

No. 06-4048

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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**LEVESTER GILLARD,**  
*Plaintiff-Appellant,*

v.

**AMY KUYKENDALL, et al.,**  
*Defendants-Appellees.*

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On Appeal from the United States District Court  
For the Western District of Arkansas

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**BRIEF *AMICUS CURIAE* OF  
THE NATIONAL LEGAL FOUNDATION,**  
in support of Plaintiff-Appellant  
Urging Reversal

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## **FRAP RULE 26.1 DISCLOSURE STATEMENT**

*Amicus Curiae* The National Legal Foundation has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

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## INTEREST OF THE AMICUS CURIAE

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters are vitally concerned with the outcome of this case because of the effect it will have on religious liberty and the interpretation of the Free Exercise Clause.

The NLF submits this Brief pursuant to consent from Counsel for Defendants-Appellees and pursuant to a Motion for Leave to File a Brief *Amicus Curiae*.

## ARGUMENT

The District Court erred when it held that requiring an inmate to clean his cell on the Sabbath did not constitute a substantial burden on his religious exercise. It also erred when it concluded that the prison's refusal to provide an accommodation was reasonable because the weight of the factors discussed in *Turner v. Safley*, 482 U.S. 78, 89-91 (1987) tilt the balance in favor of the Appellant.

### **I. THE DISTRICT COURT SHOULD BE REVERSED BECAUSE REQUIRING APPELLANT TO CLEAN HIS CELL ON SATURDAYS CONSTITUTES A SUBSTANTIAL BURDEN ON HIS RELIGIOUS EXERCISE BY FORCING HIM TO VIOLATE THE SABBATH.**

The district court held that requiring Appellant to clean his cell on the Sabbath was not a substantial burden on his exercise of religion. *Gillard v.*

*Kuykendall*, No. 06-4048, 2006 U.S. Dist. LEXIS 79590, at \*18 (W.D. Ark. Oct. 27, 2006). However, this Court has held that a substantial burden on religious exercise exists when

the governmental action [ ] “significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a [person’s] individual [religious] beliefs; [ ] meaningfully curtail[s] a [person’s] ability to express adherence to his or her faith; or [ ] den[ies] a [person] reasonable opportunities to engage in those activities that are fundamental to a [person’s] religion.”

*Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997) (some alterations in original).<sup>1</sup>

Those requirements have been met in this case.

The controlling principles are demonstrated in *Love v. Reed*, 216 F.3d 682, 689 (8th Cir. 2000). There, the district court held that a prisoner’s religious liberty was not substantially burdened when the prison refused to provide him with peanut butter and bread for meals on the Sabbath. The prisoner argued that his religious convictions prohibited him from eating food that had been prepared by others on the Sabbath. *Id.* at 687. The district court reasoned that the prisoner was not being forced to violate his religious conviction because he could either purchase food

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<sup>1</sup> *Weir* was decided under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (2006) (hereinafter RFRA), while the instant case was decided under *Turner*. The second prong of each of these analysis are different, however, the substantial burden requirement under the first prong remains the same. In fact, when *Weir* was decided, this Court relied upon both RFRA and non-RFRA cases for the application of the substantial burden test. 114 F.3d at 820. Also, Congress subsequently passed the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (2006) (hereinafter RLUIPA) which also uses the substantial burden test as its first prong in the same way as RFRA and *Turner*.

from the commissary or fast during the Sabbath. *Id.* at 689. This Court refused to accept that analysis; holding that the option to purchase food at the commissary (which he could not afford consistently) or to fast (which would not be consistent with the intent of the Sabbath) was a substantial burden on his religious exercise. *Id.*

The regulation in the instant case places a similar burden on the Appellant. Instead of denying Appellant food, the prison officials are punishing him for refusing to clean his cell on Saturday, even though his religious beliefs require complete rest on the Sabbath. *Gillard*, 2006 U.S. Dist. LEXIS 79590, at \*4-5. The prison policy required him to sweep and mop his cell and empty his trash each day. *Id.* at \*17. The failure to do so results in results in a loss of TV and telephone rights until the cell is cleaned. *Id.* The testimony of Appellant’s pastor explains the Sabbath commandment; “No work should be performed during [the Sabbath], unless your ‘ox is in a ditch’<sup>2</sup> or you must work to feed and care for your family. Housework should be taken care of before 6:00 p.m. on Fridays.” *Id.* at \*6. Appellant and his pastor agree that housework should be done the night before the Sabbath, but they disagree as to the extent of what activity is housework. Appellant specifically disagrees with his Pastor’s statement that “making a bed on

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<sup>2</sup> Having one’s “ox in a ditch” is a reference is to Luke 14:5 where Jesus recognized that if an Israelite had an emergency, such as if his ox had fallen into a ditch, he would not violate the Sabbath by removing the animal.

Saturdays would not violate” the Sabbath. *Id.* at \*5. Notwithstanding this disagreement, it is Appellant’s convictions regarding what constitutes work that would be relevant to the substantial burden analysis in this case because it is his sincerely held religious beliefs that are being restricted.<sup>3</sup> *United States v. Crystal Evangelical Free Church*, 82 F.3d 1407, 1418 (8th Cir. 1996) (holding that it is an individual’s belief that constitutes an “important expression of their sincerely held religious beliefs.”)

In spite of the evidence that was presented, the court below held that being required to perform ten minutes of work was a minimal burden, allowing the Appellant to rest for the remainder of the day. That conclusion fails to recognize the importance of the Sabbath mandate. The Bible says that when the Israelites were first given the command to rest on the seventh day, God provided food from heaven for the Israelites during their journey through the desert. Exodus 16:4. The Israelites were instructed to gather only enough food for their families for what they would need that day. Exodus 16:4. God specifically instructed them to gather twice the amount on the sixth day so that they would not violate the Sabbath by working to gather food on the seventh, because *any amount of work* would violate the Sabbath. Exodus 16:5. This demonstrates that while the amount of work may

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<sup>3</sup> Additionally, the sheriff’s testimony of his belief that “personal hygiene” does not violate the Sabbath is just as irrelevant to the inmate’s sincerely held religious belief. *Gillard*, 2006 U.S. Dist. LEXIS 79590, at \*10.

appear *de minimis*, a violation of the Sabbath occurs, not because of the *amount of time* one works, but because work is performed *at all*. Another example of the significance of the Sabbath is found in Jeremiah 17:19-27. In that passage Jeremiah reminds the Israelites that the requirement to observe the Sabbath would prohibit them from carrying a load, especially through the city gates. Jeremiah then reminds them that God promised the Israelites that if they followed this commandment Jerusalem would prosper, but if they failed to follow it, the city would fall. Jeremiah 17:24-25, 27. Furthermore, in Nehemiah 10:31, the people of Israel recognize that they are not allowed to even buy or sell merchandise with foreigners who visit their city on the Sabbath.

This is the concept of the Sabbath. This is Appellant's sincerely held religious belief. The District Court held that by requiring Appellant to perform only ten minutes worth of work on the Sabbath, the requirement was not a substantial burden on his religious exercise. However, by requiring Appellant to work on the Sabbath the prison has substantially burdened conduct that is a central tenet of Appellant's religious beliefs.

## **II. THE DISTRICT COURT SHOULD BE REVERSED BECAUSE REQUIRING APPELLANT TO VIOLATE THE SABBATH IS UNREASONABLE UNDER THE *TURNER* ANALYSIS.**

After the District Court used *Weir* to determine the prison's policy was not a substantial burden, it nonetheless evaluated Appellant's claim under *Turner*.

*Gillard*, 2006 U.S. Dist. LEXIS 79590, at \*15-16. In *Turner*, the Supreme Court used a balancing test to determine whether a prison's restriction on fundamental rights was constitutional. As the Second Circuit noted in *Salahuddin v. Goord*, 467 F.3d 263, 274 (2nd Cir. 2006), the first factor the *Turner* court considered is "whether the challenged regulation or official action has a valid, rational connection to a legitimate governmental objective." However, as the court noted "[t]he first *Turner* 'factor' is more properly labeled an 'element' because it is not simply a consideration to be weighed but rather an essential requirement." *Id.* If the regulation or action survives this inquiry, a court must then weigh the remaining factors:

(2) whether alternative means of exercising the right remain open to the prisoner, (3) the effect the requested accommodation will have on guards, other inmates, and the allocation of prison resources, and (4) whether there is some alternative which will accommodate the prisoner's needs with de minimis impact on the prison's asserted interests.

*Gillard*, 2006 U.S. Dist. LEXIS 79590, at \*16-17 (citing *Turner*, 482 U.S. at 89-91). Here, this balancing test requires the court to weigh the individual factors and then balance the two interests involved, the individual's right of the free exercise of religion and the penological interest in maintaining a safe and sanitary prison.

This Court's decision in *Love* once again serves as the starting point for analysis. There, this Court applied the *Turner* factors. It affirmed the lower court's decision, holding that the prison officials violated an inmate's rights by

placing a substantial burden on his right to free exercise of religion when they refused to provide him with food that he could prepare the night before in his cell so that he would not violate the Sabbath. 216 F.3d at 691. This Court first recognized that the preliminary question to be resolved is whether the regulation is rationally related to a legitimate penological interest and held that the health and sanitation of a prison is a legitimate interest of the prison. *Id.* at 690. That is the same interest that the prison argued before the district court in this case. *Gillard*, 2006 U.S. Dist. LEXIS 79590, at \*18-19. Is it undisputed that the prison has a legitimate penological interest in requiring the inmates to keep the cells clean. Here, because the regulation applies to keeping all cells clean, the regulation may survive this essential element. However, the key is that the regulation be *rationally related* to the interest. The regulation in *Love* was defended on the ground that it related to sanitation, yet this Court said because of its blanket prohibition on some types of food, it was not *reasonably* related. 216 F.3d at 691. Arguably, the instant regulation is susceptible to the same criticism: sanitation concerns are legitimate, but the regulation's relationship is not a reasonable one, requiring as it does a blanket no-deviation policy. However, even assuming *arguendo* that the instant policy survives this first "factor," it is only an initial element that must be met. When properly weighed, the remaining *Turner* factors tilt the balancing of the interests in Appellant's favor.

However, the District Court's discussion in this case did not include a complete analysis of the balancing test. Rather, it merely asserted, without comparing or contrasting its facts to those of Turner, *Love* or any other case, that the regulation was permissible. However, as the rest of this Brief will demonstrate, each of the remaining factors weighs in favor of the Appellant's rights and against the constitutionality of the regulation.

The first of the remaining factors a court must consider is whether alternative means exist for the exercise of the prisoner's rights. In *Murphy v. Missouri Department of Corrections*, 372 F.3d 979, 983 (8th Cir. 2004), this Court held that a group of prisoners had an alternative means to exercise their religion when they were denied group worship. This Court recognized that a prisoner is not granted every accommodation just because it is the way that he prefers to practice his religion, and that there were alternative ways in which he could practice his religion. *Id.*

However, as discussed above, in Part I, once work has been performed for any amount of time, the Sabbath has been broken and nothing else can be done to restore it. Unlike the prisoner in *Murphy*, who had alternative means of practicing his religion, by requiring Appellant to perform work on the Sabbath, the prison has prevented him from complying with a central tenet of his faith. Therefore, no other alternative means exists for the Appellant to exercise his right to free exercise

of religion. Thus, this factor clearly weighs in favor of the Appellant's rights and against the constitutionality of the regulation.

The second of the remaining factors is the effect the requested accommodation would have on the guards, other inmates, and the prison's resources. The *Love* Court rejected three arguments from the prison officials that the prisoner's requested accommodation would place too large a burden on the prison. 216 F.3d at 690-91. The first was a concern regarding perishable food from the cafeteria being kept in a cell. *Id.* This Court did not find that claim persuasive because the prisoner could purchase similar food from the commissary, and the food was not highly perishable. *Id.* The second and third claims were very similar. The prison argued that if it were to accommodate the inmate as he requested, other inmates would try to receive accommodations. *Id.* at 691. While the prison recognized that most inmates would not opt to eat cold sandwiches in their cells instead of a hot meal in the cafeteria, they might have tried to gain alternative accommodations. *Id.* The *Love* Court recognized the weight this factor has on the analysis generally, because of the effect numerous accommodations would have on the prison staff and its resources. However, this Court did not find the prison's argument that the resulting number of requests for accommodations would overwhelm its resources persuasive. It noted that prisons routinely provide

accommodations to Muslim prisoners during the month of Ramadan without wrecking havoc on the operation of the prison. *Id.* The court then held that

the key factor here is that Love's request is based upon his religious convictions. If other prisoners request dietary accommodations based upon sincerely held religious beliefs, then the [prison] has an obligation to consider their requests. If other prisoners request dietary accommodations which are based merely upon personal preference, the ADC will be under no obligation to provide those accommodations.

*Id.*

The effect that Appellant's request would have on the prison officials here is the same as prisoner's request had in *Love*. All the prison would have to do is allow the Appellant to clean his cell before 6:00 pm on Fridays or after 6:00 pm on Saturdays. The District Court offered a number of reasons why it thought this accommodation would not be reasonable, each of which can be dismissed. First, the record shows that Appellant had an ant problem, demonstrating the need for constant cleaning to the district court. *Gillard*, 2006 U.S. Dist. LEXIS 79590 at \*12. However, the ants were attracted to fifteen to twenty juice boxes underneath the Appellant's bed. *Id.* A buildup of fifteen juice boxes probably does not occur within twenty-four hours and could easily be remedied by cleaning the night before or after the Sabbath or throwing the juice boxes away as they are consumed.

Another reason the court gave for denying this accommodation was the concern of an ant infestation that would result from not cleaning would affect the

entire prison. However, the facts show that the ants were only in Appellant's cell and he was the only inmate in his cell for most of his incarceration at the prison, so the ant problem only affect, at most him and any future cellmate. *Id.* at \*12-13. This accommodation would pose no risk to the sanitation of the facility because his cell would still be cleaned, just at a different time. Furthermore, this Court in *Love*, has already pointed the way forward. The same procedure for accommodations can be applied in this case: if an inmate requests a reasonable accommodation based upon sincere religious convictions the prison should try to accommodate it, but if the inmate is only requesting special treatment because he wants it, the prison can deny that request. Therefore, this accommodation would have a minimum impact on the guards, other inmates, and the allocation of prison resources and should be granted.

The third of the remaining factors that a court must consider is alternative accommodations to the prisoner's needs with *de minimis* impact on the prison's interests. As discussed in the Part I, there is no alternative accommodation for the religious requirement to keep the Sabbath. Once the Sabbath has been violated, the damage cannot be undone. Furthermore, the impact that the request accommodation would have on the prison's interests are already *de minimis*. Therefore, the requested accommodation would have a minimal effect on the guards, other inmates, and the allocation of prison resources.

Because the prison's regulation placed a substantial burden on Appellant's religious exercise, because the accommodation that the Appellant requested from the prison was reasonable, and because the weight of each of the (true) factors involved tilt the interests in favor of Appellant, this court should reverse the judgment of the District Court.

### **CONCLUSION**

For the foregoing reasons, this Court should reverse the District Court's judgment.

Respectfully submitted  
This 5th day of April 2007

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## CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of The National Legal Foundation in the case of *Gillard v. Kuykendall*, No. 06-4048, on all required parties by depositing two paper copies and an electronic copy on compact disc in the United States mail, first class postage, prepaid on April 5, 2007, addressed as follows:

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