustion is a requirement for the maintenance of the suit. Instead, the plain language of this section demonstrates that the question of exhaustion must be addressed at the commencement of the litigation, and once the question is answered in the affirmative, the statute provides no occasion to re-examine the question.[3]

[3] The proper framework for analyzing whether Moussazadeh still had standing to proceed with this case in light of his transfer and the change in TDCJ's kosher food policy would have been mootness. As the undisputed facts demonstrate, and as the district court agreed, Plaintiff's claim is not moot because he is not receiving kosher meals in his unit's dining hall. But even if TDCJ had altered its policy during the pendency of this appeal to provide him kosher meals at the Stiles Unit, his claim would still not be moot because "the voluntary cessation of a complained-of activity by a defendant ordinarily does not moot a case." *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 324 (5th Cir. 2009) (analyzing the effect of a changed prison policy under the rubric of mootness, not exhaustion), *aff'd sub nom. Sossamon v.* Texas, 131 S. Ct. 1651 (2011).

The Supreme Court has clearly recognized that the function of the exhaustion requirement is to "afford[] corrections officials time and opportunity to address complaints internally *before allowing the initiation of a federal case*." *Porter*, 534 U.S. at 524-25 (emphasis added). Similarly, in analyzing the timing of exhaustion under Section 1997e(a), this Court has held that this "provision plainly requires that administrative remedies be exhausted *before* the filing of a [lawsuit], rather than while the action is pending." *Wendell v. Asher*, 162 F.3d 887, 890 (5th Cir. 1998) (emphasis in original) (dismissing, for failure to exhaust, a claim that was exhausted *after* filing a lawsuit rather than before). The Court in *Wendell* described exhaustion as a "threshold requirement," *id.* at 890, a characterization that emphasizes the need to determine whether claims are exhausted at the *commencement* of litigation, rather than a continuing obligation on a prisoner to ensure that his claims remain exhausted. *See also Dillon v. Rogers*, 596 F.3d 260, 272 (5th Cir. 2010) (comparing exhaustion to personal jurisdiction

and venue, other issues that are determined as of the time of filing the complaint).[4]

The district court concluded that Plaintiff was required to file a second grievance raising the exact same issue that he had raised and exhausted in 2005 and that Plaintiff asserted in his Complaint—failure to provide kosher meals in the prison dining hall. This "re-grievance" requirement is found nowhere in the TDCJ administrative grievance policy or in the PLRA. In fact, this Court has recognized that TDCJ's policy *prohibits* repetitive grievances about the same issue. *See Johnson v. Johnson*, 385 F.3d 503, 521 (5th Cir. 2004) ("TDCJ rules specifically

[4] In general, if a prisoner files an amended complaint to add new claims, the court must evaluate whether the new claims have been exhausted. *See, e.g.*, *Rhodes v. Robinson*, 621 F.3d 1002, 1005 (9th Cir. 2010) (when prisoner amends complaint to add allegations of retaliation for filing original complaint, court must evaluate whether these claims were exhausted by the time the prisoner filed the amended complaint); *Barnes v. Briley*, 420 F.3d 673, 678 (7th Cir. 2005) (holding that prisoner had properly exhausted when he exhausted administrative remedies for new claims asserted in his amended complaint prior to filing the amended complaint, but after filing the original complaint). In situations where a prisoner is amending his complaint to add new claims, he may be required to pursue administrative remedies after he has initiated litigation. This situation does not exist here—the district court denied Plaintiff's request to amend his complaint, and recognized that the claims he is currently asserting were adequately set forth in his original complaint.

direct prisoners *not* to file repetitive grievances about the same issue and hold out the threat of sanctions for excessive use of the grievance process.") (emphasis in original). The district court's imposition of an exhaustion requirement found nowhere in TDCJ policy and nowhere in the text of the PLRA itself violates the *Jones v. Bock* prohibition on judicial elaboration of exhaustion requirements.

Even without resorting to statutory interpretation of the PLRA, this Court made it clear in *Johnson* that prisoners are not required to file repetitive grievances regarding the same issue, even if the circumstances vary slightly between incidents. The plaintiff in *Johnson* properly exhausted a claim that prison officials consistently failed to protect him from violence at the hands of his fellow inmates, but did not file a grievance regarding additional attacks that occurred after this initial grievance. This Court held that he was not "required to file repeated grievances reminding the prison officials that he remained subject to attack in the general population." *Johnson*, 385 F.3d at 521. His initial grievance was sufficient to exhaust any other claims that arose from the application of the same policy. Moreover, in *Johnson*, TDCJ objected that the prisoner had failed to file grievances concerning

events that happened *before* he filed suit, but this Court still found no reason to require additional grievances. The facts here present an even clearer case, given the fact that TDCJ is now suggesting that Plaintiff should have filed an additional grievance on the same issue *after* he had already filed suit.

This Court recognized in *Johnson* that requiring a prisoner to file a new grievance every time the same objectionable prison policy was applied to him would be exceedingly impractical, as well as unnecessary to alert the prison officials to the prisoner's claim. *Id.* The *Johnson* Court cited district court opinions from multiple jurisdictions in support of the proposition that "in such circumstances, prisoners need not continue to file grievances about the same issue." *Id.* (citing *Sulton v. Wright*, 265 F. Supp. 2d 292, 295-99 (S.D.N.Y. 2003); *Aiello v. Litscher*, 104 F. Supp. 2d 1068, 1074 (W.D. Wis. 2000); and *Lewis v. Washington*, 197 F.R.D. 611, 614 (N.D. Ill. 2000)). Here, Plaintiff's current claim is based on *the same policy* that he addressed in his 2005 grievance—the refusal of TDCJ to provide him with kosher meals in the prison dining hall. This claim was properly "brought" because Plaintiff undisputedly exhausted this claim prior to filing suit in 2005. Like in *Johnson*, no

purpose would be served by requiring Plaintiff to re-grieve, since TDCJ is well aware of the nature of his claim and does not need him "to file repeated grievances reminding the prison officials that he remained subject to" the TDCJ policy of no kosher meals in the dining hall. *See Johnson*, 385 F.3d at 521.

The district court focused heavily on the changes in TDCJ's kosher food policy that were enacted after Plaintiff's original grievance, reasoning that "he was subjected to a different dietary policy and to circumstances that differed greatly from the policy and circumstances" that had existed at the time of his original grievance. *Moussazadeh*, 2011 WL 437682, at *10. But TDCJ's policy, as it applied to Plaintiff, was unchanged; he still was not being provided with kosher food in the prison dining hall. His original grievance asked only that he be granted "access to kosher meals in the prison dining hall." *Id.* at *9. Thus, changes in TDCJ policy that would have allowed him to purchase a limited number of kosher meals from the prison commissary, or that provided kosher meals to other inmates in a different facility, could not reasonably be viewed as responsive to Plaintiff's original request. After years of litigation, TDCJ still refuses to grant him what his original

grievance requested, and any additional grievance would be unnecessary and superfluous.

The kosher food policy currently applied to Plaintiff is still essentially the same as the one applied at the time of his original grievance—the prison is still not providing him with a nutritionally sufficient kosher diet. Requiring him to file a new grievance when the district court specifically found that the "core issue" he is contesting remains the same does not advance any of the purposes behind the PLRA. It does not "afford[] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case," *Porter*, 534 U.S. at 525; Plaintiff's original, properly exhausted grievance already did so before this suit was filed. It does not increase the possibility that TDCJ would take "corrective action . . . obviating the need for litigation," since TDCJ has consistently rejected the opportunity to do just that by refusing to accommodate Plaintiff's claims, and litigation is already ongoing. *See id.* And the filing of a second grievance would do no more to "filter out some frivolous claims" or foster the creation of an administrative record, since his first grievance would have already met these ends. *See id.* Because TDCJ

has already been "given a fair opportunity to consider the grievance," it is unclear what "benefits of exhaustion," *Woodford*, 548 U.S. at 95, could possibly be provided by requiring Plaintiff to file an additional, identical grievance.

The core policy that is the basis of Plaintiff's initial grievance is Defendants' refusal to provide kosher meals in the prison dining hall, and this policy continues to apply to Plaintiff. Accordingly, the district court erred in concluding that Plaintiff should have filed a new grievance upon his transfer to the Stiles Unit, and the judgment of the district court should be reversed.

B. Section 1997e(a) Requires Exhaustion Only Prior to Filing the Initial Lawsuit, Even if the Prisoner Is Transferred or the Prison Adopts a New Policy While Litigation is Pending

As the district court recognized, the "core issue" of this lawsuit was properly exhausted in 2005. Plaintiff's original grievance requesting kosher food in the dining hall was sufficient to give TDCJ notice of what he wanted, and no more should have been required. *See Johnson*, 385 F.3d at 517 ("[A] grievance should be considered sufficient to the extent that the grievance gives officials a fair opportunity to address the problem that will later form the basis of the lawsuit.").

Despite the adequacy of Plaintiff's grievance, the district court focused on the fact that he had been transferred to a different unit, and that TDCJ had modified its kosher food policy (even though the changes did not address Plaintiff's original grievance as applied to his current situation) to conclude that he was required to file a new grievance. These changes, made unilaterally by TDCJ during the course of litigation, cannot create an obligation for Plaintiff to file a new grievance.

Courts have repeatedly held that defendants in PLRA cases cannot unilaterally require dismissal of the case for non-exhaustion by adopting a new policy, especially if that policy, as here, does not address the prisoner's complaint. For example, in *Lindell v. Schneiter*, 531 F. Supp. 2d 1005, 1013 (W.D. Wis. 2008), the prisoner properly exhausted administrative remedies regarding the lack of exposure to sunlight, when he expressly informed prison officials in his grievance that he believed he needed daily exposure to the sun. In the time period between the prisoner's initial, properly exhausted grievance and the filing of a motion for summary judgment, the prison implemented a new policy that gave prisoners the opportunity for outdoor recreation (and

thereby exposure to sunlight) two or three days a week. As the *Lindell* court recognized, the original grievance exhausted his claim even in light of the intervening change in policy, because "plaintiff's complaint was not premised on the belief that he needed only *some* sunlight, but that he needed *daily* sunlight. Regardless whether defendants' later provision of some sunlight was adequate, plaintiff's request for daily sunlight . . . was sufficient to alert defendants to plaintiff's present claim." *Id.* (emphasis added). Likewise, TDCJ's provision of some kosher food for purchase in the commissary does not address Plaintiff's original request that he be provided with kosher food in the dining hall, and thus the intervening change in policy has no effect on the question of exhaustion.

Plaintiff has been engaged for years in an attempt to persuade TDCJ to provide him kosher meals in the dining hall. His request, and his grievance, was not limited to the particular unit he lived in at the time. After six years of litigation, TDCJ is well aware of what Plaintiff seeks and does not need another grievance to understand it. If TDCJ wanted to, it could address Plaintiff's claim and provide the kosher meals he seeks. It has chosen not to do so. This is strikingly similar to

the situation in *Florer v. Johnson*, C06-5561 RJB/KLS, 2007 WL 2900179 (W.D. Wash. Oct. 2, 2007) (attached as Exhibit A), in which a prisoner filed a lawsuit regarding the lack of kosher food. By the time he filed his lawsuit, the prisoner had been transferred from the unit in which he filed his grievance. Nevertheless, the court held that his claim was properly exhausted because the prisoner was challenging a state-wide policy, and he had been informed that the answer to his complaint would be the same no matter which unit he was housed in. *See id.* at *4 ("Plaintiff was specifically told that kosher meals are approved through the *state* food program manager and that the grievance response would not change with his location.") (emphasis in original).[5] The Court should follow *Florer* and hold that exhaustion has occurred.

[5] The new kosher food policy adopted by TDCJ was adopted on a state-wide basis, and provided for the provision of kosher meals *only* in the Enhanced Designated Jewish Unit, Stringfellow. Supp. USCA5 998-1002 (Supp. RE 15).

III. THE DISTRICT COURT'S RULING HAS NEGATIVE POLICY IMPLICATIONS FOR MANY PRISONERS AND PRISON SYSTEMS

A. The Ruling Encourages Gamesmanship and Would Allow Prisons to Indefinitely Delay Resolution of Meritorious Claims

The district court's ruling, if affirmed and applied in this Circuit, would allow prison defendants to avoid a judgment on the merits and indefinitely prolong the litigation by transferring the prisoner or slightly altering the policy in question, thus triggering a new grievance requirement for the plaintiff. This type of gamesmanship is not permitted by this Court. *See Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 324 (5th Cir. 2009) ("If defendants could eject plaintiffs from court on the eve of judgment, then resume the complained-of activity without fear of flouting the mandate of a court, plaintiffs would face the hassle, expense, and injustice of constantly relitigating their claims without the possibility of obtaining lasting relief.").

Requiring a new grievance every time a prisoner is transferred to a new location or every time the prison adjusts the challenged policy would reward prisons for procedural gamesmanship. That was not the intent of the PLRA, which only requires that a claim be exhausted *once*. The negative policy implications would be significant. *See, e.g.*, *Voorhis*

v. Gaetz, 1:09-CV-01089, 2009 WL 2230763, at *2 (C.D. Ill. July 22, 2009) (a transfer occurring "while the plaintiff was in the grievance appeal process" does not require a new grievance; otherwise the prison "could always frustrate an inmate's attempt to satisfy the grievance process by transferring the inmate from one facility to another," and courts favor "a ruling on the merits of a case rather than prolonging the process through dismissing with leave to re-file after filing yet another grievance") (attached as Exhibit B); *Patel v. Fed. Bureau of Prisons*, 2:05CV 00191 JMM JFF, 2006 WL 1307733, at *3 (E.D. Ark. May 11, 2006) ("It would serve no useful purpose to make Plaintiff jump through the exhaustion hoops again so he can get a response from the Warden at FCI Forrest City to the same complaints that have already been considered.") (attached as Exhibit C); *Tillis v. Lamarque*, C 04-3763 SI, 2006 WL 644876, at *6 (N.D. Cal. Mar. 9, 2006) (requiring a prisoner to file a new grievance after every transfer "would allow prison officials to indefinitely delay an inmate's suit . . . by transferring him to a new facility when he has exhausted his prison appeals and suit is imminent, thus forcing him to re-start the entire appeals process at the new

facility, which of course could ultimately transfer him again") (attached as Exhibit D).

The procedural exhaustion "hoops" that the district court has created for prisoners are all the more troubling given the context of this claim—a claim under RLUIPA that a prisoner's religious liberties are being burdened. RLIUPA was enacted to help alleviate the restrictions that involuntary confinement places on the religious practices of incarcerated individuals. TDCJ is seeking to avoid its obligations under this federal law by imposing arbitrary and meaningless re-exhaustion requirements when it is fully aware of what Plaintiff is requesting, and has been consistently requesting for the past six years.

B. The Ruling Would Prompt Inmates to File Needlessly Repetitive Grievances That Would Merely Clog the System Rather than Serve Any Legitimate Purpose.

As this Court recognized in *Johnson*, the TDCJ policies discourage (and in fact prohibit on pain of discipline) inmates from filing repetitive grievances on the same issue. 385 F.3d at 521. The district court's ruling now presents Texas prisoners with a "heads you win, tails I lose" conundrum: if they fail to file a new grievance after a change in policy or conditions (even if that change has no impact on the substance of

their claims), they may be barred from continuing a lawsuit on that issue; yet if they choose to file a new grievance on an issue they have already grieved, they may be subject to official "sanctions for excessive use of the grievance process," *id.*, not to mention the unofficial retaliation they may face as a result of being viewed as a "complainer" within the prison system.[6] This ruling will result either in a flood of unnecessary grievances or in a severe restriction on prisoners' right of access to the courts—or possibly both.

The district court's approach would encourage inmates to file grievances as a defensive litigation tactic anytime there was the slightest possibility that a court could view their circumstances as

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[6] The fact that prisoners sometimes suffer retaliation for filing grievances regarding prison conditions is well-established. Courts in many jurisdictions have awarded prisoners relief on their claims that prison officials retaliated against them based on such complaints. *See, e.g.*, *Pearson v. Welborn*, 471 F.3d 732, 741-42 (7th Cir. 2006) (affirming jury verdict on claim of retaliation for complaints about conditions); *Walker v. Bain*, 257 F.3d 660, 663-64 (6th Cir. 2001) (discussing plaintiff whose legal papers were confiscated in retaliation for filing grievances against correction officers), *cert. denied*, 535 U.S. 1095 (2002); *Gomez v. Vernon*, 255 F.3d 1118, 1122 (9th Cir. 2001) (noting that "[t]his case exemplifies antagonism toward prisoner litigation at the cost of constitutional rights and legal ethics," where prison officials retaliated against prisoners assisting others in filing grievances), *cert. denied*, 534 U.S. 1066 (2001).

having changed. The result would be to clog the TDCJ administrative appeals system with unnecessary grievances not directed at solving an actual problem, but filed to serve as a "place holder" and to ensure that litigation could later ensue (or continue, if it is already ongoing). This would be contrary to Congress's intention in imposing the exhaustion requirement. Rather than allowing "corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case," *Porter*, 534 U.S. at 524-25, TDCJ would be buried in an avalanche of grievances, with no time to do anything other than deny them.

CONCLUSION

The district court erred in its interpretation of the PLRA's exhaustion requirement and in its application of the law to the facts of this case. Requiring Plaintiff to file another grievance seeking the same relief that he requested in 2005 and that he is still denied today is contrary to federal law and to the purposes and intent of the exhaustion requirement. It is also conflicts with TDCJ's own policy prohibiting successive grievances on the same issue. The district court's approach would put Texas prisoners seeking to vindicate their rights in the unfair

position of risking either dismissal of a case for failure to re-exhaust or TDCJ sanctions and possible retaliation for filing successive grievances in violation of TDCJ policy. For all of these reasons, the district court's ruling that Plaintiff failed to exhaust administrative remedies should be reversed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on this the 13th day of January, 2012, I electronically filed the foregoing Brief of Amici Curiae American Civil Liberties Union and ACLU of Texas on Behalf of Plaintiff-Appellant 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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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 5,813 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 using 14-point Century Schoolbook font in the text and footnotes.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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